LAW OF EVIDENCE

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THE
INDIAN EVIDENCE ACT, 1872

(CONTD.)

PART III

PRODUCTION AND EFFECT OF EVIDENCE

CHAPTER VII

OF THE BURDEN OF PROOF

101. Burden of proof.—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations

(*a*) *A* desires a Court to give judgment that *B* shall be punished for a crime which *A* says *B* has committed.

A must prove that *B* has committed the crime.

(*b*) *A* desires a Court to give judgment that he is entitled to certain land in the possession of *B*, by reason of facts, which he asserts, and which *B* denies, to be true.

A must prove the existence of those facts.

102. On whom burden of proof lies.—The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Sections 101 to 104—Synopsis.

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2. Initial burden of proof.

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(*a*) Income-tax.

Illustrations

(*a*) *A* sues *B* for land of which *B* is in possession, and which, as *A* asserts, was left to *A* by the will of *C*, *B*'s father.

If no evidence were given on either side, *B* would be entitled to retain his possession.

Therefore the burden of proof is on *A*.

(*b*) *A* sues *B* for money due on a bond.

The execution of the bond is admitted, but *B* says that it was obtained by fraud, which *A* denies.

If no evidence were given on either side, *A* would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on *B*.

103. Burden of proof as to particular fact.—The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

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85. Possession.
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Illustration

[1][(a)] *A* prosecutes *B* for theft, and wishes the Court to believe that *B* admitted the theft to *C*. *A* must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

104. Burden of proving fact to be proved to make evidence admissible.—The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations

(*a*) *A* wishes to prove a dying declaration by *B*. *A* must prove *B*'s death.

(*b*) *A* wishes to prove, by secondary evidence, the contents of a lost document. *A* must prove that the document has been lost.

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1. *Sic*. In the Act as published in the Gazette of India, 1872, Pt. IV, p. 1, there is no *illustration* (*b*).

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88. Processes of Court.
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107. Will.
108. Workmen's compensation.
109. Miscellaneous.

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1. Burden of proof—Meaning and scope of.—As to meaning of "burden of proof" and the rules governing it, *see* 145 I.C. 413: A.I.R. 1933 Rang. 211. *See* also A.I.R. 1965 Mad. 355.

Onus of proof in its primary sense means the duty of establishing a case. This remains throughout the entire case exactly where the pleadings originally place it. It never shifts. It is a question of law. In its secondary sense onus means no more than the duty of adducing evidence and in this sense the burden may shift constantly throughout the trial. This involves no question of law but one of fact only: A.I.R. 1937 Nag. 230. *See* also A.I.R. 1964 S.C. 136; A.I.R. 1970 All. 51 (F.B.); 1977 Cr.L.J. 665; A.I.R. 1937 Rang. 276.

There is a difference between the burden of proof on the pleadings and the burden of adducing evidence. The former depends upon the facts asserted or denied and is determined by rules of substantive or statutory law or by presumption of law or fact. Such a burden never shifts. If the entire evidence has been adduced by both the parties and the tribunal feels it can make up its mind as to the truth or the version of either party, then the ultimate decision of the Court will not turn upon the burden. But where the Court finds that the evidence is conflicting or equally balanced so as to make it difficult for it to arrive at a determinate conclusion then the burden of proof on the pleadings turns the scale. The question of onus may also be decisive where one or both of the parties have not adduced any evidence at all on the particular issue. Then again in regard to the shifting of onus of the other kind, it would be inexpedient, even if it were possible, to lay down at what particular stage in the course of the evidence it shifts from one party to the other: 1956 An.W.R. 65.

Distinction between burden of proof as a matter of law and pleading and as a matter of adducing evidence: A.I.R. 1969 Pat. 294 (F.B.); A.I.R. 1961 S.C. 1474; A.I.R. 1974 Pat. 103 (D.B.).

There is an essential distinction between "burden of proof" and "onus of proof"; burden of proof has two distinct meanings: (*1*) the burden of proof as a matter of law and pleadings; and (2) the burden of proof as a

matter of adducing evidence; S. 101 deals with the first meaning and S. 102 with the second; the first does not change but remains constant whereas the second shifts. Where the claimant, by sufficient and acceptable evidence proves his case, the onus then shifts to the opposite party to establish such facts and circumstances which may dislodge or affect the claimants' evidence; thus, though the legal burden as a matter of law and pleadings remains constant, it changes often times as a matter of adducing evidence: A.I.R. 1982 Guj. 308: (1982) 2 Guj.L.H. 28: (1982-1) 23 Guj.L.R. 785 (D.B.).

There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts: A.I.R. 1964 S.C. 136; A.I.R. 1971 Ori. 224: (1970) 1 Cut.W.R. 433.

The distinction between the legal burden and the evidentiary burden is important; legal burden does not shift but the evidentiary burden—"a continuous process of shifting of onus of proof"—does; it is more accurate to describe them as "burden of proof" and "onus of proof", respectively, to separately denote them (case law elaborately discussed). [A.I.R. 1964 S.C. 136 and A.I.R. 1949 P.C. 278, Rel. on]: A.I.R. 1976 Del. 70.

The party on whom the onus of proving the existence of a fact lies, must produce sufficient evidence thereof before the opposite party can be asked to adduce evidence to show that the fact does not exist; if the party having the initial burden does not discharge it, the fact is said to be "not proved"; but if the *prima facie* evidence of the first party is resulted by the opposite party, the fact is said to be "disproved". There is a similar distinction between "disbelieving" a statement and holding it to be "false"; disbelieving requires no evidence but involves only the process of reasoning; holding it false needs rebuttal evidence: 1966 I.T.J. 195: (1966) 61 I.T.R. 744 (All.).

Burden of proof as contemplated under S. 101 means the burden of establishing a case: A.I.R. 1937 Rang. 83: 38 Cr.L.J. 524 (F.B.).

The burden of establishing case rests on the party who asserts the affirmative: I.L.R. 35 Cal. 1051: 9 W.R. 190; 41 P.L.R. (J.&K.) 21; 1939 M.L.R. 86. Affirmation of facts and onus, *see* A.I.R. 1954 Tripura 11.

The rules of evidence contained in Chap. VII of the Evidence Act are no more than statements of rebuttable presumptions of law and do not appear to be necessarily exclusive or independent of each other as if operating in secluded or exclusive spheres. Courts have, in the exercise of their judicial judgment, to see as to which of these rules can consistently, with the dictates of justice and the facts and circumstances of a given case, operate together or separately in order to impose the burden of proof on the contesting litigants: Per *Dua, J.* in I.L.R. (1962) 2 Punj. 290: 1962 Cur.L.J. 225.

An order or notification containing a recital, technically correct on the face of it, raises a presumption of fact under S. 114, *Illus.* (*e*). This presumption, however, is one of fact. It is an optional presumption. It can be displaced by circumstances indicating that the power lodged in an authority or official has not been exercised in accordance with the law. The original or stable onus laid down by S. 101 and S. 102 cannot be shifted by the use of S. 106, although the particular onus of proving facts and circumstances lying especially within the knowledge of the official who formed the opinion which resulted in the notification rests upon that official. The recital, if it is not defective, may obviate the need to look further. But, there may be circumstances in the case which impel the Court to look beyond it. And, at that stage, S. 106 can be invoked by the party assailing an order or notification. It is most unsafe in such cases for the official or authority concerned to rest content with non-disclosure of facts especially within his or its knowledge by relying on the sufficiency of a recital. Such an attitude may itself justify further judicial scrutiny. A.I.R. 1977 S.C. 183: (1977) 1 S.C.C. 133: (1977) 1 S.C.R. 763: (1977) 90 Mad.L.W. 17.

The full effect of evidence on record is determined not only in the context of the general duties imposed by Ss. 101 and 102 but also on special or particular duties imposed by Ss. 103 and 106; the outcome of *lis* is determined by appraisal of the totality of the facts, circumstances and presumptions in favour or against parties to the *lis*; it cannot for final appraisal at the end of the trial be split up into disjointed and disconnected parts as they came on the record at various stages through which the trial developed because of

the procedural law; what is weighed at the end is one totality against another and not selected bits or scrapes of evidence against each other: A.I.R. 1977 S.C. 183: (1977) 1 S.C.C. 133: (1977) 1 S.C.R. 763: (1977) 90 Mad.L.W. 17.

Per *Krishna Rao, J.* (in dissenting judgment): S. 101 gives effect to the ancient rule founded on considerations of good sense that the party who substantially asserts the affirmative of an issue has to prove it. It is well settled that the effect of the rule cannot be circumvented by manipulating the words of the issue: 1958 An.L.T. 985: I.L.R. (1959) Andh. Pra. 337: A.I.R. 1959 Andh. Pra. 215 (F.B.).

The terms "burden of proof" and "*onus probandi*" are somewhat confusing; after issues have been framed, "*onus probandi*" is sometimes called "right to begun" which would fall on the party which would lose if no evidence is adduced by either side; after such evidence has been recorded, it is for the Judge to determine as to on which party the burden has shifted: (1980) 21 Guj.L.R. 887.

The strict meaning of "*onus probandi*" is that if no evidence is given by a party having the burden of proof the issue must be found against him: A.I.R. 1946 P.C. 156.

When it is contended that a power conferred by a statute is not merely discretionary but it is coupled with a duty to exercise it, it lies upon those who contend that an obligation exists to exercise the power to show that there is an obligation to exercise it: 1959 Nag.L.J. 506: (1960) 62 Bom.L.R. 86.

Onus and proof—Question whether onus is rightly placed on a party is a question of law—Whether onus is discharged is only a question of fact: A.I.R. 1967 All. 513. *See* also A.I.R. 1921 Lah. 199 (D.B.).

Rr. 1 and 3, Ch. X of the Delhi High Court Rules having the effect of requiring a defendant to examine his witnesses on commission before examination of the plaintiff's witnesses, *held*, do not in any way amend Ss. 101 to 103 which provide for placement of burden of proof: A.I.R. 1977 Del. 49 (D.B.).

An inquiry under the Commission of Inquiry Act, 1952 is not a *lis*; it is merely a fact finding exercise. The technical rules of "burden" embodied in S. 101 are not attracted to such proceedings even if the word "burden" is used by the Commission. Therefore, merely because in the inquiry into the killing of ten persons by the Police, the Commission asked the aggrieved persons and not the Police to lead evidence first, that order is not vitiated: A.I.R. 1993 All. 343 (D.B.). *See* however A.I.R. 1973 Bom. 171 [The directions by the Commission that the parties who claimed that the firing was unnecessary or that it was excessive should lead their evidence first and that the officers who resorted to the firing will lead their evidence later on, *held*, are inconsistent with the normal principles which should guide any Commission of inquiry and thus, such directions are liable to be set aside.]

2. Initial burden of proof.—The burden of proof as to any particular fact lies on the person who wishes the Court to believe it; if he fails to discharge the burden, his plea can be deemed to have been rejected for want of evidence: (1991-1) 99 Punj.L.R. 38.

Onus is always on the person who asserts a proposition or fact which is not self-evident: A.I.R. 1927 P.C. 66.

The general rule as to the onus of proof and consequent obligation of leading evidence on any particular fact lies on the party who alleges it and not on him who denies it: A.I.R. 1915 Lah. 445; A.I.R. 1956 Mys. 36; (1986) 99 Mad.L.W. 369.

What plaintiff has to prove—Presence of reasonable and probable cause—Onus of proof: 29 Cut.L.T. 357.

Party putting forward claim must establish facts supporting claim: (1964) 1 M.L.J. 303: A.I.R. 1964 Mad. 255.

The burden is on the plaintiff to prove his case, and in this connection the position of the defendant who is impleaded at his own request and who denies the allegations in the plaint is not different from that of a defendant who is impleaded in the plaint. In the former case, the defendant need not make out a *prima facie* case before the plaintiff is asked to meet it: A.I.R. 1949 Ajmer 34. Also *see* A.I.R. 1980 All. 253 [It cannot be accepted on a proposition of law that the plaintiff has to prove by positive evidence a fact which cannot be in its knowledge and which is in the special knowledge of the defendant.]

When the plaintiff alleges existence of certain facts on which he bases his claim, an obligation is cast on him to prove the existence of those facts. In a given case, if the

plaintiff on whom the onus of proving the existence of certain facts lies, does not lead any evidence at all or leads evidence which is not sufficient to prove his claim, then the defendant is not obliged to lead any evidence and the suit would be liable to be dismissed. But in a case where onus of an issue is wrongly placed, then the party on whom the onus is placed would be required to disprove the existence of facts which have not been proved by the party who have alleged them. [A.I.R. 1954 Raj. 83 (F.B.), Dissent. from; A.I.R. 1963 Punj. 397, Overruled]: A.I.R. 1975 P.&H. 174: (1975) 77 Punj.L.R. 686 (F.B.).

Plaintiff to prove case set up in plaint—Defect in issues—Effects. *See* A.I.R. 1955 Raj. 45: I.L.R. (1955) 5 Raj. 191.

Essential facts constituting cause of action—Proof of—Burden on plaintiff unless it is admitted: A.I.R. 1963 Cal. 500.

Knowledge—Burden of proof is on plaintiff: I.L.R. 40 Pat. 488: (1962) 1 S.C.R. 492: A.I.R. 1961 S.C. 1474.

The plaintiff cannot obviously take advantage of the weakness of the defence. The plaintiff's case must stand or fall upon the evidence adduced by him: A.I.R. 1957 Pat. 64; A.I.R. 1924 Cal. 558 (D.B.); A.I.R. 1933 Oudh 242 (D.B.); A.I.R. 1948 Oudh 139; A.I.R. 1949 Ajmer 34; I.L.R. (1975) 1 Del. 445; A.I.R. 1978 N.O.C. 280 (Cal.); A.I.R. 1979 Cal. 50.

The burden of proving the case is always on the plaintiff who must adduce reliable and admissible evidence to prove the case. The plaintiff must succeed on the strength of his own title and not be sustained by any weakness in the case of defendant: A.I.R. 1991 Madh. Pra. 15. *See* also A.I.R. 1918 P.C. 35; A.I.R. 1932 P.C. 95.

Where the initial onus was not discharged, the opposite party need not adduce any evidence: 1983 M.P.W.N. 214.

The onus to prove deposit of the amount in bank is on the party alleging such deposit but not the onus to prove as to why it was not recorded in the bank books: A.I.R. 1918 P.C. 218.

Even where the burden of proof initially lies on the plaintiff who fails to discharge that burden by his evidence but all the same the defendant's evidence admits the material facts or tends to prove the plaintiff's case, *held*, there is no bar to the Court's decreeing the suit; it is well settled that on adduction of evidence by both sides, the question of burden loses all importance: A.I.R. 1971 Assam 168: 1971 Assam L.R. 341.

Where a defendant pleads occurrence of a fact, burden is on him to prove its occurrence and not on the plaintiff to prove its non-occurrence: A.I.R. 1916 Oudh 216. *See* also A.I.R. 1924 Cal. 467 (D.B.).

It is true that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong, but they do raise an estoppel and shift the burden of proof on to the person making them or his representative-in-interest: A.I.R. 1979 S.C. 861.

The ordinary rule regarding the onus, incumbent on the plaintiff, has really no application to cases where the true boundary is to be ascertained. A precise boundary with scientific accuracy is hardly to be expected in every case substantial justice being all that is necessary for practical purposes. It is the duty of either party to aid the Court in ascertaining the true boundary. Where any other rule is recognised, the result might be that some boundaries would remain incapable of judicial settlement for all times: (1963-64) 68 Cal.W.N. 1043: A.I.R. 1965 Cal. 199.

Though the form in which the issue was framed cast the burden of proof on the defendant, the form could not affect the burden of proof on the pleadings which is on the plaintiff. As the evidence adduced did not disclose how or when the property was acquired or whether the property was treated at any time as one attached to the office of sthanom, the plaintiff must fail: 1960 Ker.L.J. 1401: I.L.R. (1961) 1 Ker. 67: 1961 Ker.L.T. 846: A.I.R. 1962 Ker. 93 (F.B.).

Burden of proof is generally on plaintiff—Suit on handloan—Defendant denying loan—Decision should rest on rule as to burden of proof under law and also the admitted or proved circumstances of the case: 1961 An.L.T. 404: A.I.R. 1961 Andh. Pra. 461.

When the petitioner claims his social status as backward class, the burden is on him to conclusively establish that he in fact belongs to a backward class: A.I.R. 1986 Andh. Pra. 196: (1986) 2 A.P.L.J. (H.C.) 183; 1980 Jab.L.J. (Notes) 58.

In a suit for declaration that the orders of the plaintiff's demotion and subsequent dismissal were illegal and *ultra vires* on the

ground that the statutory procedure was not followed, the onus is on the plaintiff to show by proper evidence that the requisite legal procedure was not followed, and so the orders were vitiated and *ultra vires*. S. 102, Evidence Act and not S. 106, is applicable to such a case: 1959 B.L.J.R. 703: A.I.R. 1960 Pat. 162.

It is on the person who asserts that a transfer is in contravention of S. 12 of the C.P. Tenancy Act, that the burden of proving it lies, for it is his application that would fail, if no evidence at all were given: 1938 Nag.L.J. 474. *See* also 1939 M.L.R. 149.

Where the plaintiff came to the Court with a definite case that the deceased was a Hindu, although the fact was that she was buried according to the Christian rites, *held*, the burden was on plaintiff to prove that the lady had not converted her religion and it was not for the defendant to prove the conversion. [A.I.R. 1957 Mad. 186 and A.I.R. 1961 Mad. 289, Foll.]: A.I.R. 1988 Mad. 132: (1987) 100 Mad.L.W. 895: (1987) 2 M.L.J. 481.

Where the plaintiff wants to prove the fact that a grant has been made to his ancestors of land revenue alone and that they were ordinary Muafidars, he should produce proper material before the Court and facts mentioned in various judgments could not be used as evidence to prove his contention: 1954 All.L.J. 641: A.I.R. 1955 All. 1 (F.B.). A plaintiff claiming relief on the basis of heirship, *held*, should prove the same: (1978) 2 M.P.W.N. 299.

Plaintiff contending that the grant was service grant and was inalienable has to prove his contention. *See* A.I.R. 1955 Assam 23.

Where on an escheat by the Crown the plaintiff brings a suit for declaration that he is entitled to the malguzari in question as reversioner of the last male holder and for possession, the onus lies on him to prove that the malguzari rights in question were held by the common ancestor. It is not for the defendant State to prove that the last proprietor died heirless: A.I.R. 1953 Him. Pra. 79.

Conversion of goods—Essentials necessary to be established by plaintiff. *See* A.I.R. 1957 S.C. 357.

3. Question of onus after evidence is let in.—The expression "burden of proof" really means two different things. It means sometimes that a party is required to prove an allegation before judgment can be given in its favour; it also means that on a contested issue one of the two contending parties has to introduce evidence. The burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must eventually fail. Where, however, parties have joined issue and have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic: A.I.R. 1960 S.C. 100.

The question of *onus probandi* is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side. In such a contingency the party on whom the onus lies to prove a certain fact must fail. Where, however, evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place and truth or otherwise of the case must always be adjudged on the evidence led by the parties: (1964) 3 S.C.R. 191: A.I.R. 1964 S.C. 880.

Though where entire evidence has been adduced by both the parties and the Tribunal feels that it can make up its mind as to the truth of the version of either party, then the ultimate decision will not turn upon the burden; but where it finds that the evidence is conflicting or equally balanced so as to make it difficult for it to arrive at a determinate conclusion, then the burden of proof on the pleadings turns the scale: A.I.R. 1957 Andh. Pra. 264 (D.B.).

The question of burden of proof acquires importance, only where, by reason of not discharging the burden which was put upon a party, it must eventually fail. Where, not only parties have joined issues, but have led evidence, the two versions can be gone into, with a view to determine which way the weight of the evidence turns. In such a case the abstract question of *onus probandi* loses its significance, as the Court determines the controversy, on the weight of the evidence led on the contested issue, and not upon the abstract question or burden of proof, which becomes purely academic. Of course, if the mind of the Judge, determining the suit, is left in doubt as to the point on which side the balance should fall in forming a conclusion,

the doctrine of *onus probandi* will become a determining factor: I.L.R. (1960) 2 Punj. 506: (1960) 62 Punj.L.R. 624: A.I.R. 1960 Punj. 500.

Where both the parties have led evidence, the burden of proof would assume secondary importance: A.I.R. 1981 Cal. 9: (1981) 1 Cal.H.N. 131 (D.B.); A.I.R. 1981 S.C. 2085 (D.B.).

Where on evidence adduced by both the parties the Courts below gave a concurrent finding of facts, *held*, the question of the onus of proof would pale into insignificance. The concurrent findings could not be disturbed merely because the burden of proof was not correctly placed. [A.I.R. 1983 All. 81, Disting.]: A.I.R. 1986 All. 185: (1986) 12 All.L.R. 52: 1986 All.C.J. 130.

Burden of proof and presumption—Function of—They have to be considered together—Their importance vanishes in the face of evidence given by both sides: A.I.R. 1970 All. 51: 1969 All.L.J. 659 (F.B.); A.I.R. 1971 Assam 168.

Where there is a good deal of evidence on both the sides, the question of burden of proof is not important and the same will be relevant only when the evidence placed is meagre and where there is uncertainty due to equibalanced evidence on some point in issue. [A.I.R. 1970 All. 51 (F.B.), Foll.]: 1971 All.L.J. 600 (D.B.).

Both parties adducing evidence—Question of burden of proof is not of importance—Court has to come to a decision on a consideration of all materials: A.I.R. 1961 Pat. 158; A.I.R. 1920 P.C. 67; A.I.R. 1921 Cal. 435; A.I.R. 1922 P.C. 195; A.I.R. 1922 P.C. 292; A.I.R. 1922 Bom. 233; A.I.R. 1923 Lah. 641; A.I.R. 1925 Cal. 61; A.I.R. 1939 All. 257; A.I.R. 1939 Pat. 108: 1938 P.W.N. 773; A.I.R. 1949 P.C. 207; (1949) 54 Mys.H.C.R. 451; I.L.R. (1953) 32 Pat. 803; A.I.R. 1957 Pat. 64; A.I.R. 1959 Andh. Pra. 64 (D.B.); I.L.R. (1960) 12 Assam 1; A.I.R. 1961 All. 14 (D.B.); A.I.R. 1961 Pat. 88; A.I.R. 1963 S.C. 1150; A.I.R. 1964 Raj. 126 (D.B.); A.I.R. 1964 Andh. Pra. 172 (D.B.); I.L.R. (1965) 2 All. 901; A.I.R. 1966 Mad. 240; (1967) 2 Mys.L.J. 210 (D.B.); 1970 B.L.J.R. 919 (D.B.); 1970 All.L.J. 102 (D.B.); 1971 All.W.R. (H.C.) 41; (1975) 41 Cut.L.T. 736; 1981 B.L.J.R. 246; 1981 All.L.J. (N.O.C.) 115; A.I.R. 1988 Cal. 79; A.I.R. 1994 Karn. 247: (1994) 1 Hindu.L.R. 595 (D.B.).

Burden of proof on wrong party—When parties have actually led evidence this question would be merely academic: (1966) 62 I.T.R. 367: (1966) 18 S.T.C. 482: (1967) 1 I.T.J. 40 (Guj.).

When evidence has been adduced on both sides or opportunity has been given to litigants to produce evidence, question of burden of proof ceases to have any practical importance: 1969 Raj.L.W. 107: I.L.R. (1968) 18 Raj. 1212; I.L.R. (1956) Hyd. 868: A.I.R. 1957 Hyd. 29.

After the evidence was recorded in the case, it becomes wholly immaterial as to on whom the onus lay to prove a particular fact: (1992) 2 Rev.L.R. 445.

In a civil proceeding when the evidence has been gone into by both the sides, the question of onus is immaterial and it is for the Court to find out the truth unless the evidence on both sides is hopelessly worthless: A.I.R. 1959 Pat. 490.

The question of burden of proof has no importance when both the parties had adduced evidence and the trial Court and the appellate Court had appreciated that evidence: A.I.R. 1973 S.C. 626: (1973) 3 S.C.C. 718.

The question of onus of proof is of no importance if all the relevant evidence has been given: A.I.R. 1950 P.C. 25; I.L.R. (1951) 1 Cal. 295; A.I.R. 1954 Kutch 39; 1955 An.W.R. 459; 1958 All.L.J. 526: A.I.R. 1958 All. 22; (1980) 3 S.C.C. 451.

If the entire evidence is adduced by both the parties and Court feels that it can make up its mind as to the truth of the version of either party, then the ultimate decision of the Court will not turn upon the burden of proof. [A.I.R. 1959 S.C. 1204, Rel. on]: (1992) 1 M.L.J. 636 (D.B.); A.I.R. 1949 P.C. 278.

The question of burden of proof at the end of the case, when both parties have adduced their evidence is not of very great importance and the Court has to come to a decision on a consideration of all materials: 1958 Ker.L.T. 721: A.I.R. 1959 S.C. 31; A.I.R. 1959 S.C. 1204.

Burden of proof—Both sides adducing evidence—Evidence adduced on both sides—Appraisal of: 1964 B.L.J.R. 701.

Where the Courts below had concurrently found on evidence, both oral and documentary, led by the parties, *held*, the question of placing the onus would be of no more than of academic significance: A.I.R. 1972 Pat. 472.

The person on whom the burden lies has to adduce evidence, but when the evidence

has been recorded, the question of burden of proof becomes academic; it assumes importance only when a party fails for not discharging the burden. The burden of proof is not a weapon of oppression in the hands of the Court and never in the hands of the opponent. The failure to apply the correct legal test and the resultant judgment constitutes a substantial error of law: (1984) 1 An.W.R. 129.

Where the parties have produced all their available evidence, the dispute on the point of onus is mainly of an academic nature: I.L.R. 9 Lah. 224: A.I.R. 1928 Lah. 432. *See* also A.I.R. 1929 Rang. 183; I.L.R. 56 Cal. 805: A.I.R. 1929 Cal. 425; I.L.R. (1940) Kar. 235 (P.C.) ; A.I.R. 1934 Lah. 936; A.I.R. 1934 Pesh. 134; A.I.R. 1934 Lah. 542; I.L.R. (1954) Cut. 171: A.I.R. 1954 Ori. 225.

Once the parties have been permitted to produce evidence in support of their respective cases and it is not their grievance that any evidence was shut out, *held*, the question of burden of proof loses significance and remains only academic: A.I.R. 1991 S.C. 1040. The case then has to be judged on consideration of probabilities: 1982 All.W.C. 501; (1972) 85 Mad.L.W. 40 (D.B.).

Onus of proof immaterial—Both sides adducing evidence—If each side has adduced evidence, the question of onus of proof loses all the great importance—which at one stage it had, and would only resume its importance if on considering the evidence as a whole—irrespective of which side adduced it—the Court is left in reasonable doubt on any material question: 80 Cal.L.J. 297: I.L.R. (1945) 1 Cal. 565.

The question of burden of proof pales into insignificance when the parties have entered upon evidence and the evidence has been duly considered by the Court in its totality: A.I.R. 1984 All. 180: 1984 All.W.C. 203.

Where both the parties have led evidence on an issue, *held*, the burden of proof is rendered only of academic importance; it does not affect the outcome based on appreciation of evidence: A.I.R. 1983 N.O.C. 173: 1983 All.C.J. 183: (1983) 2 Ren.C.J. 15; 1984 All.W.C. (Supp.) 642; 1982 M.P.W.N. 154; 1982 M.P.W.N. 196; (1981) 2 M.P.W.N. 36; 1980 All.W.C. 258: 1980 All.L.J. 344.

The onus as a determining factor of the whole case can only arise if the Court finds the evidence pros and con so evenly balanced that it can come to no definite conclusion and then the onus will determine the matter. But if the Court after hearing and weighing the evidence comes to a definite conclusion, the need for placing the onus does not arise. In other words, the question of onus at the close of a case only becomes important if the circumstances are so ambiguous that a definite conclusion is impossible without resort to it: (1955) 68 Mad.L.W. 192: (1955) 2 M.L.J. 36.

It is always open to the defendant not to lead any evidence where the onus is upon the plaintiff but after having gone into evidence, he cannot ask the Court not to look at and act on it. The question of burden of proof at the end of case when both parties have tendered evidence is not of any great importance and the Court has to come to a decision on a consideration of all materials: (1991-1) 11 Guj.L.H. 288 (S.C.).

In a case where all the facts are proved by ample evidence and the Court is in a position exactly to say what happened, no importance need be attached to the rule as regards burden of proof. It is only in cases where evidence is meagre and the Court is not in a position definitely to know what happened that the technical rule as to burden of proof is to be observed: 1939 M.L.R. 244 (Civ.). *See* also I.L.R. (1940) Kar. 235 (P.C.); 1945 Nag.L.J. 489; A.I.R. 1957 Pat. 64; A.I.R. 1957 Hyd. 29.

No objection can be taken to the broad proposition that when the parties have led evidence the question of burden of proof becomes immaterial. But when there is an admission in the document between the parties of the passing of the consideration, burden lies on the party making the admission to explain the admission and the admissions can be taken into consideration in assessing the value of the evidence produced by the parties. The question of burden of proof also is material with a view to assess the value of the evidence produced by the parties: I.L.R. (1963) 15 Assam 104: A.I.R. 1963 Assam 41.

The principle that after recording of both the parties evidence, the question of onus loses all relevance and pales into insignificance is not peculiar to civil cases only; it applies to criminal cases as well. Thus, where the accused, despite having no onus to do so, had nevertheless adduced evidence sufficient to convict him even though the

prosecution has not, *held*, the accused could well be convicted; to insist that the prosecution must nevertheless fail would tantamount to stretching to the breaking point that the prosecution must establish the guilt of the accused on the evidence adduced by it: 1989 Cal.Cr.L.R. 122: (1988-89) 93 Cal.W.N. 1035: 1990 Cr.L.J. (N.O.C.) 78: (1989) 1 Cal.H.N. 352 (D.B.).

When all evidence is let in the question of burden of proof has little or no importance in appeal: 103 I.C. 166; A.I.R. 1929 Rang. 183. *See* also 162 I.C. 247: 1937 R.D. 170; A.I.R. 1936 Lah. 1016; (1939) 52 Mad.L.W. 57: A.I.R. 1940 P.C. 93 (P.C.); A.I.R. 1940 Lah. 336; 1939 M.L.R. 244 (Civ.); I.L.R. (1940) Kar. 235 (P.C.); 63 M.L.J. 694: A.I.R. 1932 P.C. 228 (P.C.); I.L.R. 60 Cal. 1158: A.I.R. 1933 Cal. 900; 29 Nag.L.R. 298: A.I.R. 1933 Nag. 379; I.L.R. (1945) 1 Cal. 565; A.I.R. 1950 P.C. 25; A.I.R. 1951 Madh. Bh. 77.

Where the entire evidence is on the record the question of onus has lost all importance. Had the evidence left any doubt, the question of onus might have been of importance because then the party on whom lay the onus would have failed: A.I.R. 1958 All. 546.

Where all available evidence is considered without reference to onus and without relying on the circumstances that the onus lies on a particular party, the issue is determined on facts, and the onus cannot be said to have influenced the decision: I.L.R. (1953) 5 Assam 173: A.I.R. 1954 Assam 49.

The question of onus loses its efficacy when it is never objected to in the lower Courts and evidence having been led by the parties, at the appellate stage the Court has to adjudicate on the material before it: (1968) 34 Cut.L.T. 890.

Petitioner objecting to transfer of village C to Pakistan under Part relating to Berubari Union No. 12 in Sch. 2 of the Constitution (Ninth Amendment) Act, 1960—Petitioner alleging that no part of the Union falls south of east to west horizontal line and therefore, Amendment Act is impossible of implementation—Onus lies on him to show that attempt made by Government to transfer the village is illegal and unconstitutional—Petitioner if unable to produce evidence in support of plea cannot require the Government to show his plea untenable—Claim by petitioner that location of different villages is a matter within special knowledge of Government and should therefore, be established by them is also not right—Further where both parties have produced the maps relied on by them and the Court accepts the maps produced by Government as reliable, no question of onus really arises: A.I.R. 1966 S.C. 644.

The burden of proving that the purchase had been made by a person as an agent for the plaintiff and that the former fraudulently made the purchase in his own name and concealed the fact from the plaintiff is entirely on the latter but when evidence has been led by both sides, the Courts are entitled to consider the entire evidence bearing on the points involved instead of merely resting on the abstract doctrine of onus of proof: A.I.R. 1955 Assam 177.

4. Burden of proof—When wrongly placed.—Question whether particular sale was sham—Burden of proof put on wrong party—Finding, *held*, was vitiated in law: (1964) 5 Guj.L.R. 678: A.I.R. 1964 Guj. 174.

A wrong approach with regard to onus of proof vitiates a finding of fact. The bias created by a wrong approach with regard to onus of proof also affects the reasoning and conclusions derived from the evidence: 1981 All.W.C. (Rev.) 19.

Where in the trial Court a party accepted the onus of proof upon him and undertook to discharge the same, but failed to discharge it, *held*, he cannot be allowed, in appeal, to turn round and say that the trial Court committed error in placing the burden of proof on him: A.I.R. 1974 Raj. 238: 1974 Raj.L.W. 106. *See* also 1939 Nag.L.R. 244 (Civ.); A.I.R. 1954 Raj. 135.

Party accepted burden of proof in trial Court—It cannot complain in appeal: A.I.R. 1934 Lah. 1019; A.I.R. 1952 Trav.-Co. 185; A.I.R. 1921 Lah. 284.

Burden wrongly placed—Entire evidence before High Court in second appeal—Mistake can be corrected in second appeal—Remand is not necessary: A.I.R. 1960 Manipur 11.

Burden of proof—Wrong placing of—Ground not included in memo. of appeal—Evidence led—Question at appellate stage is immaterial: (1965) 67 Punj.L.R. 134: A.I.R. 1965 Punj. 232; I.L.R. (1965) 15 Raj. 233: A.I.R. 1965 Raj. 115.

Finding of fact—Wrong approach with regard to onus of proof—High Court can interfere: A.I.R. 1966 All. 39.

5. Shifting of onus.—31 Cut.L.T. 1082: A.I.R. 1964 Ori. 332; A.I.R. 1967 Cal. 529; A.I.R. 1971 S.C. 2085; A.I.R. 1975 Ori. 184.

S. 102 shows that the initial burden of proving *prima facie* case in his favour is cast on the plaintiff; after he has led the necessary evidence in that behalf, the onus to rebut that evidence shifts on to the defendant; as the case continues to develop the onus may shift back to the plaintiff. It is not easy to decide at what particular stage in the course of evidence the onus shifts forth or back. However, when the entire evidence has been adduced and the Tribunal is still unable to make up his mind as to which of the two versions is true, it will hold that the party on whom the burden was cast has not discharged it, and decide against it; but if it finds no difficulty in accepting one of the version as true, the question of burden would be of no significance and recede into the background. [A.I.R. 1937 P.C. 274; A.I.R. 1950 Pat. 370; A.I.R. 1952 Mys. 114, Rel. on]: A.I.R. 1976 Del. 70.

The evidence required to shift the burden need not necessarily be direct evidence, *i.e.*, oral or documentary evidence or admissions made by opposite party—It may comprise of circumstantial evidence or presumption of law or fact. *See* A.I.R. 1961 S.C. 1316; 1975 Tax.L.R. 625 (Andh. Pra.) (D.B.); (1979) 92 Mad.L.W. 225: (1979) 2 M.L.J. 137.

In civil cases, onus of proof is never permanently fixed, it constantly fluctuates: A.I.R. 1944 Lah. 276 (D.B.).

There is an essential distinction between the burden of proof as a matter of law and pleading and as a matter of adducing evidence; the burden in the first sense is always upon the party who comes to Court to get a decision on certain facts he asserts; but the burden to prove in the sense of adducing evidence "shifts from time to time", having regard to the evidence adduced by one party or the other or the presumption of fact or law raised in favour of one or the other: A.I.R. 1961 S.C. 1474; A.I.R. 1975 Ori. 184.

There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence: (1964) 1 S.C.A. 593: (1964) 2 S.C.R. 933: A.I.R. 1964 S.C. 136. As the case continues to develop the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of evidence, the onus shifts from one side to the other: A.I.R. 1949 P.C. 278; A.I.R. 1957 Andh. Pra. 264 (D.B.).

The burden of proof in a case must be determined with reference to the law and the pleadings. The burden to prove in the sense of first adducing evidence is called onus of proof; it may shift from time to time considering the evidence adduced; and the shifting of onus must be judged with reference to the standard of proof required on a contested issue which in civil law is only the balance of probabilities: (1984) 1 An.W.R. 129.

The Court ought to fix burden according to law and not to shift it by redundant averment in pleadings or by incautious acceptance of an issue: A.I.R. 1927 Mad. 1054 (F.B.).

Evidence and proof—Publication of statements—Falsity of—Proof—Onus—Petitioner proving falsity—Burden shifts on maker of statements to prove truth of statements: 1965 Jab.L.J. 1176: A.I.R. 1965 Madh. Pra. 55.

The burden of adducing evidence is not constant and it shifts as the case continues to develop. When once the entire evidence is adduced and on the entire evidence on record the Court is able to come to the conclusion that the case pleaded by the plaintiff is established, it will be a case for holding that the plaintiff has discharged his burden. On the contrary, if the Court is not able to come to a definite conclusion as to which version, *i.e.*, either of the plaintiff or of the defendant, is true, in such an event, as the burden of proof is on the plaintiff, it will be a case where the plaintiff has failed to prove the case pleaded by him and thereby he has failed to discharge the burden of proof: (1987) 2 Hindu L.R. 405 (Karn.) (D.B.).

The burden of proof is not stationary. The expression burden of proof is used in two senses, *i.e.*, the burden of proving an issue sometimes termed the "legal burden" and the burden of proof as a matter of adducing evidence during the various stages of the

trial. What is called the burden of proof on the pleadings should not be confused with the burden of proof of adducing evidence which is described as "shifting". These two aspects of the burden of proof are enunciated in Ss. 101 and 102 of the Evidence Act. S. 101 shows that the initial burden of proving a *prima facie* case in his favour is on the plaintiff when he gives such evidence as will support a *prima facie* case, the onus shifts on to the defendant to adduce rebutting evidence. As case continues to develop, the onus may shift back again to the plaintiff. In the case of a bond when execution and consideration are both denied by the defendant, the primary burden to prove execution as well as consideration is on the plaintiff. But once he proves that the signature or the thumb mark is of the defendant, the burden shifts to the latter. That burden the defendant can discharge either by establishing circumstances as would vitiate the contract, *e.g.*, fraud, coercion, undue influence, mistake, want or failure of consideration or he can make out circumstances to show that no presumption fairly arises against him under S. 114, Evidence Act. As soon as the defendant succeeds in this, the burden shifts back to the plaintiff. The recital in the document that the defendant has received consideration is not conclusive and the defendant can show that the recital is not correct. In cases of this nature it is the clear duty of the Court to analyse the evidence: 1962 M.P.L.J. (Notes) 143: 1963 Jab.L.J. 113: A.I.R. 1963 Madh. Pra. 15.

Plaintiff's evidence amply established by evidence—It is incumbent on the defendant to meet that evidence by personal testimony: 10 I.C. 963 (P.C.).

Proof of acknowledgment of receipt of consideration does not necessarily shift burden: A.I.R. 1915 Mad. 156 (D.B.). *See* also Note 31, *infra*.

Where the plaintiff's title to the suit property is challenged by the defendant, the initial burden of proof is on the plaintiff and when the plaintiff produces judgments of competent civil Courts declaring the title of the plaintiff to the suit property, he discharges the initial burden of proving his *prima facie* case. Even though the judgments produced by the plaintiff are not *inter partes* or *in rem*, they cannot be said to be of no value as document of plaintiff's title. The plaintiff having thus given some proof of his title, the burden shifts on to the defendant either to prove a competing title in himself or to dislodge the evidence of the plaintiff: 1962 Ker.L.J. 1277.

Burden of proof whether discharged is question of fact but whether it shifts is matter of law: 1962 M.P.L.J. (Notes) 143: 1963 Jab.L.J. 113: A.I.R. 1963 Madh. Pra. 15.

Onus—Shifting of—Stolen articles conforming to specifications of Railway standards—That they belonged to particular Railway need not be proved: 30 Cut.L.T. 275.

Prosecution for unauthorised construction—Burden of proof—Prosecution producing copy of the plan retained in office with clear marking of refused portions—Burden shifts on the accused—Failure of accused to rebut it by producing copy of the plan sent to—Onus, *held*, not discharged: 1961 Jab.L.J. 1448.

Where a witness proved a letter received by him to be in the handwriting of a particular person, *held*, the burden then shifts to the other party to prove that the letter was either not written by that person or it was written in collusion with the witness; merely putting the suggestion of forgery or collusion—two inconsistent pleas—to the witness in cross-examination who denied them, is not sufficient to discharge the shifted burden: A.I.R. 1971 S.C. 1949.

Where the defendant intended to non-suit the plaintiff on the ground that the plaintiff was a "firm" and was not registered, it was for the defendant who raised this plea in the first instance that the plaintiff was a "firm" as defined by the Partnership Act, and after that it was for the plaintiff (if found to be a "firm") to prove that the firm was registered, to get over the objection: (1971) 1 Cut.W.R. 848.

Plaintiff's suit resting on partnership and breach of terms thereof by second defendant, *i.e.*, by breaking one of the terms of the partnership in as much as he got the rent bill in his name and became direct tenant under the first defendant, the landlord—Defendant pleading a letter from plaintiff's Solicitor to first defendant that plaintiff had no objection to second defendant, sub-tenant, becoming direct tenant under the first defendant—Solicitor examined as witness by defendant—*Held*, lack of authority on the part of the Solicitor was so patent upon his evidence

that question of onus, be it of proving a negative in the first instance became of an academic interest—To put it in another way landlord defendant had discharged plaintiff's onus though unwillingly by examining Solicitor as his witness—Plaintiff thrown over-board by questionable means in 1956 by defendant—Plaintiff's suit filed in 1958—No full knowledge on part of plaintiff—*Held*, acquiescence of plaintiff was not acquiescence in the context of facts—Plaintiff could not be held to have ratified action of the solicitor: (1963-64) 68 Cal.W.N. 786.

Once the landlord discharges his initial burden of proving that the defendant was permitted to occupy the premises as a licensee, *held*, the burden clearly shifts on the defendant to prove his tenancy: A.I.R. 1984 All. 180: 1984 All.W.C. 203.

Even when the burden of proof is on plaintiff who asserts a right, having regard to the circumstances of each case, the onus may also shift to the defendant. But that is not to say that no duty is cast upon the plaintiff even to show that he acquired knowledge of the defendant's action very late. Placing the entire burden on the defendant in such a situation would be contrary to the tenor of the provisions of the Limitation Act and also rules of Evidence. Where defendants pleaded bar of limitation in a suit and the plaintiffs were conscious of their belated action, *held*, it was for the plaintiffs to show that the suit was within time: A.I.R. 1993 J.&K. 14.

Letters Patent (Cal.), Cl. 12—Carrying on business what constitutes—Burden of proof—Is on plaintiff—*Prima facie* case made out—Burden shifts on defendant: A.I.R. 1966 Cal. 302.

When the plaintiff seeks a declaration to the effect that it is not liable under the Employees' Provident Funds Act and also seeks a permanent injunction restraining the Department from enforcing the provisions of Act because even though he has not led sufficient evidence, no positive evidence has been adduced by the Department, the reliefs which the plaintiff claims are equitable reliefs and the initial burden of proving that he is entitled to these equitable reliefs is upon the plaintiff. It may be that very slight evidence may be sufficient to satisfy the Court that the burden has been discharged. It may be that, in some cases, slight evidence may be considered as sufficient to shift the burden of proof on the other side. But, the important point to notice is that there must be some such reliable evidence adduced by plaintiff in the first instance which would permit the Court to hold that the burden has either been discharged or that it has been shifted on the other side: I.L.R. (1965) Guj. 408: (1966-67) 30 F.J.R. 1: A.I.R. 1966 Guj. 116.

Misapplication of capital of company resulting in loss—Onus—Once liquidator shows that there was declaration of dividend resulting in misapplication—Burden shifts on to directors to show that it was not actually paid: A.I.R. 1970 Ker. 131 (D.B.).

In a case when a transaction is between the brothers and at a time when one of the brothers is found to be involved in debt and his property is threatened to be sold and the consideration money as stated in the deed is abnormally low, a slight evidence challenging the genuineness of such transaction shifts the onus on the shoulder of that person who claims to have derived his title by the same: A.I.R. 1975 Cal. 211: (1974-75) 79 Cal.W.N. 282 (D.B.).

Credit entry of deposit by wife of assessee partner in account book of firm—Source of money need not be proved by assessee—Burden to prove it false shifts on Department: A.I.R. 1968 Assam 1.

Where in a money suit the defendant pleaded payment and produced an entry in his *bahi* on which he claimed plaintiff's thumb-mark, *held*, as soon as it was found that the thumb-mark was that of the plaintiff, the onus shifted to the plaintiff: (1930) 32 Punj.L.R. 407: 133 I.C. 867 (D.B.).

Burden of proof—Injury to workman—*Prima facie* case entitling to compensation proved by workman—Shifting of onus: (S.) A.I.R. 1957 Cal. 601.

Admission and shifting of onus: (S.) A.I.R. 1957 All. 1: 1958 Cr.L.J. 1.

Once supply of articles is admitted, the onus to prove the factum of making payment shifts: (1978) 2 M.P.W.N. 150.

Admission to Medical College—Charge of *mala fide* against Selection Committee at the time of interview—*Held*, the charge has to be proved by satisfactory evidence and the fact that the petitioner could not get outside evidence to establish what happened at the time of interview cannot shift the burden that is on him to prove his allegation: A.I.R. 1971 S.C. 2085.

Shifting of onus in criminal cases—*See* Note 14, *infra*.

6. Discharge of onus.—In ordinary civil proceeding a party on whom the burden of proof lies to prove a fact must discharge the burden to the satisfaction of the Court. He is not entitled to any benefit of doubt. If he fails to discharge the burden, his plea must be rejected: 1951 All.W.R. (Rev.) 50: 1951 R.D. 45.

Where the burden of proving a particular fact lies upon a person, *held*, he, before closing his case, has to produce all the evidence which he thinks to be necessary and which are available: A.I.R. 1934 All. 406 (F.B.); A.I.R. 1949 F.C. 88.

Where the plaintiff not merely failed to discharge the onus that was cast upon him but had also positively disproved his case, *held*, there was no need for the defendants to adduce any evidence on their side: A.I.R. 1952 Trav.-Co. 185 (D.B.).

A party on whom onus lies may take advantage not only of evidence adduced of him or on his behalf but also of any fact or circumstances in his favour appearing in evidence adduced by, or on behalf of, other party: A.I.R. 1936 Rang. 170 (D.B.).

The onus is not discharged by producing evidence which is just as consistent which the allegation of the party on whom the onus of proof lies as with the denial of the opponent: A.I.R. 1927 Pat. 225. The party upon whom the burden of proof lies, does not discharge that burden by showing that other side could equally have proved the contrary: A.I.R. 1920 Pat. 441 (D.B.).

Law does not prescribe any quantitative test to find out whether onus in a particular case has been discharged or not: A.I.R. 1971 S.C. 2439: 1971 U.J. (S.C.) 872. Whether onus is disharged is only a question of fact: A.I.R. 1967 All. 513.

Whether any party has discharged its burden of proof may be determined on the basis of their own depositions in the Court; no rule of law lays down that, unless corroborated by other evidence, depositions of the parties by themselves are no evidence; while appreciating such evidence the Court may rely upon legal presumptions including those under S. 114: (1986) 1 Hindu L.R. 62 (Ker.).

Onus — Discharge — Preponderance of probability is enough: 1966 Cr.L.J. 1357: A.I.R. 1966 S.C. 1762.

Difference between burden of proof on pleadings and burden of rebutting *prima facie* case made out by opponent—When burden of proof on pleadings is deemed to have been discharged. *See* A.I.R. 1937 Rang. 276 (D.B.).

Where the evidence is conflicting, the party on whom the onus lies does not necessarily fail as in the case where no evidence is led on either side: 123 I.C. 612: A.I.R. 1930 Pat. 134.

Onus is not discharged by merely showing that the opponent had wilfully omitted to adduce contra evidence in its possession: A.I.R. 1920 Pat. 441 (D.B.).

Where a suit is instituted within time even though a plaintiff is guilty of laches, it cannot be dismissed as barred by limitation, but when the result of a delay is that almost every bit of evidence that would have been available to an alienee had the suit been brought promptly disappears in the meanwhile, the Court would be justified in holding that the onus to prove necessity and consideration for the sale which lies upon the alienee is very light and in an appropriate case, even in finding that mere recitals in the deed of alienation as regards necessity and payment of consideration are sufficient to discharge that onus: I.L.R. (1953) Patiala 351: A.I.R. 1954 Pepsu 39.

It is absolutely necessary for the occupant of a premises to establish positively and decisively that he was in the premises prior to the date he contends; where no such proof was on record and long years had already lapsed, *held*, the case may be decided on the basis of the burden of proof; the occupant must fail for non-discharging of burden: (1986) 1 Bom.C.R. 581.

Sending sample of food for analysis—Burden of proving that sample sent for analysis is part of sample retained by Food Inspector and also given to accused, is on prosecution—Burden can be discharged by producing the sample retained by Food Inspector—Burden cannot be shifted by asking accused to produce his sample, when it is pleaded in defence that no such part of sample was given to accused: (1967) 2 An.W.R. 424.

7. Presumptions and onus of proof.—(*See* also Notes under S. 114, *infra*). Presumption is a decisive factor for the decision of cases only when the evidence is so evenly

balanced that the case cannot be decided in favour of one party or the other without taking into consideration the presumption: A.I.R. 1952 Nag. 308: I.L.R. (1953) Nag. 233. Question of raising presumption arises only when the facts are not known and there are gaps in the evidence which have to be filled in with their aid but where all the facts are known, no question of applying presumption arises: A.I.R. 1958 All. 42 (D.B.).

Compromise decree—Presumption as to its validity: A.I.R. 1965 Pat. 345.

A presumption in itself is no evidence; it only makes out a *prima facie* case for the party concerned; it is a rule concerning evidence; it indicates the person on whom the burden of proof lies. If the presumption is conclusive, it obviates the production of any other evidence, whether in support or in opposition. In case of a rebuttable presumption, the other party may produce evidence, fairly and reasonably tending to show that the real fact is not as presumed; the purpose of presumption is then over; then only the evidence of the parties will determine the true nature of the presumed fact: A.I.R. 1986 S.C. 1099: (1986) 99 Mad.L.W. 30: (1986) 2 S.C.C. 486.

Joint family—Partition—Burden of proof—Burden is on person who sets up partition—One coparcener separating from others—There is no presumption whether rest continue joint or separate: (1964) 2 S.C.R. 933: A.I.R. 1964 S.C. 136.

Suit for partition—Plaintiff admitting previous partial partition—Presumption of jointness is wiped out—Onus to prove that properties in dispute are still joint and partible is on plaintiff: (1960) 2 Ori.J.D. 449. *See* also Note 60, *infra*.

Recitals in document as to admission by person executing document—Presumption—Rebuttal of presumption—Onus: I.L.R. (1962) Andh. Pra. 431: A.I.R. 1964 Andh. Pra. 17.

Acceptance of gratification—Presumption—Nature and scope of—Rebuttal of presumption—Burden of proof must be discharged by proof in accordance with S. 3, Evidence Act: I.L.R. (1963) Guj. 837: (1964) 2 Cr.L.J. 291: A.I.R. 1964 Guj. 206.

Suit on bond—Defence of coercion, undue influence and want of consideration—Burden of proof—Presumption as to passing of consideration—Rebuttal—Rule as to—*Held*, that the conclusion by the lower appellate Court was ambiguous and indefinite. It was a matter of substantive law that the debtor must repay the amount borrowed by him. It was a rule of evidence that where execution was not admitted, it was the plaintiff who must prove it. As soon as the execution was admitted and proved a presumption arose that the defendant must have borrowed. But it was only a presumption of fact, it could always be rebutted either by producing evidence or by establishing from the plaintiff's own evidence that what appeared on the face of the document was not the truth. As soon as that presumption was destroyed the onus again shifted to the plaintiff to show that although the consideration was not paid in the manner described, yet the amount was otherwise due to him from the defendant. That he had to prove positively. The natural presumption regarding passing of consideration which arose under S. 114 of the Evidence Act could be rebutted on the basis of the evidence adduced by the plaintiff, even though the defendant, on whom the burden lay, did not lead any evidence: 1964 M.P.L.J. (Notes) 92. *See* also Note 31, *infra*.

Estate—What constitutes—Burden of proof—Explanation creates no presumption as to whether minor grants had been granted prior to or subsequent to grant of named village—Burden lies on party contending that land is not estate to prove that minor inams were granted subsequent to inam grant of named village: A.I.R. 1963 S.C. 1715.

Question whether particular land was estate and owner of it was zamindar—Evidence and proof—Presumption—Entry in khasra is not conclusive proof: A.I.R. 1963 All. 119.

Registered letter containing notice sent to tenant in arrears—Letter refused—Presumption of receipt of notice by tenant will be raised: 1963 All.L.J. 25: A.I.R. 1963 All. 250.

In a suit for money on the basis of account books containing entries countersigned by the defendant relating to transactions which are described as cash transactions, the initial presumption about the nature of transaction is in favour of the plaintiff and the burden lies heavily on the defendant who pleads that the entries were in respect of prohibited transaction in linseed and not cash transactions, to prove his allegation: 1963 Jab.L.J. 218: 1963 M.P.L.J. 325: A.I.R. 1963 Madh. Pra. 323. *See* also Note 17, *infra*.

Merely because the defendant, in a suit, admits encashing of cheque issued in his favour by the plaintiff, *held*, there is no presumption that the amount received was by way of loan; the burden is on the plaintiff to prove that it was a loan: I.L.R. (1974) 1 Del. 856; (1980) 2 Karn.L.J. 202.

Settlement entry—Presumption of correctness—Presumption of correctness attaching to the Settlement entry will prevail unless the contrary is proved by the plaintiffs as required by sub-S. (3) of S. 167: I.L.R. (1963) Cut. 175: A.I.R. 1963 Ori. 121. *See* also Note 91, *infra*.

Death of several persons by same calamity, at same time—Presumption as to survivorship: A.I.R. 1963 Punj. 66. *See* also Note 37, and Ss. 107-108, *infra*.

In any action by an inamdar to evict his tenants and by a zamindar prior to the enactment of the Madras Estates Land Act, 1901, to evict his ryots from their holdings, the burden was on the plaintiff to make out the right to evict by proving that the grant included both the melvaram and the kudivaram interests or that the holders of land or their predecessors were let into possession by the inamdar or the zamindar under a terminable lease. This presumption applies in a suit between persons claiming under the ryot as well as in a suit against the ryot by the zamindar: (1962) 3 S.C.R. 653: A.I.R. 1962 S.C. 342.

The initial burden of proving the execution of a document when it is denied must rest upon the person alleging its execution. But where a document is admitted to bear a certain signature and it comes from proper custody, that would be enough to raise an inference that it was signed with the intention of execution. Such an inference arises under S. 114 of the Evidence Act. Where, therefore, a person having signed a document wants to show that he signed it blank, it is he who relies on an exceptional circumstance, and therefore, the burden of proving that exceptional circumstance must rest upon him. But the question of burden of proof is hardly of any materiality when both parties led their full evidence, and the only question for the Court to determine is which of the two versions, namely, that put forward by the plaintiff, or the other one by the defendants, is correct: I.L.R. (1961) 11 Raj. 103: A.I.R. 1962 Raj. 231. *See* also Note 47 and S. 114, Note 88, *infra*.

Appeal to Central Government under S. 111(3) of the Companies Act, 1956—Refusal of registration of shares—Presumption in favour of directors—Burden of proof on person appealing against refusal order of directors—Central Government being Tribunal should record reason: A.I.R. 1961 S.C. 1669.

A party wall which stands between two houses must generally be presumed to be the common property of the owners of both the houses as tenants in common. It is only where the wall stands partly on one man's land and partly on other's and the precise extent of land which originally belonged to each party can be ascertained that the presumption of tenancy in common gives way to the inference that each owns that portion of the wall which stands upon his land: 1961 M.P.L.J. (Notes) 184.

Bombay Prevention of Gambling Act (IV of 1887), S. 7—S. 7 only raises a presumption that the raided place from which instruments of gaming were seized was a common gaming house but it does not raise a presumption that the accused was the keeper of the gaming house on the date of raid. It is to be established by the prosecution: (1967) 8 Guj.L.R. 145.

Withholding of material witness by prosecution—Adverse inference: 1968 Cr.L.J. 925: A.I.R. 1968 Goa 63. *See* also S. 114, Note 51, *infra*.

8. Onus in appeal.—Onus in appeal lies on the party asking for a finding of fact to be disturbed on the ground that it is wrong: (1968) 1 I.T.J. 117: 65 I.T.R. 424: A.I.R. 1967 All. 557; A.I.R. 1916 Cal. 964 (S.B.); A.I.R. 1922 P.C. 39; A.I.R. 1922 Lah. 127 (D.B.); (1922) 65 I.C. 182 (Cal.) (D.B.); A.I.R. 1927 Oudh 66; A.I.R. 1934 P.C. 208; A.I.R. 1950 East Punj. 296 (D.B.); A.I.R. 1952 All. 808 (D.B.); A.I.R. 1956 Bom. 99 (D.B.).

Although the initial burden in regard to the proof of a pedigree lies upon the plaintiff, after a finding has been given and appeal preferred, the onus lies on the appellant to show that the decision of the trial Court is wrong. The onus is not discharged by merely showing that there is an equal possibility of the judgment in favour of one party or the other being correct: I.L.R. 22 Luck. 249: 1947 O.W.N. 197: A.I.R. 1947 Oudh 164.

The burden to show that the judgment appealed against is wrong, *held*, lies on the

appellant; if the impugned judgment is shown to be nicely balanced indicating equal possibility of the judgment being right on either side, the second appeal is liable to be dismissed: A.I.R. 1972 Him. Pra. 87.

Appeal—Error of lower Court—Onus an appellant: 10 O.W.N. 201: A.I.R. 1933 Oudh 142 (D.B.).

Where the lower Court has held that a party was guilty of breach of contract, the burden of proving that the decision is wrong is on him: A.I.R. 1955 All. 24. *See* also A.I.R. 1959 Punj. 249.

The right of filing an objection and that of filing appeals are intended to provide opportunities to the assessee of proving the assessment to be wrong or excessive. Where the assessee fails to show that the assessment is *prima facie* wrong, the taxing authority is under no obligation to prove that it is justified and the assessee is bound to fail in his objection and his appeal when he fails to make out his point: A.I.R. 1959 Cal. 413.

Where the findings arrived at by the Courts below are based on evidence, both oral and documentary, adduced by the parties, *held*, the consideration of question of onus in appeal will be only academic: A.I.R. 1972 Pat. 472; A.I.R. 1917 P.C. 18; A.I.R. 1926 Lah. 514 (1); A.I.R. 1927 Nag. 382; A.I.R. 1930 Nag. 225 (D.B.); A.I.R. 1935 Mad. 769 (D.B.); A.I.R. 1951 Pepsu 33 (F.B.).

Concurrent finding of two Courts below—Finding is binding in appeal under Art. 136—Onus is upon appellant to prove that finding is erroneous: A.I.R. 1970 S.C. 146: (1970) 1 S.C.R. 290.

9. Withholding of best evidence.—(*See* also Notes under S. 114). If relevant evidence is withheld by the plaintiff, even if the burden of proof does not lie on the plaintiff, the Court may draw an adverse inference on the basis that an important document in the possession of the plaintiff which would have thrown light on the facts in issue, had been withheld. [A.I.R. 1917 P.C. 6 and A.I.R. 1968 S.C. 1413, Foll.]: (1976) 42 Cut.L.T. 751.

It is an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition, trusting to the abstract doctrine of the onus of proof: (1960) 62 Punj.L.R. 224: A.I.R. 1960 Punj. 417. Notwithstanding the burden of proof, an adverse inference may be drawn if a party withholds evidence in his possession which can throw light on the facts and issues: (1978) 91 Mad.L.W. 636 .

Parties must produce best evidence and if they have personal knowledge, they must themselves appear as witnesses. In case of their failure to do so, without any cogent explanation, the Court can legitimately draw inference against the party in default; such party in that eventuality may not successfully take advantage of the abstract doctrine of onus of proof: (1967) 69 Punj.L.R. 119; A.I.R. 1958 Punj. 190 (D.B.).

Where a defendant had not come out with the best evidence in his possession, *held*, he cannot be permitted to rely upon the abstract doctrine of onus of proof: (1983) 96 Mad.L.W. 693 (D.B.).

Evidence entirely in hand of defendant—Suit cannot be decided on abstract—Principle of onus—Defendant cannot succeed on ground that no evidence has been produced by plaintiff: (1953) 55 Punj.L.R. 28: A.I.R. 1953 Punj. 94.

Application by landlord under S. 14 of the Delhi Rent Control Act (LIX of 1958) for ejectment of tenant—Plea in appeal by tenant that original notice of demand did not bear signature of person giving such notice on behalf of landlord—Plea not taken in written statement—Original notice in possession of tenant but not produced at the hearing of the case before Rent Controller—*Held*, the Court will be justified in presuming that had it been produced it would have gone against the tenant—The mere fact that the main onus to prove the case was on the landlord was immaterial—The appellant-tenant by suppressing the notice in spite of being in possession of the same, cannot be allowed to take advantage of abstract doctrine of the onus of proof: (1963) 65 Punj.L.R. 1019.

Where original appointment file of the petitioner was called for but he failed to produce it and gave no justifying reasons for withholding the record from the Court, *held*, an adverse inference could be drawn against the petitioner that if the record had been produced it would not have supported the case of the petitioner: (1977) 44 Cut.L.T. 181 (D.B.).

P alleging existence of contract for payment of good-will money between him and *D*—When *D* possessed account books, he

could have produced them to refuse *P*'s plea—*D* cannot be heard to say, relying on abstract doctrine of onus of proof that it was no part of his duty to produce them unless he was called upon to do so: 1968 Raj.L.W. 163: A.I.R. 1968 Raj. 278.

10. Burden when no evidence let in.—S. 102 embodies a test as to which party would be successful if no evidence at all were given: 162 I.C. 21: A.I.R. 1936 Pat. 243: 38 Pat.L.R. 427; (1946) 36 Trav.L.J. 19 (F.B.).

If no or insufficient evidence is given, party who has to prove his case in order to succeed in an action, must fail (*obiter*): A.I.R. 1969 J.&K. 36; A.I.R. 1930 Pat. 134 (D.B.).

A party though in a position to adduce better evidence, deliberately abstaining from doing so, *held*, adverse inference may be drawn against him: A.I.R. 1937 Mad. 182 (D.B.).

11. Onus when evidence is equally balanced.—Where the evidence of both sides is equally balanced and it is not clear which version is correct, the onus of proof plays an important part. [1975 Lab.I.C. 94 (Cal.), Rel. on]: 1976 Lab.I.C. 202 (Cal.); A.I.R. 1927 P.C. 66; A.I.R. 1946 Nag. 84 (D.B.); A.I.R. 1948 P.C. 210; 1970 All.L.J. 102.

When there is ample evidence from both sides, the facts of the case are not determined by presumption or burden of proof but by a careful selection of the correct version, based, no doubt, on preponderance of probabilities: 1987 All.W.C. 1432.

12. Burden in civil cases.—Standard of proof—Civil case involving allegation of charges of criminal or fraudulent character—Insistence on proving charges clearly and beyond reasonable doubt is wrong: A.I.R. 1966 S.C. 1734.

In a civil suit, there is no burden cast on any party similar to the one in criminal prosecutions which requires the prosecution in all fairness to produce even evidence against its case: (1968) 70 Bom.L.R. 222: 1968 Mah.L.J. 492: A.I.R. 1968 Bom. 388.

In a civil suit, the burden lies on the plaintiff to establish his case. He is not entitled to the decree merely because the defence was defective or inconsistent: A.I.R. 1989 N.O.C. 178: (1989) 1 An.L.T. 91.

The burden of proof in civil proceedings is not something static and it keeps on changing on the proof of certain facts from which the Court could legitimately draw an inference: (1977) 2 Ren.C.J. 828.

13. Burden in matrimonial cases.—The burden of proof in the cases of marriage is to the extent of preponderance of probabilities and proof beyond reasonable doubt is not required in such cases: (1993) 2 Hindu L.R. 189 (Madh. Pra.). Matrimonial wrong may be proved by preponderance of probability: (1986) 2 Cal.L.J. 109.

Matters of a civil nature are always decided on a preponderance of probabilities and the burden of proof in such cases is not to be discharged as conclusively as would be expected in a criminal trial. To seek corroboration to a fact alleged by a spouse to a marriage, regarding the healthy or unhealthy character of their intimate relations which belong to the sacred and secret precincts of marital life, and which are known only to the spouses and which are not supposed to be known to any other living soul on the surface of the planet, would amount to shutting one's eyes towards the facts of life and reality: A.I.R. 1985 Guj. 121: (1984) 4 Guj.L.H. 939: (1985-1) 26 Guj.L.R. 119.

The standard of proof in respect of matrimonial offences, is as in a civil case being preponderance of probability and not of "beyond reasonable doubt" as in a criminal trial: A.I.R. 1975 S.C. 1534: (1975) 2 S.C.C. 326; A.I.R. 1982 Karn. 329: (1982) 1 Karn.L.J. 441: 1982 Hindu L.R. 413: (1982) 2 D.M.C. 84 (D.B.); (1985) 1 Cur. Civ. Cas. 243 (Del.).

S. 23(1)(*d*) of the Hindu Marriage Act, 1955 creates a bar to the proceedings under the Act in case there is improper and unreasonable delay in approaching the Court; whether or not the delay is improper and unreasonable is a question to be determined on the facts of each case and the explanation offered for the delay; only culpable delay is fatal to the proceeding, not a mere wrong; the burden to prove that the delay is inexcusable lies on the respondent: A.I.R. 1977 Del. 24: (1976) 12 Del.L.T. 200: 1976 Rajdhani L.R. 526: I.L.R. (1976) 1 Del. 887: (1977) 79 Punj.L.R. (Del.) 221: 1977 Hindu L.R. 751.

The burden of proof in proceedings under the Divorce Act, 1869 is as in a civil case and not in a criminal case; it should be proved by preponderance of probability and not beyond reasonable doubt; graver the charge, the greater should be the degree of proof required to satisfy the Court. Grave

allegations of cruel treatment, desertion and sodomy in the petition, it is settled law, cannot be directed to be proved on affidavit. S. 14 of that Act specifically requires the Court to be satisfied on the petitioner's proof on record: the Court can neither direct any party to prove the case on affidavit nor permit it to read an affidavit as evidence. Evidence has to be recorded as contemplated under O. 18, R. 2 or R. 5 of the Code of Civil Procedure: A.I.R. 1985 Kam. 47: (1987) 2 Hindu L.R. 670 (F.B.). *See* also A.I.R. 1985 Kam. 135: (1987) 2 Hindu L.R. 658 (S.B.).

14. Burden in criminal cases.—*See* A.I.R. 1954 Madh. Bh. 145: 55 Cr.L.J. 1347; A.I.R. 1954 S.C. 23: 55 Cr.L.J. 253; A.I.R. 1957 S.C. 366; (1957) 2 An.W.R. 131; A.I.R. 1958 Pat. 12; I.L.R. 36 Pat. 141.

A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to "proof" is an exercise particular to each case. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof: A.I.R. 1988 S.C. 2154: 1989 Cr.L.J. 288.

Standard of proof beyond reasonable doubt required in criminal cases calls for a careful and independent assessment and evaluation of the eye witnesses' account; they should not be adversely pre-judged on the basis of other, including medical evidence treating it as a sole touch-stone of credibility; *held*, on facts, eye witnesses were credible. [A.I.R. 1988 S.C. 2154, Foll.]: 1994 M.P.L.J. 57 (D.B.).

It is the fundamental principle of criminal jurisprudence that when an accused is put up for trial, the burden to prove the offence to the hilt by legal and cogent evidence remains on the prosecution, which never shifts. Only in exceptional cases where a special defence or plea is raised by the accused, the burden is to be discharged by him either by leading evidence or by demonstrating from the record that such special defence is made out: 1990 Cr.L.J. 2763 (Madh. Pra.) (D.B.); I.L.R. (1972) 22 Raj. 632: 1972 Raj.L.W. 384: 1972 W.L.N. 375.

In a criminal case it is for the State or the prosecution to show that the accused persons have committed the offence with which they are charged: 1956 Cr.L.J. 917: A.I.R. 1956 Punj. 169; A.I.R. 1957 Assam 45 (D.B.); (1919-20) 24 Cal.W.N. 619; A.I.R. 1959 Mad. 166; A.I.R. 1963 Guj. 224: (1963) 4 Guj.L.R. 1429: (1963) 2 Cr.L.J. 264; A.I.R. 1964 Ker. 222: I.L.R. (1963) 1 Ker. 458; A.I.R. 1965 Ker. 196: 1965 Ker.L.T. 20: (1965) 2 Cr.L.J. 215; A.I.R. 1965 J.&K. 105; 1984 Cr.L.J. (N.O.C.) 153 (P.&H.).

The onus of proving all the ingredients of an offence is always upon the prosecution; at no stage does it shift to the accused. It is no part of the prosecution duty to somehow hook the crook. Even where the defence does not appear to be credible or is palpably false, the prosecution's burden does not become any the less. It is only after the prosecution's burden is discharged that the accused is to explain or controvert to negative the essential elements of the prosecution case. Even if the onus shifts to the accused and he has to establish his plea, the standard of proof required is not the same as of the prosecution; if the evidence on his behalf probabilises his plea, he is entitled to the benefit of a reasonable doubt: A.I.R. 1972 S.C. 716: 1972 Cr.L.J. 511.

It is for the prosecution to prove its case in a criminal trial and it is only while considering whether the prosecution has proved its case that incidentally and where necessary a criminal Court, would have to consider the case made for the defence. It would not be right for a criminal Court to convict an accused person not so much because the prosecution case is established beyond a reasonable doubt by the prosecution evidence but because the defence theory appears to the Court to be unreasonable or does not appear to the Court to have been established: 1956 Cr.L.J. 725: A.I.R. 1956 Bom. 426. *See* also 1984 Cr.L.J. 1164: 1984 All.Cr.R. 509.

Where the trial Judge before considering the prosecution evidence first considered the truthfulness or otherwise of the defence version and after considering it rejected the same observing that it was for the accused to prove his innocence and thereafter, considered the prosecution evidence and concluded that the charge against the accused

was proved, *held*, the trial Judge betrayed complete ignorance of the elementary and cardinal principle of criminal jurisprudence which requires the prosecution to stand on its own legs. The trial Judge ought to have first discussed if the prosecution had succeeded in proving its case. Only thereafter, he should have looked into the defence version to see if the same was acceptable or not. To examine the defence version before examining the prosecution story is to put the cart before the horse: 1994 Cr.L.J. 904 (Raj.) (D.B.).

Per *Anna Chandy, J.*—In criminal case the accused had no obligation to prove his innocence nor is an accused under an obligation to positively prove how the victim died. The burden to prove the guilt of the accused is ever on the prosecution and if the prosecution has failed to establish the guilt beyond a shadow of doubt, the accused should be acquitted no matter how far fetched and unconvincing his suggestions might appear to be: 1963 Ker.L.T. 292: 1963 Ker.L.J. 369: 1964 M.L.J. (Cr.) 347: (1964) 1 Cr.L.J. 493.

The onus on the accused is not as heavy as it is on the prosecution. The prosecution has to establish its case, in a criminal trial, beyond reasonable doubt, while, the onus of the accused is discharged on the theory of balance of probabilities as in a civil suit. If the accused's version may reasonably be true, no conviction can lie: (1974) 40 Cut.L.T. 199: (1974) 1 Cut.W.R. 180; (1994) 5 S.C.C. 410: 1994 S.C.C. (Cr.) 1433.

In a criminal trial the burden always lies on the prosecution to establish the case against the accused and the accused is presumed to be innocent of the offence charged till the contrary is established. The burden lies upon the prosecution, and the presumption of innocence applies with equal, if not greater, force in an appeal to the High Court against an order of acquittal. In applying the presumption of innocence, the High Court is undoubtedly slow to disturb findings based on appreciation of oral evidence, for the Court which has the opportunity of seeing the witnesses is always in a better position to evaluate their evidence than the Court which merely peruses the record: (1963) 3 S.C.R. 386: 1964 M.L.J. (Cr.) 473; (1957) 2 An.W.R. 131: 1957 M.L.J. (Cr.) 402; A.I.R. 1960 Andh. Pra. 311: 1960 Cr.L.J. 787.

In a criminal case the burden of proof is on the prosecution and in order to prove a charge against an accused the prosecution must establish its case beyond reasonable doubt by legal evidence adduced in the case. It is also an established principle that the accused must be presumed to be innocent until the prosecution has been able to establish the charge against him beyond reasonable doubt and the presumption of innocence must continue even in an appeal against acquittal. In a criminal case there is no burden on the accused to prove his innocence: 1972 Cr.L.J. 1552 (D.B.). *See* also I.L.R. (1972) 22 Raj. 25 ; 1979 W.L.N. (U.C.) 176 (Raj.) (D.B.); 1979 Cr.L.J. (N.O.C.) 89 (All.) (D.B.); 1983 Cr.L.J. 521 (Ori.); (1987) 1 Crimes 748 (Gau.).

The law in India places the burden of proof upon the prosecution to bring the guilt home to the accused and does not admit of any exception. The presumption of innocence has to be dislodged by the prosecution by leading evidence pointing to the guilt of the accused. Under S. 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case within any of the general or special exception is placed on the accused. It is the duty of the accused to introduce such evidence as will displace the presumption of the absence of circumstances bringing his case within any exception, and that will suffice to satisfy the Court that such circumstances may have existed. Despite what is stated in S. 105, Evidence Act, the prosecution is not absolved from the burden laid on it by S. 102: 1959 Cr.L.J. 901: A.I.R. 1959 Punj. 332: I.L.R. (1959) Punj. 1473.

S. 106 is an exception to the general rule laid down in S. 101 that burden of proof basically lies on prosecution. S. 106 does not relieve the prosecution of that duty: (1986) 29 Del.L.T. 23.

In a case in which the evidence is of a circumstantial nature, the facts and circumstances from which the conclusion of guilt is said to be drawn by the prosecution must be fully established beyond all reasonable doubts and the facts and circumstances so established should not only be consistent with the guilt of the appellant but also they must entirely be incompatible with the innocence of the accused and must exclude every reasonable hypothesis consistent with his innocence: A.I.R. 1991 S.C. 917: 1991 Cr.L.J. 330. *See* also A.I.R. 1982 S.C. 1157: 1982 Cr.L.J. 1243: (1982) 2 S.C.C. 351; A.I.R. 1983 S.C. 61: 1983 Cr.L.J. 155: (1982) 3 S.C.C. 462: (1983) 1

S.C.R. 822; A.I.R. 1983 S.C. 446; A.I.R. 1987 S.C. 1921: (1987) 3 S.C.C. 655; A.I.R. 1987 S.C. 350: 1987 Cr.L.J. 330: (1987) 1 S.C.C. 1.

Criminal trial—Onus—Duty of prosecution: 1958 Cr.L.J. 190: 1957 M.P.L.J. 137: A.I.R. 1958 Madh. Pra. 55.

The fundamental principle of criminal jurisprudence is that the onus to prove every essential of the offence against the accused lies on the prosecution and that it is only if these essentials are proved that the Court is entitled to examine the defence. The prosecution must stand on its own strength and cannot seek support from the possible weakness of the defence. The evidence in defence is to be examined with a view to see if it rebuts the case of the prosecution only if proved: A.I.R. 1955 Bhopal 9. *See* also 1989 Cal.Cr.L.R. 122: (1989) 1 Cal.H.N. 352: (1988-89) 93 Cal.W.N. 1035: 1990 Cr.L.J. (N.O.C.) 78 [Defence witnesses examined may sometimes prove the case of the prosecution]; (1989) 1 An.L.T. 91.

Evidence given by one accused, which is against the interest of a co-accused, *held*, does not relieve the prosecution of the burden of proving their case: 1983 Cr.L.J. (N.O.C.) 155: (1983) 1 Crimes 1083 (Del.).

It should never be forgotten that in a criminal case the burden lying on the prosecution never shifts. It is the duty of the Court to require the prosecution to prove every part of its case affirmatively by sufficient and legal evidence and it is not possible to convict an accused person on the ground of any weakness in his defence. Where the prosecution evidence falls short of proving the guilt of the accused with reasonable certainty, it is the duty of the Court to acquit the accused straightway. It cannot convict on a finding of mere probability: 1953 Cr.L.J. 1399: A.I.R. 1953 Cal. 634; A.I.R. 1959 Pat. 362.

It is the duty of the prosecution to prove the guilt of the accused and this burden on the prosecution cannot be shifted on to the accused when he furnishes an explanation either under S. 342, Cr.P.Code, or when under the newly amended Code he gives evidence on his own behalf. The explanation of the accused may be so convincing as to falsify the prosecution case and in which case the accused would be entitled to an acquittal or the explanation may be held to be so reasonably true that it will *pro tanto* throw reasonable doubts on the prosecution version with the result that the State would not have discharged the onus of proof imposed on it by satisfying the Court beyond reasonable doubt of the prisoner's guilt and in which case also the accused would be entitled to an acquittal. But, of course, if the explanation given by the accused is on the face of it improbable, inadequate or unconvincing or contradictory or a manifest after-thought, no Court would come to the conclusion that the explanation may reasonably be true. But even then the failure of the accused's explanation getting no importance attached to it would not render the prosecution any stronger and it must affirmatively and satisfactorily establish the guilt of the accused. In short, it is for the prosecution to establish the guilt of the accused, and not for the accused to establish his innocence: 1958 Cr.L.J. 906: A.I.R. 1958 Mad. 368.

If the prosecution evidence as a whole is unreliable and cannot be accepted as correct for specific reasons, the silence of the accused can be of no avail to the prosecution, for such conduct of silence can never be permitted to become a substitute for proof by the prosecution. The substantive prosecution evidence being rejected as unworthy of credit, the alleged conduct must be referable to some innocent reason. Different persons react in different ways in similar circumstances and in the absence of satisfactory evidence the Court ought not to treat the case as positively proved beyond reasonable doubt only by reason of the failure of the accused to put up his defence immediately when he was confronted: 1954 Cr.L.J. 230: A.I.R. 1954 S.C. 15 (Per *Desai, J.*)—If the inference of guilt from the proved incriminating facts is as much a natural or probable hypothesis as any other, the accused may be called upon to explain and if he fails or refuses, the Court may treat it as an additional circumstantial fact and infer his guilt. Or it may take judicial notice of the other hypothesis even without any explanation by the accused and acquit him: 1955 All.L.J. 468: A.I.R. 1955 All. 443.

It is true that the onus of proving guilt rests, throughout the trial, on the prosecution and never shifts on to the shoulders of the accused, but if the accused wants to rely on a particular fact for discrediting a prosecution witness, that fact must be adequately brought out in the cross-examination of the witnesses for the prosecution: (1970) 72 Bom.L.R. 405: 1970 Mah.L.J. 634: A.I.R. 1970 Bom. 438 (D.B.).

Criminal trial—Onus of proof in a criminal case is on the prosecution—Proof need not, however, be a mathematically accurate proof—Standard of proof required is indicated in S. 3 of the Evidence Act, which is applicable to the former Portuguese territory from 1st June, 1964—Being adjective law, Law of Evidence has retrospective effect—Supreme Court Justice—Vol. 60, page 536—*Boletin Ministario de Jostica*: 1967 Cr.L.J. 473: A.I.R. 1967 Goa 51 (F.B.); A.I.R. 1965 S.C. 666.

When it is said that an accused is presumed to be innocent what is meant is that the burden of proving the guilt of the accused is upon the prosecution. The accused has every advantage while the prosecution is held rigidly to the charge. The accused need not disclose the barest outline of his defence. He cannot be convicted when there is the least fair doubt in the minds of the Court. The prosecution cannot be permitted to take advantage of the weakness in the defence version. The prosecution has to prove the guilt of the accused *de hors* this weakness: 1967 Cr.L.J. 191: A.I.R. 1967 Goa 18.

Suspicion, however grave, is not positive proof of commission of offence: I.L.R. (1952) Patiala 512: A.I.R. 1953 Pepsu 82. Per *Agarwala J.*—One of the well-known maxims of criminal trial is that it is better that ten guilty persons be acquitted rather than one innocent person be convicted. The burden of proving that the accused is guilty is always on the prosecution. If there is an element of reasonable doubt as to the guilt of the accused, the benefit of that doubt must go to him. The maxim merely emphasises these principles in a striking fashion. It does not mean that even an imaginary or unreal and improbable doubt is enough for holding the accused not guilty if the evidence, on the whole, points to the only conclusion, on which a prudent man can act, that the accused is guilty: A.I.R. 1955 All. 443: 1955 All.L.J. 468. *See* also A.I.R. 1954 All. 795: 55 Cr.L.J. 1762.

Criminal trial—Prosecution must dislodge presumption of innocence available to accused by leading evidence to prove guilt—Mere suspicion, however strong, not sufficient for conviction: 1966 Ker.L.J. 868.

Prosecution evidence raising suspicion against accused—Suspicion, howsoever strong, cannot take the place of proof—Benefit of doubt should go to the accused: (1964) 2 Cr.L.J. 497: A.I.R. 1964 All. 481; (1964) 1 Cr.L.J. 566 (S.C.).

It is but fundamental that the onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution and the evidence must be such as to exclude moral certainty to every reasonable doubt about the guilt of the accused. The hypothesis of delinquency shall be consistent with the facts proved: (1968) 1 An.W.R. 178: 1968 M.L.J. (Cr.) 131.

Two views possible—View favourable to accused has to be adopted. *See* (1964) 1 Cr.L.J. 327: A.I.R. 1964 All. 106; (1987) 1 Crimes 748 (Gau.).

Criminal trial—Evidence—Burden of proof—Benefit of doubt: I.L.R. (1963) Andh. Pra. 349: (1964) 2 An.L.T. 77: (1964) 2 Cr.L.J. 78; 1992 Cr.L.J. 942 (Pat.); 1992 Cr.L.J. 648 (Pat.).

Criminal trial—Standard of proof—Prosecution has to prove its case beyond reasonable doubt—Reasonable doubt—Meaning of: A.I.R. 1970 All. 51 (F.B.); (1964) 2 Cr.L.J. 733: A.I.R. 1964 Tripura 62.

Defence can take inconsistent pleas and that too from time to time but that does not absolve the prosecution from the duty to prove its case beyond reasonable doubt: 1984 Mad.L.W. (Cr.) 44: 1984 Cr.L.J. (N.O.C.) 149. *See* also 1984 Cr.L.J. (N.O.C.) 150 (Ori.).

It is the fundamental doctrine of criminal law relating to onus of proof that the prosecution must establish all the ingredients of the offence with which the accused was charged, by independent evidence for convicting the accused irrespective of the fact whether the accused is able to adduce evidence bringing his case within any one of the exceptions, or not. The nature and the extent of the onus of proof that lies on the prosecution to prove the guilt of the accused is absolute and it stands on a different footing from the kind and nature of proof expected of the accused person to bring his case within any one of the exceptions pleaded by him. The prosecution has to establish the guilt of the accused beyond all reasonable doubts, whereas it is enough for the accused to bring his case within any one of the exceptions, if he succeeds in proving a preponderance of probability: 1970 Cr.L.J. 83 (Andh. Pra.).

Where an accused in a murder case denied his guilt and produced no evidence in

defence, *held*, the prosecution has still to prove its case satisfactorily; silence of the accused would be of no consequence: A.I.R. 1975 S.C. 573: (1975) 3 S.C.C. 700.

Whenever intention or knowledge forms one of the ingredients of an offence, *held*, the prosecution's burden in such a case includes the burden of proving the mental state of the accused: 1982 Cr.L.J. 856 (Bom.).

The burden of proof lies entirely on the prosecution to establish its case, including *actus reus* and *mens rea*, beyond reasonable doubt; such burden is neither discharged nor shifted merely because the accused pleads private defence; such plea is to be established by the defence only after the prosecution has discharged its burden. However, the burden on the defence is not so onerous as the initial burden on the prosecution. The defence can discharge its burden either, as in all cases, by direct evidence or by establishing probabilities of the plea founded on defence evidence, prosecution evidence and presumptions; and even if in such endeavour the defence raises a reasonable doubt in the prosecution case, the accused is liable to acquittal: 1982 Cr.L.J. 173 (Ker.).

The accused owes no one a duty to share his confidence with any one and much less with the prosecution and by the very fact that he keeps his own Counsel he really does not merit the criticism that he remains quiet by choice and design because he knows the truth and if he speaks out, he would be doing so at his peril. The Court cannot make any such assumptions. Likewise, the falsity of the defence, can only be used to embellish the conclusion of guilt if established conclusively on the material produced by the prosecution. But, on the contrary, if the prosecution's case at the end of the trial remains still inchoate and indecisive, touching the guilt of the accused, it would not be open to the Court to forge together a syndrome of inconclusive factors nestling in the twilight zone into an unbreakable strand, each link of which proclaims the guilt of the accused: I.L.R. (1990) Karn. 1973 (D.B.).

What is the precise nature of the burden resting on the prosecution where a bail granted to the accused is sought to be cancelled on the ground that the accused having won them over, the witnesses had turned hostile? It is indeed a criminal matter but it does not mean that every incidental matter in a criminal case must be proved beyond reasonable doubt as the accused's guilt; indeed, proof of facts by preponderance of probabilities as in a civil case is not foreign to criminal jurisprudence; the prosecution, thus, is not required to prove by mathematical certainty or beyond reasonable doubt that the accused had tampered with the witnesses; proof by balance of probabilities of such tampering or its apprehension is sufficient to cancel the bail: A.I.R. 1978 S.C. 961: 1978 Cr.L.J. 952: (1978) 2 S.C.C. 411: 1978 U.J. (S.C.) 534.

Mens rea—Burden of proof: 1960 Cr.L.J. 393: A.I.R. 1960 Punj. 135.

Prosecution's failure to throw light on the genesis of occurrence, in case where there was old rivalry between the two groups—Effect on prosecution's case. *See* A.I.R. 1989 S.C. 2004: 1989 Cr.L.J. 2167.

There is no conflict between the prosecution's general burden—which never shifts—to prove all components of the offence and the special burden of the accused to make out the defence of his insanity; it is not sufficient for the prosecution to establish that the deceased's death was a consequence of the injuries inflicted by the accused but also that those injuries were caused with the intention or knowledge mentioned in S. 300 of the Indian Penal Code; it is only, thereafter, that the Court would consider the accused's plea of insanity. Even if the evidence of insanity is not sufficient to discharge the burden under S. 105 cast on the accused, but if the evidence on record raises a reasonable doubt in the Court's mind about the existence of one or other essential ingredient of the offence, the accused is liable to be acquitted. [A.I.R. 1962 S.C. 605; A.I.R. 1964 S.C. 1563, Foll.]: A.I.R. 1971 Tripura 16: 1971 Cr.L.J. 407.

S. 16 of Orissa Special Courts Act, 1992, placing the burden on the accused during the trial to prove his innocence, *held*, being against the established principle of criminal law in this country, has to be struck down: A.I.R. 1993 Ori. 259: (1993) 76 Cut.L.T. 720 (D.B.).

Criminal trial—Onus of proof—Presumption of innocence of accused—Replacement by prosecution evidence of guilt—Miscarriage of justice can arise by acquitting a guilty person: 1968 Cr.L.J. 992 (Goa).

Burden of proof—Witnesses not cross-examined by accused—Failure of accused to

cross-examine witnesses does not discharge burden of proof on prosecution: (1966) 68 Bom.L.R. 389: 1966 Mah.L.J. 565: I.L.R. (1966) Bom. 407.

(*a*) Falsity or weakness of defence—Effect.—The accused persons are under no obligation to substantiate their defence version; they have simply to come forward with a probable and plausible version which fits in with the circumstances of a particular case: 1993 Cr.L.J. 1622 (Del.).

The burden of proving the prosecution case which squarely lies on the prosecution never shifts; defence is not bound to open its mouth so long as prosecution does not discharge its general burden of proving its case beyond reasonable doubt. Defence version may even be false, but the prosecution cannot derive any advantage from the falsity or other infirmities of the defence version, so long as it does not discharge its initial burden of proving its case beyond all reasonable doubts: 1992 Cr.L.J. 3287 (Gau.) (D.B.).

The case of the prosecution has to be tested independently of the defence version and in a case which depends for its proof on direct testimony, falsity of defence will not help the prosecution to establish its own case: A.I.R. 1974 S.C. 155: 1974 Cr.L.J. 303: (1974) 3 S.C.C. 589; A.I.R. 1966 Guj. 293: 1966 Cr.L.J. 1429.

Burden of proof in criminal trial—Accused not bound to prove his defence to the hilt, like the prosecution: 1967 Cr.L.J. 1654: A.I.R. 1967 Manipur 41; 1982 M.P.W.N. 55.

In a criminal case, the burden of proof is heavy on the prosecution; it cannot take advantage of the weaknesses of the defence or of the inconsistent stand taken by the accused from time to time; the prosecution must stand on its own legs basing on the evidence that has been let in by it: A.I.R. 1984 S.C. 1622: (1985) 1 Bom.C.R. 208: 1985 Cr.L.J. 1738: (1984) 4 S.C.C. 116; 1993 Cr.L.J. 558: (1992) 1 An.W.R. 16.

Where all links in the prosecution chain are complete, the Court may seek assurance from any false plea or defence the accused might have raised; but no infirmity or lacuna in the prosecution can be filled up to convict an accused merely because of his false plea or defence; there is a vital difference between an incomplete chain of circumstances and a circumstance, which after the chain is complete, added to it to reinforce the Court's conclusion: A.I.R. 1984 S.C. 1622: (1985) 1 Bom.C.R. 208: (1984) 4 S.C.C. 116: 1984 Cr.L.J. 1738.

Criminal trial—Falsity of defence does not relieve prosecution from proving its case beyond reasonable doubt—Burden of proving guilt is always on prosecution except in certain cases: 1967 Cr.L.J. 746: A.I.R. 1967 Goa 60.

Though the evidence both for the prosecution and for the defence has, at some stage of the case, to be weighed in criminal cases, the defence has not to be weighed in golden scales, and there must be great preponderance of weight on the side of the prosecution before the accused can be found guilty: 1953 Cr.L.J. 171: A.I.R. 1953 J.&K. 41.

The mere fact that the defence testimony has proved unhelpful is not sufficient. It is for the prosecution to establish the guilt of the accused and not for the accused to establish their innocence: 55 Cr.L.J. 583: A.I.R. 1954 Mad. 433.

In a criminal trial, even where the defence theory is rejected, the burden lies always on the prosecution to prove the guilt of the accused. Falsity of the defence may be a circumstance, sometimes a strong circumstance to be taken into consideration in establishing the guilt of the accused but conviction cannot be based only on the falsity of defence. It is always for the prosecution to prove its case and this may be by adducing either positive evidence or by establishing such circumstances against the accused that the Court is driven to the conclusion that it was the accused and the accused only who could be guilty of the crime: 1964 Raj.L.W. 279. *See* also 1989 Cal.Cr.L.R. 122: (1989) 1 Cal.H.N. 352: (1988-89) 93 Cal.W.N. 1035: 1990 Cr.L.J. (N.O.C.) 78 (D.B.), cited under Note 3, *supra*.

(*b*) Injuries on accused—Explanation for.—Where prosecution successfully established that deceased was stabbed by accused and there was no evidence to show that the accused sustained injuries in the same transaction, *held*, there was no obligation on the part of the prosecution to explain the injuries sustained by the accused: 1994 Cr.L.J. 1522 (Ker.) (D.B.).

A sweeping statement that the prosecution has no duty to explain the injuries on the accused is erroneous yet in the circumstances of the case, regard must be had to the

ultimate. Where a burden is cast on the prosecution to explain the injuries on the accused person or persons, if the defence is that in course of the same transaction, as put up by the prosecution, the accused persons have received the injuries, then a duty is cast on the prosecution to explain the injuries on the accused persons provided they are glaring and manifest: (1975) 41 Cut.L.T. 1379.

Where the Court believes the testimony of prosecution witnesses as proof of the accused's guilt beyond reasonable doubt, *held*, the prosecution ceases to be under obligation to explain the injuries sustained by the accused; it is not an invariable rule that the prosecution has to explain injuries suffered by the accused in the same occurrence: A.I.R. 1988 S.C. 863; 1994 Cr.L.J. 3623 (All.).

Where the accused established a probable defence that they had sustained serious injuries in that very occurrence, *held*, it is incumbent on the prosecution to satisfactorily explain those injuries; otherwise, the accused are entitled to acquittal on benefit of doubt: 1988 B.B.C.J. (H.C.) 86 (D.B.).

In a criminal case, if the prosecution adduces reliable evidence for proving all the ingredients of the charges against the accused persons, the prosecution is entitled to succeed, unless the accused relies on any general or special exception, in which case the burden is on the accused to prove the exception. In a case where the accused is said to have attacked the complainant or members of the complainant's party, it is sufficient for the prosecution to prove that the accused had attacked the members of the complainant's party with the requisite intention. If the accused had sustained injuries, it is not necessary for the prosecution to "cogently explain how the accused sustained injuries". It is open to the defence to put questions to the prosecution witnesses in cross-examination, and use such answers given in the cross-examination in order to discredit the testimony of the prosecution witnesses. The fact that some of the prosecution witnesses have suppressed or have given a futile explanation as to the injuries on the accused would not necessarily make their answers totally unbelievable: (1961) 1 Cr.L.J. 54(2): A.I.R. 1961 Guj. 8.

(*c*) Identification parade.—(*See* also S. 9). It is the prosecution's duty to prove that the identification parade was held in fool proof manner leaving no doubt about the honesty, integrity and safety of the same: (1984) 2 Bom.C.R. 615 (D.B.).

Test identification—Accused must not be seen by witness between crime and test identification—Once evidence has been led to show this, the burden shifts on the accused to show otherwise: I.L.R. (1960) 2 All. 418: (1961) 1 Cr.L.J. 340: A.I.R. 1961 All. 153.

(*d*) General exceptions.—(*See* also Notes under S. 105, *infra*). The initial onus is upon the prosecution to prove the guilt of the accused. However, when an accused pleads general exceptions, the burden of proof will be upon him. However, it is not necessary that in order to discharge the onus, he must adduce evidence from his own side. The accused, thus, is entitled to show that he comes within the purview of the general exceptions provided in Chapter IV of the Indian Penal Code relying on the basis of the evidence itself and/or the circumstances which have been brought on record showing the conduct of the accused prior thereto or after commission of the crime: (1991-1) 39 B.L.J.R. 397 (D.B.).

It is fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in S. 299 of the Penal Code. This general burden never shifts and it always rests on the prosecution. But, under S. 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within exception lies on the accused; and the Court shall presume the absence of such circumstances. Under S. 105 of the Evidence Act, read with the definition of "shall presume" in S. 4 thereof, the Court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the Court sufficient to make it consider the existence of the said circumstances so probable that a prudent man

would act upon them. The accused has to satisfy the standard of a "prudent man". If the material placed before the Court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of "prudent man" the accused would have discharged his burden. The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions: (*1*) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea;* and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S. 84 of the Penal Code; the accused may rebut it by placing before the Court all the relevant evidence—oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including *mens rea* of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged: (1964) 7 S.C.R. 361: 1965 M.L.J. (Cr.) 773: A.I.R. 1964 S.C. 1563.

Exception to general rule—Rule—Onus—Burden of proof: A.I.R. 1958 S.C. 183: (1958) 2 M.L.J. (S.C.) 32; I.L.R. (1964) Cut. 623; 1957 Pat.L.R. 259.

The burden of proving the plea that the deceased died in the manner alleged by the accused lies on him, as is clear from the provisions of Ss. 103 and 106. The burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certainly lies upon him. It is a different matter that the quantum of evidence by which he may succeed in discharging his burden of creating a reasonable belief, that circumstances absolving him from criminal liability may have existed is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a *prima facie* case, that the question arises of considering facts of which the burden of proof may lie upon the accused: A.I.R. 1974 S.C. 778: 1974 Cr.L.J. 664: (1974) 4 S.C.C. 193.

Though the "burden of proof " is not defined yet it is an accepted principle of criminal jurisprudence that the burden of proving its case always lies on the prosecution and never shifts to the accused; the cardinal principle is that an accused is presumed to be innocent unless otherwise proved by the prosecution, he is entitled to the benefit of every reasonable doubt. But the burden of proving the circumstances bringing the case within the exceptions set out in S. 105 is upon the accused and the Court shall presume their nonexistence. But that burden, it is well settled, does not absolve the prosecution from its initial burden to prove its case beyond all reasonable doubts; thus, even if accused does not adduce evidence of exceptions under S. 105, he is nevertheless entitled to acquittal if on appraisal of evidence as a whole the Court still entertains a doubt whether or not the accused is entitled to the benefit of exceptions set down in S. 105: A.I.R. 1990 S.C. 1459: 1990 Cr.L.J. 1510: 1990 All.L.J. 415; (1987) 1 Crimes 181 (Him. Pra.).

An accused who pleads not guilty throws on the prosecution the burden of proving that the facts alleged in the indictment are true, but if he takes a special plea and the prosecution traverses it, the burden is on the accused of proving that the facts alleged in his plea are true. If the prosecution does not give sufficient proof of the alleged facts to establish a *prima facie* case, a verdict of not guilty has to be directed. [(1909) 25 T.L.R. 612, Rel. on]: I.L.R. (1972) 22 Raj. 632: 1972 Raj.L.W. 384: 1972 W.L.N. 375.

Criminal trial—Proof of exception pleaded by accused—It may be proved by showing preponderance of probability: A.I.R. 1970 All. 51: 1969 All.L.J. 659 (F.B.).

(*e*) Food adulteration cases.—(*See* also S. 106, Note 6, *infra*). Sale of adulterated article of food—Accused can always plead that it was never sold for human consumption—Onus to prove the same lies heavily on the accused: 1968 Cr.L.J. 912: A.I.R. 1968 Cal. 342.

Appreciation of evidence—Criminal trial—Material on record justifying finding in favour of accused—Court, *held*, could act

on it though accused had not taken it as a specific ground of defence—"Matar dal"—Analyst testing it only for "pulse"—Court also treating it as "foodgrain"—Absence of additional tests could result in acquittal—Fact that accused had not pleaded it in defence, *held*, immaterial: A.I.R. 1970 Cal. 120.

Notification under R. 44-A, Prevention of Food Adulteration Rules, 1955, prohibiting sale of kesari dal for human consumption—*Held*, onus was on the prosecution to prove beyond reasonable doubt that kesari dal kept in shop of accused was for sale for human consumption—Unless onus was discharged, offence was not brought home and accused must be given benefit of doubt: (1967) 33 Cut.L.T. 830.

In a prosecution for storing pea besan containing khesari grant, the burden to prove that the said pea besan was stored or sold for human consumption was squarely on the prosecution, and on their failure to establish the same, the petitioner cannot be convicted merely on his failure to assert any such fact in his defence: (1972) 38 Cut.L.T. 396: (1972) 1 Cut.W.R. 549.

Sale—Sale of curd—In order to constitute it a sale under S. 2(13), curd must be intended for sale and burden of proving that it was for domestic consumption is on accused—Whether particular article of food is intended for sale or not is question of fact: (1967) 2 An.W.R. 424.

Proviso to S. 2(*ia*)(*m*) of the Prevention of Food Adulteration Act, 1954—Burden of proof—It is for the accused to show that fall in standard is solely due to natural causes and beyond control of human agency: 1984 Cr.L.J. 690: 1984 Chand.Cr.C. 86 (H.C.) (P.&H.). *See* also (1967) 2 An.W.R. 424, cited under Note 6, *supra*.

(*f*) Cases under the Customs Act.—Proceedings under the Customs Act, 1962 being penal in nature, the burden of proving its case is always upon the Department except where S. 123 thereof is attracted; if the goods are not covered by its provisions, the adjudicating authority must proceed on the basis that if the Department has not discharged its burden to prove its case, the accused cannot be called upon to disprove the Department's case: (1990) 48 E.L.T. 210 (Bom.).

Before an accused can be called upon to prove that goods recovered from his possession are not smuggled goods, the prosecution has to establish that they were seized under the Customs Act, 1962 in the reasonable belief that they are smuggled goods ; merely because the accused admitted their possession would not shift the burden on him to disprove that the goods were smuggled goods. Thus, if on his own showing the Superintendent of Customs simply suspected but had no reason to believe that they were smuggled goods before seizing them, the accused was not liable to prove otherwise: A.I.R. 1971 Andh. Pra. 345.

Contravention of order of prohibition—Onus—Department should prove importation of goods contrary to order—Plea of *bona fide* purchase—Rejection of, not sufficient to discharge burden: (1962) 1 Cr.L.J. 269: A.I.R. 1962 Assam 39.

Goods not covered by S. 178-A, Sea Customs Act, 1878 [S. 123 of the Customs Act, 1962]—Burden to prove illicit importation before confiscation. *See* (1965) 2 Cr.L.J. 487: A.I.R. 1965 Cal. 527.

Once it is shown that the goods were seized in the manner contemplated by the first part of S. 178-A, Sea Customs Act, it would be for the person in possession to prove that the goods were not smuggled goods. If the person found in possession has not discharged the burden placed on him under S. 178-A (Sea Customs Act), the goods are liable to confiscation under S. 167(8) (Sea Customs Act): A.I.R. 1962 S.C. 1559: (1983) 13 E.L.T. 1360 ; (1964) 66 Punj. L.R. 151 ; A.I.R. 1968 Tripura 39 ; 1972 M.L.J. (Cr.) 220: (1971) 1 Mys.L.J. 564.

When goods are seized by the Customs Officer on the reasonable belief that they are smuggled goods then under S. 178-A of the Sea Customs Act, the onus of proving that they are not smuggled goods, that is, not of foreign origin on which duty is not paid, is on the person from whose possession the goods are seized. The onus is not on the prosecution to show that the goods are not of Indian origin. [A.I.R. 1962 S.C. 316, Rel. on]: 1967 Cr.L.J. 651: A.I.R. 1967 S.C. 737.

It is true that under S. 178-A of the Sea Customs Act a statutory condition has been imposed upon the accused of establishing his innocence, namely, that the gold was not smuggled ; in other words, the burden of proof on the accused is fixed. It cannot be altered nor does it shift during the course of

the enquiry. But when once the accused has placed all the available materials before the Customs Authorities and also when the Customs Authorities are possessed of all the materials as a result of the investigation, after certain stage, the burden of proof imposed on the accused shifts on to the Customs Authorities to prove that it was smuggled gold. In considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively: I.L.R. (1965) 2 Mad. 10: A.I.R. 1967 Mad. 39.

Presumption under S. 123 of the Customs Act, 1962 is not conclusive ; it merely shifts burden of establishing that goods seized were not smuggled goods on the person from whom they were seized: 1979 Cr.L.J. 1265 (Goa).

The burden of proving that the goods were smuggled goods is on the Department; it need not do so with mathematical precision to a demonstrable degree ; it has also to establish such a degree of probability that a prudent man may, on its basis, believe in the existence of those facts ; the broad effect of the basic principle underlying S. 106, Evidence Act on cases under S. 167(8) of the Sea Customs Act is that the Department would be deemed to have discharged its burden on adducing only so much of evidence, circumstantial or direct, as is sufficient to raise the presumption in regard to the existence of facts to be proved: A.I.R. 1974 S.C. 859: (1974) 2 S.C.C. 544.

There is no force in the contention that S. 123 of the Customs Act, 1962 applies only to adjudication proceedings and not to Court proceedings which are exclusively governed by the Evidence Act. [A.I.R. 1960 Punj. 664, Rel. on]: 1975 Cr.L.J. 1161: (1974) 2 Karn.L.J. 249 ; I.L.R. (1970) Guj. 942.

When evidence sufficiently established that the accused were found in possession of the seized goods which the Inspector of Customs reasonably believed to be smuggled, *held*, the burden of proving that they were not smuggled goods would be on the accused ; though under S. 123 of the Customs Act, 1962 such burden is not heavy and can be discharged by showing preponderance of probability, but when the accused had brought no such material on record, they were rightly convicted : (1991) 51 E.L.T. 43 (Bom.).

Where his trial was full and fair and the accused had not at any stage raised any objection to the search and seizure but, on the other hand, admitted before the Customs Officer not only the seizure but also that the goods seized were of foreign origin, *held*, the burden was on the accused, if he sought that trust-worthy prosecution evidence be ignored, to show that the goods seized were not of foreign origin: (1984) 16 E.L.T. 202 (Andh. Pra.).

Where gold of high fineness bore no foreign markings, it cannot be contended as a natural corollary that such high fineness belongs to foreign gold and if the person charged had personal knowledge that such fineness could be produced in India, the burden to prove the same would shift on the person under S. 106 of the Evidence Act; the question of shifting of the burden of proof would arise only after the initial burden of proof had been discharged ; such burden could not be deemed to have been discharged when the gold bore no foreign markings: I.L.R. (1979) Bom. 329.

While S. 178-A, Sea Customs Act has the result of placing the burden of proof that the gold was not smuggled on the accused, it is of no assistance to the prosecution to prove that the accused was carrying the gold knowingly to evade the prohibition which was for the time being in force with respect to the import of gold into India. Once, however, it is found, in consequence of the provisions of S. 178-A (the accused not having discharged the burden that lay on him that the gold was not smuggled) that he was carrying smuggled gold, the circumstances under which the gold was discovered, the manner in which he was carrying the gold, the considerable quantity of the gold that was being carried and the form in which gold was being carried, namely, blocks and bars in which the major portion of the gold was found and the fact that the accused was not the person who was expected to carry so much gold (286 tolas), all these circumstances establish beyond a shadow of doubt that the accused was carrying the gold knowingly and with the intention of evading the prohibition that was in force with respect to the import of gold into the country. When all these circumstances are taken together, it is not possible

to say that he might be carrying the gold innocently having purchased it from somebody: (1964) 4 S.C.R. 708: A.I.R. 1965 S.C. 476.

Where the Customs Officers seized goods on the reasonable belief that they were smuggled goods which were subsequently established to be of foreign origin, *held*, the burden of proving that they were not smuggled goods was on the accused: (1987) 30 E.L.T. 113 (Ker.) ; 1976 Cr.L.J. 165 (Ker.).

Petitioner failing to produce vouchers relating to goods alleged to be of foreign origin, *held*, burden shifts on him to prove how he got possession of such goods: 1980 Cen-Cus. 641 (Mad.).

If the goods with foreign markings are seized on the reasonable belief that they were smuggled and the accused fails to show that they are of indigenous origin, the inference that the goods are smuggled would clearly arise in favour of the prosecution ; on evidence clearly showing that the accused had the necessary knowledge of the gold being smuggled and liable to confiscation, *held*, he was rightly convicted: (1979) 4 E.L.T. 195 (Mad.).

Where at the time of the seizure of the Video Cassette Recorders, they were not notified goods, either under S. 123 or S. 11-B of the Customs Act, 1962, *held*, the onus of proving whether or not, the Video Cassette Recorders seized were smuggled into the country was squarely lay on the Customs Authorities: (1986) 1 Crimes 111: (1985) 2 Bom.C.R. 482 (D.B.).

Order by State Import Control Authorities—Prohibition to import watches without licence—Breach of—Onus is on Customs Authorities to prove the breach: (1965) 1 Cr.L.J. 547: A.I.R. 1965 Cal. 248.

Before a person could be held guilty of an offence under S. 167(81) of the Sea Customs Act, the prosecution must prove by dependable evidence that the goods were smuggled ones. The presumption under S. 178-A of the Sea Customs Act will be attracted only in cases where the goods seized fall within the specified class. Merely because a person is in possession of goods, not falling under the category specified in S. 178-A, and is unable to account satisfactorily for its acquisition, it cannot be said that an offence separately punishable under S. 167(81) of the Act is committed, once it is conceded that the identity of the goods is not established: A.I.R. 1961 Mad. 368: (1961) 1 M.L.J. 374.

"Smuggled goods" — Meaning — Mere possession not sufficient—Active part in smuggling is necessary—Onus of proof: (1962) 2 Cr.L.J. 43: A.I.R. 1962 Cal. 370.

There are two distinct matters which have to be established before a person can be held guilty of the offence set out in S. 167(81) of the Sea Customs Act: (*i*) that the goods were smuggled, *i.e.*, imported into the country either without payment of duty or in contravention of any restriction or prohibition imposed as regards the entry of those goods, and (*ii*) that the accused knowing that the goods were of that character did the acts specified in the latter part of the provision. In the absence of any valid statutory provision in that behalf the onus of establishing the two ingredients necessary to bring home the offence to an accused is on the prosecution: 1962 (Supp.) 1 S.C.R. 364: A.I.R. 1962 S.C. 496: (1983) 13 E.L.T. 1365.

In order to establish an offence in relation to smuggled gold under S. 167(81) of the Sea Customs Act, it is not necessary for the prosecution to prove by positive evidence that the intention of the accused was to defraud the Government of the duty payable on the gold or to evade the prohibition or restriction on the imports thereon for the time being in force. Once it is proved that the gold is smuggled gold, it follows that it was brought into the country without payment of duty or in violation of the prohibition or restriction in force and whosoever brought it and whosoever dealt with it thereafter knowing it to be smuggled in the manner provided in the section must be held to have the intention of evading the payment of duty or violating the prohibition or restriction: (1965) 3 S.C.R. 854: A.I.R. 1965 S.C. 481.

The Department is not required to prove its case with mathematical precision to a demonstrable degree ; in all human affairs, absolute certainty is a myth and all exactness a fake ; the law does not require the prosecution to prove the impossible ; all that is required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue: (1992) 59 E.L.T. 235 (Guj.) (D.B.).

Intention is not a matter which can be directly proved and has to be inferred on the facts and circumstances of a particular case.

Where, therefore, the prosecution is able to prove that the goods were smuggled and that the accused had them in his conscious possession for use or sale, it would as a rule follow in the absence of any other circumstance that he intended to defraud the Revenue or evade the restrictions imposed on the import of the goods which were recovered from his possession. [(1951) 1 All E.R. 203 and (1952) 1 All E.R. 715, Rel. on]: I.L.R. (1962) 12 Raj. 469: 1962 Raj.L.W. 492: (1962) 2 Cr.L.J. 584.

When the Court can infer that the goods were seized in the reasonable belief of having been smuggled, the accused is duty bound to repel the presumption by adducing evidence that the goods' origin is not at all foreign and that they are not smuggled; an accused unable to rebut the presumption or to prove that the goods were covered by a permit or licence or were purchased locally without knowledge of their foreign origin can be convicted under S. 135(*b*) of the Customs Act, 1962: 1975 Cr.L.J. 1161: (1974) 2 Karn.L.J. 249. *See* also I.L.R. (1973) Cut. 1384.

Where once on the facts of a case S. 178-A of the Sea Customs Act comes rightly into play, then all that is further necessary for the prosecution to establish is that the accused was doing any one of the things mentioned in S. 167(81) of the Sea Customs Act knowingly, that is, consciously, or otherwise than by sheer accident. It is not necessary for the prosecution still to establish in a case of this character by evidence *aliunde* that the goods which he was in possession of or was otherwise concerned with were smuggled. [(1961) 2 Cr.L.J. 406 (Raj.), Dissent. from]: I.L.R. (1962) 12 Raj. 469: 1962 Raj. L.W. 492: (1962) 2 Cr.L.J. 584.

Charge of offence under S. 135 of the Customs Act, 1962 for having concerned in carrying smuggled gold—Though burden to prove that gold is not smuggled was on accused, prosecution must prove that accused was carrying gold knowingly to evade prohibition which law imposed: 1967 Mys.L.J. (Cr.) 728: (1967) 2 Mys.L.J. 63: A.I.R. 1967 Mys. 175.

Order of confiscation under S. 167(8), Sea Customs Act, 1878—Offence under Col. 1 must be proved by Revenue Authorities: 1968 Cr.L.J. 1407: A.I.R. 1968 Cal. 524.

Imposition of penalty under S. 167(8) of the Sea Customs Act—Burden of proof of offence is on Customs Authorities: 1968 Cr.L.J. 1407: A.I.R. 1968 Cal. 524. *See* also 1992 Cr.L.J. 1190: (1992) 2 Cal.H.N. 119: (1991-92) 96 Cal.W.N. 463.

Conditions required by S. 178-A of the Sea Customs Act fulfilled—Accused must be held guilty under S. 167(81) of the Sea Customs Act unless he shows that the goods were not smuggled: (1959) 61 Punj.L.R. 937: A.I.R. 1960 Punj. 664.

But *see contra*. The first essential ingredient of the offence under S. 167(81) of the Sea Customs Act is that the person from whom the goods are seized must know that they are smuggled goods. Even in cases in which a presumption can be drawn under S. 178-A of the Sea Customs Act (S. 123 of the Customs Act, 1962) it has further to be established that the person knew that the goods were smuggled ones. For the presumption raised under that section is not that the person from whom the gold is seized under reasonable belief is a smuggler or is in any manner concerned in smuggling of that gold or that he is in possession of it knowing that it is smuggled. The second essential ingredient of the offence is that the accused must have one or both of the intents mentioned in the section, namely, (1) to defraud the Government of any duty, and (2) to evade any prohibition or restriction in force.

A person cannot be convicted for an offence under S. 167(81) merely on the recovery of the gold and his inability to prove that it was not smuggled gold. The burden lies on the prosecution to prove that the gold seized was smuggled one: I.L.R. (1960) 10 Raj. 1274: (1961) 2 Cr.L.J. 406. The prosecution must prove as to what was seized was gold: 1980 Cr.L.J. 533 (Karn.) (D.B.).

In absence of a notification under S. 123(2) of the Customs Act, 1962 applicable to the import of goods seized, no statutory presumption under S. 123 of the Customs Act, 1962 could be invoked by the prosecution ; but if the circumstances established unerringly raised the inference regarding all factual ingredients of the offence under S. 135(*b*) read with S. 135(*ii*) of the Customs Act, 1962, *held*, conviction upheld: A.I.R. 1976 S.C. 1167: (1976) 2 S.C.C. 302: (1976) 3 S.C.R. 672.

The burden is on the prosecution to establish that they were smuggled goods and the accused, knowing or having reason to

believe that the goods were of that character, was in possession or was in any way concerned in dealing with them; the falsity or otherwise of the defence is no ground to convict a person; the prosecution must prove beyond doubt that the accused fell within the purview of S. 135 of the Customs Act, 1962: (1986) 23 E.L.T. 42: (1984) 18 E.L.T. 278 (Ori.); 1970 Mad.L.W. (Cr.) 234.

Where the prosecution proved that the goods in his possession were of foreign origin and the accused had no permit to import them, *held*, the burden to account for his possession under S. 106 of the Evidence Act shifts to the accused: (1987) 29 E.L.T. 853 (Mad.).

(g) Cases under the Indian Penal Code.—Cheating—Claims for work not done—Finding that works to which the claims related were not carried out at all—In view of this finding there was no burden on the prosecution to establish that appellant had personal knowledge of the bogus nature of his claims: 1967 Cr.L.J. 656: A.I.R. 1967 S.C. 752.

Where in defence to a charge of cheating, the accused pleaded negligence and irregularity, *held*, the prosecution is bound to prove that the act was not negligent or irregular but was deliberate and intentional: 1982 Cr.L.J. 856 (Bom.).

Offence of cheating and false evidence—No fraudulent representation—Reasonable explanation given by accused—Onus. *See* A.I.R. 1957 S.C. 466. When an accused person pleads S. 197, Cr.P.Code as a bar to his trial, it is for him to show the facts which bring that section into operation: 1957 Cr.L.J. 394: A.I.R. 1957 Tripura 18. Sanction under S. 132, Cr.P.Code—Onus. *See* (1957) 1 M.L.J. 353: 1957 M.L.J. (Cr.) 206.

Proof of theft—Burden of proof—Accused removing jack-fruits, etc., from all of complainant—Plea of *bona fide* claim—Proof of dishonest intention of accused: (1965) 2 Cr.L.J. 810: A.I.R. 1965 Tripura 42.

Charge under S. 409, Penal Code—Accused proved to have received money—Onus to prove that he had accounted for it. *See* (1971) 39 Cut.L.T. 659.

Lekhpal charged for having committed an offence under S. 218, I.P.Code—Burden to establish that he acted dishonestly when he made the entries lay heavily on the prosecution: 1968 Lab.I.C. 858: 1968 Cr.L.J. 721: A.I.R. 1968 All. 207.

Where the Headmaster of a Primary School charge-sheeted for embezzlement on the report of his superior admitted having received the money which he contended he had paid to the complainant against receipt, verified by the Block Development Officer and was exonerated but was convicted on the complainant's complaint because the first line of the receipt admittedly signed by the complainant was rather squeezed and the complainant deposed that the Block Development Officer's verification was false, *held*, the defence witnesses of the receipt by, and payment to, the complainant made the defence version more probable; the burden lay very heavy on the prosecution to prove its case beyond reasonable doubt: 1983 Raj.L.W. 720.

Offence under—Accused admitting receiving of money but contending that he handed it over to *J*, who was in charge of office—Extra-judicial confession of accused of having misappropriated some amount out of money in question—High Court upheld the conviction holding that burden of proof was on him to show what he had done with money and that he failed to discharge that burden—On appeal, it was contended that he could have raised a doubt on prosecution evidence entitling him for benefit of reasonable doubt if documents called for by him had been produced and his application for their production had not been rejected—*Held*, that in view of his admission and confession there was no question of his raising any reasonable doubt—*Held* further, that on facts also the case of the accused that reasonable doubt would be created could not have been made out, even if documents in question were produced: 1967 All. Cr. R. 523: 1967 All. W.R. (H.C.) 817: A.I.R. 1967 S.C. 1590.

Where it was established that a currency note formed part of the money which was to be deposited in the treasury and that it was given to a person for being kept in his custody to be deposited in the treasury later on and the note was recovered from the outer courtyard of the accused, *held*, that it was for the accused to prove that the note belonged to him and that he retained possession over the note honestly: 1954 Cr.L.J. 1713: A.I.R. 1954 Manipur 13.

Under S. 489-B, I.P.Code the burden is on the prosecution to prove that at the time when the accused was passing the note he

knew that it was a forged one. The mere possession of it by him does not shift the burden on the accused to prove his innocent possession of the forged note. Similarly, under S. 489-C, it is to be proved that the accused intended to use the forged or counterfeit currency note as genuine or it might be used as genuine. It is for the prosecution to prove the circumstances which would irresistibly lead to the conclusion that the accused had the intention to introduce surreptitiously the note on the public. This knowledge or reason to believe that the note was forged has to be proved to fix the liability under Ss. 489-B and 489-C: 1990 Cr.L.J. 215 (Cal.) (D.B.).

In a case where special provision of S. 299 Cr.P.Code, is invoked, it is the bounden duty of the prosecution to strictly satisfy the Court that the person who is put up for trial subsequently is not only the absconding accused but is the accused who committed the crime and there is no doubt about his identity and of his being implicated in the crime to prove which evidence had been recorded earlier: 1990 Cr.L.J. 2763 (Madh. Pra.) (D.B.).

In a prosecution for an offence under S. 199, Indian Penal Code, *held*, the burden of proof is on the prosecution to show that at time of taking the affidavit, accused either knew or believed it to be false or did not believe it to be true: 1983 Cr.L.J. 1527: 54 Cut.L.T. 601.

A promise of marriage is known personally to the parties; it is her word against him. But where the defendant in his examination-in-chief merely stated that he knew her but did not promise to marry her and had no sexual intercourse with her without her consent, and said nothing on oath about a hoard of evidence, oral and documentary, indicating promise of marriage, *held*, the promise stood established: (1987-1) 7 Guj.L.H. 231 (D.B.).

Offence of kidnapping—Burden of proof: 1968 Cr.L.J. 832 (Madh. Pra.).

Criminal trial—Prosecution under Ss. 363 and 366, Penal Code—Onus: A.I.R. 1957 Him. Pra. 42: 1957 Cr.L.J. 847.

Where the accused were charged with criminal conspiracy to commit criminal misappropriation on allegation that they had dishonestly and fraudulently misappropriated or converted to their own use some bags of wheat from the bags released from the ship, it is no doubt true that the onus on the prosecution is of a negative character and also that the failure on the part of the accused to give evidence on the question as to when, where and to whom the controversial bags were delivered cannot under our law give rise to any presumption against them. The criminal Courts holding trial under the Cr.P.Code have to bear in mind the provisions of S. 342-A of the Code and to see that their mind is not influenced by such failure on the part of the accused. But that does not mean that such negative onus is not capable of being discharged by appropriate circumstantial evidence. If the circumstantial evidence is trustworthy and establishes facts and circumstances the combination of which does not admit of any safe inference other than that of the guilt of the accused then there can hardly be any escape for him and the Court can confidently record a verdict of guilt beyond reasonable doubt. The Court would, of course, be well advised in case of circumstantial evidence to be watchful and to ensure that conjectures or suspicions do not take the place of legal proof. The chain of evidence to sustain a conviction must be complete and admit of no reasonable conclusion consistent with the innocence of the accused: A.I.R. 1970 S.C. 1514: 1970 Cr.L.J. 1391.

It is well settled that in a criminal conspiracy (to destroy the film *Kissa Kursi Ka* during the Emergency) there must be direct or circumstantial evidence of the agreement between the accused showing a meeting of minds leading to the ultimate decision to commit the offence; despite difficulties in obtaining direct evidence and possible disappearance of evidence because of one year's delay in starting investigation, *held*, the prosecution has still to discharge its burden of proving the conspiracy beyond reasonable doubt: A.I.R. 1980 S.C. 1382: (1980) 2 S.C.C. 665: 1980 Cr.L.J. 965.

Extra-judicial confession—Onus: A.I.R. 1957 All. 459.

When a witness gives evidence on oath, the presumption is that he had stated truth; the burden to prove otherwise is on the person challenging its truthness: 1978 All.W.C. 804: 1978 All.Cr.R. 325.

Where the accused sought to impeach the testimony of a witness as that of an accomplice, *held*, the burden lies on the accused to

convince the Court by his own testimony or some other material on record that the witness could aptly be described as an accomplice: A.I.R. 1971 Tripura 26: 1971 Cr.L.J. 786. *See* also Notes under S. 133.

Accused, if previous convict—Burden of proof: 1957 Cr.L.J. 275 (All.).

Appeal against acquittal—Burden of proof: A.I.R. 1957 Him. Pra. 37: 1957 Cr.L.J. 631(2).

In a case where death is due to the injuries or wounds caused by a lethal weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or atleast possible for the injuries to have been caused with the weapon with which they are alleged to have been caused: I.L.R. (1954) Hyd. 130: A.I.R. 1954 Hyd. 196.

Prosecution failing to prove that accused started grappling with deceased because he declined to take him to his house for drinks and meals—Defence Counsel suggesting that it may be that deceased under influence of liquor started grappling with accused whom he had invited to his house and accused in order to save himself threw him on ground with fatal result—*Held*, charge could not be said to have been substantiated against accused beyond doubt: 1968 Cur.L.J. 241.

Motive—Murder-case resting on circumstantial evidence—Motive for murder assumes some importance: 1966 Mad.L.W. (Cr.) 82.

Where prosecution failed to discharge the burden that the offence was committed by the accused and it sought to rely on the fact that accused gave false information to witnesses regarding the cause of death, *held*, the false information given by the accused would have the effect of being simply taken in aid to lend assurance to the prosecution story and could never form basis for drawing of inference that the accused and accused alone were guilty of the offence. It is only when the evidence led by the prosecution, if believed, will sustain a conviction or atleast make out a *prima faice* case, that the question of accused discharging the burden under S. 106 arises. Therefore, there should be at least a *prima facie* case made out by the evidence let-in by the prosecution to take the false information given by the accused in-aid to lend assurance to the prosecution story: 1992 Cr.L.J. 1339 (Andh. Pra.) (D.B.).

Intention or knowledge to cause death necessary ingredient of offence under S. 307, I.P.Code—Burden of proof of intention or knowledge lies on prosecution: 1967 Cr.L.J. 1588: A.I.R. 1967 All. 580.

Criminal trial—Accused (snakecharmer) administering pills to his disciples alongwith heated liver of goat—Some disciples dying and rest becoming sick—Burden of proof: 30 Cut.L.T. 18: (1964) 2 Cr.L.J. 42: A.I.R. 1964 Ori. 173.

Fight between two rival parties over land dispute—Injuries caused to members of both parties and death of one of members—Conflicting versions of incident given by rival parties—Court should attempt to find out which version is more probable bearing in mind the basic fact that burden is always on prosecution to prove their case beyond doubt: (1964) 1 Cr.L.J. 101 (Ker.).

Where gold ornaments worn by a lady who was murdered were recovered on the basis of the accused's discovery statement but there was nothing on record to connect the accused with the murder, *held*, no presumption of his being involved in the murder could be drawn merely because the accused remained silent; it is for the prosecution to prove its case affirmatively against the accused; however, the presumption that the accused was receiver of stolen goods could be drawn under S. 114; he could be convicted under S. 411 of the Indian Penal Code if its ingredients were proved: A.I.R. 1980 S.C. 1753: 1980 Cr.L.J. 1270.

Murder and robbery forming part of same transaction—Possession of stolen property—Presumption—Burden of proof. *See* (1954) 2 M.L.J. 673: A.I.R. 1954 Mad. 1088. *See* also Notes under S. 114.

Where, there was no oral or documentary evidence even remotely suggesting the involvement of the accused in the offence except the mere presence of the accused near the scene of occurrence, *held*, the same was not sufficient to discharge the burden of the prosecution and shift the burden of proof to the accused: 1990 Cr.L.J. 100 (Ker.).

When shortly before the death of the deceased both the accused had entered the house of the deceased and it was bolted from inside and they did not open the door despite tapping several times and the door had to be broken by the neighbours and the relations and both the accused were found

hiding under the cot in the bedroom and the deceased was lying dead with injuries on his person, *held*, the accused had an obligation to explain their presence and the circumstances under which the deceased died: (1994) 2 S.C.C. 677: 1994 S.C.C. (Cr.) 601.

Criminal trial—Poisoning—Burden of proof: A.I.R. 1957 All. 1: 1958 Cr.L.J. 1.

(*h*) Others.—In view of Ss. 20 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985, it is for the person who is found in possession of any illegal drugs to prove that he holds a licence therefor or that he was in its lawful possession. If the presumption is not rebutted by such person, then the presumption will stand and there is no reason whatsoever for the prosecution to prove the unlawful and illegal possession by such person of the said substance: (1988) 1 Bom.C.R. 332: 1988 Cr.L.J. 17 (D.B.).

To get benefit of S. 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985, in respect of punishment, the burden is on the accused to prove that the small quantity of narcotic drug or psychotropic substance found in his possession was intended for his personal consumption and not for sale: (1989) 1 Bom.C.R. 574 (D.B.).

In a prosecution under the Drugs and Cosmetics Act, 1940, the burden of proving that the Drugs Inspector changed the sample is on the accused: 1976 All.W.C. 743. *See* also 1984 Mad.L.W. (Cr.) 271, cited under Note 81, *infra*.

Offence under S. 14, Drugs and Magic Remedies (Objectionable Advertisements) Act, 1964—Burden of proof: (1964) 5 S.C.R. 582: (1964) 1 Cr.L.J. 560: A.I.R. 1964 S.C. 784.

Statements before committing Court alleged to be made under Police pressure—Onus is on accused to prove: A.I.R. 1969 Ori. 289.

The prime burden of proof rests on the prosecution to establish the basic facts and ingredients for bringing home to the accused the offence under S. 3 or S. 4 of the Dowry Prohibition Act, 1961 and the prosecution will have to establish its case in this connection beyond reasonable doubt. Once that happens, then only the burden will shift on the accused under S. 8-A of the Act, to show that he has not given or taken or abetted any giving or taking of any property or valuable security in connection with the marriage of parties or that he has not demanded directly or indirectly from the parents or the relatives of the bride or bridegroom, as the case may be, any dowry, meaning thereby such demand if any is not in connection with the marriage of the said parties. The said burden of proof on the accused as contemplated in S. 8-A of the Act can be discharged on preponderance of probabilities: (1993) 2 Hindu L.R. 672 (Karn.) (F.B.).

Where an unverified and unstamped measure at the time of inspection was found along with the other measures in the accused's shop at the time of inspection and the accused failed to prove that said measure was not in use, *held*, the accused was guilty under S. 25 of the Tamil Nadu Weights and Measures (Enforcement) Act, 1958: 1989 Cr.L.J. 1161 (Mad.).

Onus in proceeding under S. 62(1)(*b*) Stamp Act is on the prosecution to prove all the requisites of the offence under the section. *See* Stamp Act (1899), S. 62 (1)(*b*): 1970 Cr.L.J. 276 (Andh. Pra.).

Confiscation of contraband goods—Onus of proof—Law applicable. *See* A.I.R. 1956 Cal. 621.

Transfer of a case—Onus of showing that trial should not take place at the place enjoined by law, is on the party seeking transfer: 1967 Cr.L.J. 675: A.I.R. 1967 All. 246.

Delhi Municipal Corporation Act, S. 471—Offence under—It is on prosecution to prove every ingredient of offence—If Corporation does not take action within stipulated period, accused stands exonerated of his liability for punishment: (1966) 68 Punj.L.R. 349 (Del.).

Prosecution for occupation of Municipal land without permission—Accused stating that occupation is with permission—Burden of proving such occupation lies on him: 1964 All.W.R. (H.C.) 309: (1965) 1 Cr.L.J. 412: A.I.R. 1965 All. 160.

Proof of entry without passport is necessary—Burden of proof is on prosecution—Question whether accused persons are foreigners or Indian citizen not relevant: (1964) 1 Cr.L.J. 72: A.I.R. 1964 Tripura 3.

Onus to show that possession was lawful is on accused—Mode of discharge of onus: 28 Cut.L.T. 17.

Protection under S. 56—Burden of establishing *bona fides* is on person claiming

protection—Wilful and deliberate disobedience to statutory provisions of Act—Protection cannot be claimed: 14 Law Rep. 243 (Mys.).

Prosecution for contravention of regulation made under R. 22(1)—Onus lies on prosecution to prove the regulation: 1966 All.Cr.R. 321.

Bye-laws framed under Ss. 298 (2)(*h*) and (*m*) and 299 (1), Bye-law No. 5—Prosecution under, on the ground that accused was running power-driven lathe without licence—Before accused could be punished for having failed to pay licence-fee prescribed by the bye-law by Municipal Board, it is bounden duty of prosecutor to prove that the bye-law is legally enforceable and valid: 1966 All.W.R. (H.C.) 605.

Complaint filed by Ruler of former State through agent—Application by Ruler to examine himself as his own witness on Commission—Claim of right as Ruler to be exempted from personal attendance—Burden of proving it is on Ruler—Such claim not justified by S. 503 or S. 197-A, Cr.P.Code or by the Constitution—Statement in White Paper on States not a statutory provision—Discretion rests with Magistrate to issue Commission—Magistrate's order disallowing application upheld: (1963) 1 Cr.L.J. 600: A.I.R. 1963 Madh. Pra. 162.

Habitual offender or dangerous character—Proof: 1969 All.W.R. (H.C.) 729.

Consumption of liquor—Burden of proof—Practicable method. *See* (1955) 1 M.L.J. 473.

Where persons were detained under the T.N. Prevention of Dangerous Activities of Boot-leggers, Drug-offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1982 on the basis of an occurrence which took place on 25-11-1991 at 3 P.M. but they alleged that they had in fact been arrested much earlier on that day and telegrams about their arrest had been sent to various authorities, and they impeached their detention solely on the ground that the detaining authority did not consider the telegrams, *held*, a telegram by itself is no authentic document; it is like an unsigned/anonymous communication; unless it is confirmed by a subsequent signed application, representation or affidavit, its contents have no authenticity and are irrelevant for assessing the value of other authentic documents on the record; the detaining authority could not take the telegrams into consideration in the absence of any subsequent communication confirming the same: A.I.R. 1993 S.C. 2633: 1993 Cr.L.J. 3677.

15. Abandonment and waiver.—(*See* also Notes under S. 115, *infra*). Abandonment—Burden of proof: A.I.R. 1959 Andh. Pra. 551. Abandonment—Onus: A.I.R. 1960 Punj. 494.

Waiver and estoppel—Suit for possession and *mesne profits*—Consent decree making *mesne profits* payable in instalments and in default entitling decree-holder to execute decree for possession—Acceptance of money after default cannot by itself amount to waiver of right to possession—Plea of waiver—Onus of proof: A.I.R. 1963 Cal. 473.

16. Accident.—(*See* also Notes 36 and 57 and S. 106, Note 8, *infra*). Rash and negligent driving resulting in accident—Cause of accident—Proof—Burden of: A.I.R. 1968 Madh. Pra. 47.

Person driving a motor vehicle—Causing accident resulting in death of a person—Onus of proof that accused drove rashly and negligently is on the prosecution: 1968 Cr.L.J. 1338: A.I.R. 1968 Andh. Pra. 290.

From the decided cases two lines of approach in regard to the application and effect of the maxim *res ipsa loquitur* are discernible. According to the first, where the maxim applies, it operates as an exception to the general rule that the burden of proof of the alleged negligence is, in the first instance, on the plaintiff. In this view, if the nature of an accident is such that the mere happening of it is evidence of negligence, such as, where a motor vehicle without apparent cause leaves the highway or overturns or in fair visibility runs into an obstacle, or brushes the branches of an overhanging tree, resulting in injury, or where there is a duty on the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course ensue, the burden shifts or is in the first instance, on the defendant to disprove his liability. According to the other line of approach *res ipsa loquitur* is not a special rule of substantive law, that functionally, it is only an aid in the evaluation of evidence, "an application of general method of inferring

one or more facts in issue from circumstances proved in evidence." In this view, the maxim *res ipsa loquitur* does not require the raising of any presumption of law which must shift the onus on the defendant. It only, when applied appropriately, allows the drawing of a permissive inference of fact, as distinguished from a mandatory presumption properly so-called, having regard to the totality of the circumstances and probabilities of the case. *Res ipsa* is only a mean of estimating logical probability from the circumstances of the accident. The first line of approach which tends to give the maxim a larger effect than that of a merely permissive inference, by laying down that the application of the maxim shifts or casts, even in the first instance, the burden on the defendant who in order to exculpate himself must rebut the presumption of negligence against him, cannot as such be invoked in the trial of criminal cases where the accused stands charged for causing injury or death by negligent or rash act. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment: A.I.R. 1979 S.C. 1848: (1979) 2 Karn.L.J. (S.N.) 73.

As the true cause of the accident is not known to the plaintiff but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur, i.e.*, the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence: (1985) 5 Guj.L.H. 963: (1985) 26 Guj.L.R. 1242.

Maxim *res ipsa loquitur*—Applicability to an accident—Depends upon facts of each case—Question is one relating to onus of proof—Onus is on defendant to prove want of negligence: A.I.R. 1965 Cal. 252.

In a case to which doctrine of *res ipsa loquitur* is attracted, the initial onus is on the defendant-driver to prove that he was not negligent. If he fails to discharge that onus, then the issue of negligence has to be concluded against him: A.I.R. 1978 P.&H. 177: (1977) 79 Punj.L.R. 628. *See* however 1982 All.W.C. 34: 1982 All.L.J. 43.

Normally, the burden of proof that the vehicle was being driven rashly and negligently at the time of accident is on the claimant. However, the circumstances of a particular case may speak for themselves and show negligence on the part of the driver of the vehicle and in such a case, it will be the duty of the driver and owner of the vehicle to disprove negligence: A.I.R. 1972 Del. 189. Thus, where the evidence is that the vehicle did not go in the usual manner and went off the road and dashed a tree, the doctrine *"res ipsa loquitur"* (*i.e.*, thing speaks for itself) is attracted and the burden shifts on the other party: A.I.R. 1994 Gau. 59.

Onus—Distinction between civil and criminal negligence: A.I.R. 1970 Punj. 137: (1969) 71 Punj.L.R. 452.

Death due to rash driving—Suit for damages—Burden of proving negligence: 1961 M.P.L.J. 526: A.I.R. 1962 Madh. Pra. 23.

In a motor accident claim, *held*, the burden lies on the claimant to prove the identity of the vehicle involved in the accident and if such burden is not discharged by the claimant by adduction of positive evidence, the opposite party need not prove that the vehicle was not involved in the accident: A.I.R. 1994 N.O.C. 255 (Del.). Claimants have to prove as to what was the income of the deceased and what pecuniary loss they have suffered due to his death and it is thereafter that the opposite party has to adduce evidence to show what pecuniary advantages the claimants received by reason of the death: A.I.R. 1969 Del. 183 (D.B.).

Motor Vehicles Act—Negligence of motor driver—Want of reasonable care and speed in driving ought to be established—Onus lies on claimant to prove that there was negligence: 1967 Cr.L.J. 1023: A.I.R. 1967 Mys. 11.

Where the defence plea was that the motor accident was occasioned by a mechanical defect, *held*, the burden lay on the owner of the vehicle to prove that he had taken all necessary precautions, that the defect was latent and not discoverable by use of reasonable care: A.I.R. 1990 Him. Pra. 53.

Where in a motor accident claim case, a plea of inevitable accident due to a latent manufacturing defect in tyre is taken, *held*, when the said tyre was used for more than

five months after it was installed and the truck had run for more than 152 days, what was required to be proved was that there was direct nexus between the accident and the latent or patent mechanical or manufacturing defect and the plea of inevitable accident was required to be established by the person who propounds it: (1991-1) 11 Guj.L.H. 412.

If a person claims that someone other than himself was driving the truck at the time of the accident, the onus would shift to him to prove it when the owner of the truck has made a reliable statement that the said person was the driver of the truck at the time of the occurrence: 1979 All.Cr.R. 114: 1979 Cr.L.J. 517 (D.B.).

In a motor accident claim case, burden lies on the insurance company to establish breach of the policy conditions; it is for the company to prove that the vehicle was being driven by a driver holding no valid licence: A.I.R. 1979 Karn. 114 (D.B.).

In an appeal against the order of the Motor Accident Claims Tribunal awarding interim compensation under S. 140 of the Motor Vehicles Act, 1988, *held*, the burden is on the appellant insurer to satisfy the appellate Court that the injuries suffered by the claimant *prima facie* do not fall within the definition of permanent disablement as contemplated under S. 142 of the said Act: 1995 D.N.J. 497 (Raj.).

Where a pick-up van belonging to a firm met with an accident and the insurance company pleaded that as the driver did not have any valid driving licence it was not liable under the terms of insurance contract, *held*, the burden to prove that there was breach of contract of insurance was on the insurance company: A.I.R. 1985 S.C. 1281: (1985) 2 S.C.C. 574. But where the owner of the vehicle had suppressed the name of the person who was driving the vehicle at the time of accident, *held*, an adverse inference could be drawn that the vehicle was driven by an unlicensed person and the burden of the insurance company stood discharged: (1978) 1 An.W.R. 277 (D.B.).

Where in a motor accident claim case, the driver of the vehicle had been produced as its witness by the insurance company itself and he categorically stated that he had a driving licence when accident occurred but could not produce it as he had destroyed it after its expiry and no evidence was produced to show that his explanation was wrong, *held*, there was no other alternative but to accept his statement that he had a licence at the relevant time, and the insurance company could not contend otherwise: (1991-2) 11 Guj.L.H. 322 (S.C.); (1978) 2 M.P.W.N. 39. *See* also Note 57, *infra*.

Where a truck collided with the goods train as the gate on the level railway crossing was not closed and no issue in regard to the claimant's contributory negligence was raised in the suit for damages and the claimant's Counsel was, he alleged, taken by surprise, *held*, no specific issue of contributory negligence need to have been raised; the claimant's contributory negligence is capable of being raised under the general issue of negligence; the two issues are inseparable, and in most cases, inextricably "bound up together". Since the burden of proving contributory negligence lies on the defendant, it need not, however, discharge the same by adducing evidence; contributory negligence can be deduced from the plaintiff's evidence or primary facts on a balance of probabilities: A.I.R. 1980 Del. 92: (1980) 82 Punj.L.R. (Del.) 37.

Where, under a contract, a vehicle is hired out with its driver to another person, and an accident occurs by reason of the negligent driving, to make the hirer liable, the plaintiff has to establish that the hirer had a right not only to give direction as to what work the driver of the vehicle had to perform, but also had the right to control how he should drive the vehicle: A.I.R. 1970 Mys. 13.

Where the widow of the deceased claimed compensation from the Railway Authorities on the ground that her husband was travelling on the ill-fated train which met with an accident but the Railway Authorities contended that the deceased was not a *bona fide* passenger and that the name of the deceased was not borne out in the official list of the dead persons, *held*, it was for the wife of the deceased to prove beyond doubt that her husband was actually travelling by the ill-fated train and he died as a result of the accident and that he was a *bona fide* passenger. [A.I.R. 1984 All. 277 (F.B.), Rel. on]: A.I.R. 1985 All. 52: 1985 All.L.J. 66 (D.B.). *See* also Note 36, *infra*.

17. Accounts.—Suit for accounts—Accounts genuine—Entries made in regular course of business showing debt due to third party—Defendant claiming credit for discharging the debt—Burden to prove that credit was not fictitious does not lie on defendant: A.I.R. 1964 Mad. 205: (1964) 1 M.L.J. 103; A.I.R. 1955 N.U.C. 3160 (Mad.).

Money suit on basis of account books containing entries countersigned by the defendant—Presumption—Burden of proof. *See* A.I.R. 1963 Madh. Pra. 323: 1963 M.P.L.J. 325, cited under Note 7, *supra*.

There is no presumption that in a suit for accounts the accounts produced by the legal representative, as being that of the deceased accounting party, are either genuine or correct. But since the original accounting party is not available, they must be treated as *'prima facie'* the accounts of the deceased, and it would be for the plaintiff to prove that they are not genuine or correct: A.I.R. 1953 Cal. 244.

Account books—Manager of joint Hindu family is accountable for cash—Manager producing account books—Person challenging accuracy has to surcharge and falsify them and lead *prima facie* evidence to throw burden upon manager to prove accuracy of these books: A.I.R. 1953 Nag. 70: I.L.R. (1954) Nag. 30; A.I.R. 1955 Mad. 394.

Where in a suit for money lent, the plaintiff admitted that he kept a day book but the same was not produced, *held*, that the plaintiff on whom lay the onus of proof should produce the best evidence available and in case such evidence was not produced he must suffer the consequences: 41 P.L.R. J.&K. 21.

Suit for recovery of amount due on the basis of adjustment of accounts signed by defendant—Defendant denying correctness of amount found due—Defendant who is in possession of account books kept by him and from which the balance could be ascertained should produce them before Court—He cannot be heard to say, relying upon the abstract doctrine of onus of proof, that it was no part of his duty to produce them unless he was called upon to do so: 1953 S.C.R. 758: A.I.R. 1953 S.C. 225; A.I.R. 1921 Lah. 166.

Person liable to account not alive—Suit against representative—Onus: A.I.R. 1957 Mad. 100.

18. Admission.—True, evidentiary admissions are not conclusive proof of the facts admitted or may be explained or shown to be wrong but they do raise an estoppel and shift the burden of proof on to their maker or his representative-in-interest; they are, if not explained away or shown to be wrong are an efficacious proof of the facts admitted: A.I.R. 1979 S.C. 861.

Admissions made by the plaintiff—Burden is on him to show that they are erroneous: (1962) 64 Bom.L.R. 683: 1963 Mah.L.J. 60: I.L.R. (1963) Bom. 158: A.I.R. 1963 Bom. 110; A.I.R. 1957 All. 1 (F.B.); A.I.R. 1946 Lah. 450 (D.B.); A.I.R. 1940 Oudh 35 (D.B.); A.I.R. 1935 Cal. 368 (D.B.); A.I.R. 1934 Lah. 662 (D.B.).

Where the defendant though admitted receipt of goods, his plea was that some of them were not proper, *held*, burden was on him to so prove: (1987) 2 Raj.L.R. 944.

Onus of proof on a party ceases when opposite party admits: A.I.R. 1932 All. 199 (D.B.). *See* A.I.R. 1971 Assam 168, cited under Note 2, *supra*.

Admission of gift. *See* A.I.R. 1922 Oudh 178 (D.B.), cited under Note 49, *infra*.

Admission regarding passing of consideration. *See* A.I.R. 1927 Lah. 823, cited under Note 31, *infra*.

When in a sale deed there is an admission of a party admitting the receipt of consideration, *held*, it is for him to prove by cogent evidence that the statement contained in the document was false: A.I.R. 1971 All. 151.

Admission of mortgage—Onus is on mortgagee to show that mortgage extinguished by subsequent sale. *See* A.I.R. 1930 P.C. 91, cited under Note 76, *infra*.

A mere admission of a party having thumb-marked on a blank paper at the asking of his creditor on obtaining a loan since repaid and the plaintiff might have obtained the same to turn it to be a hand-note, *held*, it does not amount to be an admission of the hand-note itself; the burden lies on the plaintiff to prove it: A.I.R. 1976 Pat. 92.

19. Adoption.—Fraud or no fraud, mere recital in a document cannot establish adoption in law. It has to be established as a fact whether adoption has been made or not. The person who asserts adoption has got to prove the same, whether he figures as plaintiff or as defendant to an action: A.I.R. 1957 Pat. 131. *See* also A.I.R. 1957 Raj. 261.

The burden of establishing that there was a valid adoption which deflected the ordinary course of succession undoubtedly is on the party pleading adoption: A.I.R. 1972 S.C. 2446; A.I.R. 1982 Ori. 114: 1982 Hindu L.R. 665: (1982) 53 Cut.L.T. 335 (D.B.); A.I.R. 1978 Ori. 48: (1977) 2 Cut.W.R. 358: 45 Cut.L.T. 111; A.I.R. 1973 J.&K. 89: 1973 Kash.L.J. 91 (F.B.); A.I.R. 1971 Ori. 299: (1971) 37 Cut.L.T. 297; A.I.R. 1970 Raj. 190.

It is well settled that the party seeking to displace natural succession to property has

to establish the factum as well as the validity of adoption; such proof should be free from all suspicion of fraud leaving no doubt about its truth; physical act of giving and taking is an essential requisite and imperative in all adoptions whatever be the caste; a mere expression of consent or execution of the adoption deed is not enough. However, adoption is to be proved in the same way as any other fact: A.I.R. 1983 S.C. 114: 1983 Hindu L.R. 475: (1983) 1 S.C.C. 35: 1983 U.J. (S.C.) 25: (1983) 1 S.C.R. 851; A.I.R. 1995 Ori. 32; A.I.R. 1964 S.C. 136; A.I.R. 1949 P.C. 207; A.I.R. 1937 P.C. 242.

Since adoption displaces the normal order of successions, Courts must insist upon strict and even severe standards of proof, and the evidence by which the adoption is sought to be proved must be beyond suspicion and of unimpeachable character. [A.I.R. 1930 P.C. 79; A.I.R. 1931 P.C. 84; A.I.R. 1949 P.C. 18, Foll.]: A.I.R. 1976 Bom. 264: 1977 Mah.L.J. 68 (D.B.).

As adoption results in changing the course of succession, very grave and serious onus rests upon such person who seeks to displace the natural successor by alleging adoption: A.I.R. 1995 Ori. 32.

A person, who sets up an adoption, must prove by clear evidence the factum of the adoption, particularly when the adoption was a recent event. Deeper scrutiny of evidence is called for in a case where the adoption set up is that of an illegitimate son which, to say the least, is got ordinarily done: (1957) 2 An.W.R. 308: A.I.R. 1958 Andh. Pra. 611.

Burden of proving fact of adoption lies on plaintiff who claims to be adopted: 1963 M.P.L.J. 46.

The onus of proof, especially in the absence of contemporaneous deed of adoption rests heavily on the party asserting adoption; if the giving and taking ceremony is not satisfactorily established and there are rival and competing deeds of adoption, *held*, the requisite heavy burden is not discharged and adoption is not proved: A.I.R. 1977 N.O.C. 344: I.L.R. (1977) Cut. 608 (D.B.).

Ordinarily, it is for the person who had been adopted to prove that he had been validly adopted satisfying all the statutory requirements. But where there is a deed of adoption recording the giving and taking of the child with all the ceremonies and that deed had been proved to have been executed and registered in accordance with law, the Court shall presume under S. 16 of the Hindu Adoptions and Maintenance Act, 1956 that the adoption has been made in compliance with the provisions, unless and until it is disproved. It would be then for the party challenging the adoption to prove that the adoption had either not taken place in fact or though it did take place, it was not in compliance with the provisions of the said Act and was invalid: 1982 Hindu L.R. 248: (1982) 1 Karn.L.J. 210 (D.B.); A.I.R. 1979 Ori. 205 (D.B.).

Once the execution of the adoption deed was duly proved in accordance with law, and the law does not require the production of more than one attesting witness to prove a deed, the burden to disprove that it was executed by him shifted on to the defendant who denied its due execution. It was for him to establish by expert evidence, if he could, that the adoption deed did not bear his thumb-impression and signature: 1978 All.W.C. 52.

Even though there are no special rules of evidence to establish an adoption, the burden of proving an adoption is a very grave and serious one, as an adoption displaces the natural succession. It is true that if the adoption is questioned after the lapse of a long period, allowance will have to be made for the absence and disappearance of direct evidence of witnesses who had attended and participated in the function and too much importance ought not to be attached to discrepancies in the evidence which would be inevitable if witnesses speak about events and incidents which took place, decades back. A contemporaneous deed of adoption coming into existence at the same time as the adoption took place, would no doubt, be strong cogent evidence. Again transactions and dealings and documents in which reference is made to the adoption in question wherein third parties or relatives referred to the status of the person as an adopted son and persons who have knowledge of the family history of the party concerned have referred to that status would also be useful evidence. If there is no contemporaneous deed of adoption and if there is no satisfactory proof of the giving and taking and if the inference of adoption is to be drawn from the recitals in the documents and the assertion of rights in documents dealing with the estate as the adopted son, etc., the documentary evidence must manifest one consistent pattern of conduct and if there were rival

competing sets of documents, it cannot be said that the grave, and serious burden had been discharged: (1970) 1 M.L.J. 105: I.L.R. (1969) 1 Mad. 459: A.I.R. 1969 Mad. 329.

Adoption—Registered document—Good faith—Burden of proof: A.I.R. 1967 Ori. 129.

The evidence of adoption after lapse of long years may not be available which may make it difficult to find an eye-witness who had actually seen the actual giving and taking in adoption; if in such cases the party propounding adoption adduces some evidence of the factum of adoption, *held*, it may be accepted as sufficient to shift the burden on the opposite party to prove that there was no adoption; a presumption of validity of adoption may be drawn from the status and recognition of the adopted son by members of the adoptive family. [A.I.R. 1955 Raj. 65; A.I.R. 1936 P.C. 304; A.I.R. 1925 P.C. 201; A.I.R. 1923 Cal. 18; (1870) 14 Moo. Ind. App. 67 (P.C.), Foll.]: A.I.R. 1976 Raj. 40: 1975 Raj.L.W. 14: 1975 W.L.N. 931.

Custom—Plaintiff setting up custom of adoption derogatory to Hindu law—Burden of proof is on him to prove it—Place of custom must be specific, *i.e.*, whether family custom or local custom: A.I.R. 1964 Manipur 14.

Where the defendants claimed adoption of a remarried widow's son from her deceased husband by her second husband based on a special custom, *held*, the burden lay on them to plead and prove it; their contention that they could not adduce evidence for want of an issue has no merit precisely because the special custom was not pleaded by them and no issue could be framed on the point: A.I.R. 1981 Pat. 204: 1981 B.L.J. 273: 1981 B.L.J.R. 501 (D.B.).

Where it is proved by evidence that amongst the khateeks of a certain area married males having children were adopted over the past 20 to 30 years, *held*, an ancient, certain and reasonable custom of such adoptions is proved; it was for the other party to rebut the custom: A.I.R. 1981 N.O.C. 187: 1981 Raj.L.W. 61 (D.B.); A.I.R. 1948 P.C. 60.

Adoption—Onus—Party pleading special custom—Burden of proof: A.I.R. 1957 J.&K. 53.

Vaishnava Agarwals in Berar—Power of widow to adopt without proof of husband's authority—Reliance on custom in Punjab—Burden of proof. *See* A.I.R. 1957 Nag. 79. *See* also Note 35, *infra*.

Hindu law—Burden of proof: A.I.R. 1957 Raj. 261.

Burden of proof—Long lapse between time of adoption and date of suit: (1963) 2 An.W.R. 169: A.I.R. 1964 Andh. Pra. 109.

The evidence in support of adoption must be sufficient to satisfy the very grave and serious onus that rests upon any person who seeks to displace the natural succession by alleging adoption. When there is a long lapse of years between the adoption and its being questioned, every allowance for the absence of such evidence to prove such fact must be favourably entertained, the reason being that after very long term of years it is difficult to procure evidence. Where there is a long variety of transactions upon the footing that the adoption was a valid act, the burden rests very heavily upon the party who challenges its validity: I.L.R. (1962) Cut. 422: A.I.R. 1963 Ori. 45.

There is a very heavy and serious onus resting on a person who relies upon an adoption. This burden has to be discharged with even greater strictness where an unusual adoption such as an adoption of a girl is set up: 1961 Jab.L.J. 857: 1961 M.P.L.J. 208: A.I.R. 1961 Madh. Pra. 173.

Adoption—Oral evidence—Reliability of witnesses has to be tested only by surrounding circumstances: A.I.R. 1968 Mys. 309: 13 Law Rep. 681.

Allegation of fact and onus of proof—Plaintiff alleging adoption of defendant—Onus lies on him to prove it—Admission by defendant—Effect of—Shifting of onus: (1968) 34 Cut.L.T. 890.

Ancient adoption—Proof—Onus: A.I.R. 1970 S.C. 1286. *See* also(1968) 34 Cut.L.T. 778; (1968) 70 Punj.L.R. 535.

A person who claims title on the basis of adoption must prove the adoption and it has to be established that the essential ceremony of giving and taking did take place. That burden, however, shifts to the person who challenges the adoption to disprove the adoption when on account of long lapse of years, direct evidence of giving and taking has disappeared: A.I.R. 1985 Ori. 171 (D.B.).

Burden of proof—Old adoption—Shifting of burden of proof. *See* A.I.R. 1955 Raj. 65: I.L.R. (1954) Raj. 822.

While the normal rule is that the party seeking to deflect the natural line of

succession to property must prove the adoption yet where an ancient adoption had been acted upon over 36 years, *held*, the initial burden would shift on to the party who wants to disprove the adoption: A.I.R. 1976 Ori. 43.

Presumption and onus—Adoption recognised by all members of family for over fifty years—Strong presumption in favour of its validity arises—Heavy burden lies on reversioner challenging it to prove his allegation that it is invalid on the ground of the adoptive mother lacking competence to adopt: A.I.R. 1969 S.C. 1359.

Where an alleged adoption was questioned after an interval of more than fifty-five years, the onus lies on the plaintiff to disprove adoption and although the defendant was bound to prove his title as adopted son, every allowance for an absence of evidence to prove such fact must be favourably entertained: I.L.R. 55 Mad. 40: A.I.R. 1932 Mad. 198: 62 M.L.J. 116.

When a person has for nearly half a century enjoyed the status of an adopted son and it is not possible to get witnesses who were actually present at the time and could depose to the performance of the ceremony, it must be presumed that all the necessary ceremonies were duly and regularly performed: 1960 Jab.L.J. 122: 1960 M.P.C. 45: 1960 M.P.L.J. 424.

Normally, in case of an adoption where the adopter has admitted in the deed that he has adopted the plaintiff, presumption would enure in favour of the plaintiff and the onus to prove that there was no valid adoption would shift to the other party. Where, however, the deed of adoption containing the admission has been alleged to be fraudulent and the plaintiff has by his own conduct by filing a suit after the death of adopter made it impossible to have any explanation for the admission by the adopter such admission cannot be treated as conclusive. The question of burden becomes immaterial in appellate Court where the whole evidence has been led before the trial Court. The appellate Court would decide the validity of adoption on the materials placed before it: 13 Law Rep. 681: A.I.R. 1968 Mys. 309.

Adoption by male Hindu—Soundness of mind—Nature of evidence—Burden of proof—*See* 1979 All.L.J. 1333.

Under S. 7 of the Hindu Adoptions and Maintenance Act, 1956, it is a major Hindu of sound mind who is competent to adopt; if an adoption is challenged on the ground of the adoptive father being of unsound mind, the heavy onus of proving it lies on the objector; the mental capacity for the purpose, however, does not need a high degree of intelligence; it is enough if the adoptive comprehends what he was doing; there is a strong presumption of sanity unless he is shown to be a lunatic. Thus, where the adoptive father was found to be dumb and hard of hearing but was able to express by signs and physical gestures that he had filed the written statement and had adopted the child, even if his expressions were not clear, *held*, he was *prima facie* not an idiot: 1981 Hindu L.R. 781 (All.).

20. Adultery.—In a petition for divorce based on adultery it is not necessary and it is indeed rarely possible to prove the issue by any direct evidence for in very few cases such proof can be obtainable; the Court may be satisfied of the fact of adultery by purely circumstantial evidence: A.I.R. 1974 Madh. Pra. 88: 1974 M.P.L.J. 188 (S.B.); A.I.R. 1979 Madh. Pra. 70 (F.B.); A.I.R. 1982 Karn. 295 (D.B.); A.I.R. 1980 Cal. 374 (D.B.), holding A.I.R. 1970 Cal. 38 and A.I.R. 1974 Cal. 61 no longer good law in view of A.I.R. 1975 S.C. 1534.

It is extremely difficult to prove actual fact of adultery; seclusion and secrecy are its most vital aspects; what is to be seen is the cumulative effect of the evidence found satisfactory to the Court's conscience; as laid down by English Courts and the Supreme Court of India, proof cannot in such cases be on mere preponderance of evidence; it has to be established beyond reasonable doubt. Between "may be true" and "must be true" is a gap which must be bridged by evidence to decree divorce on the ground of adultery: A.I.R. 1975 Cal. 243: (1974-75) 79 Cal.W.N. 157.

In a proceeding for divorce under the Hindu Marriage Act, 1955 on the ground of adultery, the burden is on the petitioner to prove the charge: 1982 Hindu L.R. 304 (Raj.). No party can be asked to prove a negative fact that he or she is not living in adultery: 1981 Hindu L.R. 344 (P.&H.).

Divorce—Adultery—Burden of proof: A.I.R. 1970 Cal. 38: (1969-70) 74 Cal.W.N. 168 (D.B.).

Allegations of adultery—Burden of proof—Nature and standard of evidence required—Mere possibility of misconduct not sufficient: I.L.R. (1960) 1 Punj. 579: A.I.R. 1961 Punj. 181.

Principles regarding proof of adultery are: (*1*) direct proof is very rare; (2) adultery can be established by circumstantial evidence; and (*3*) circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion of adultery: A.I.R. 1979 Raj. 156: 1980 Hindu L.R. 141 (S.B.).

The standard of proof for matrimonial offences, like adultery in divorce cases, is not as strict as in a criminal case where it has to be beyond reasonable doubt. [A.I.R. 1975 Cal. 243, Dissent. from; A.I.R. 1974 Madh. Pra. 88; A.I.R. 1981 Madh. Pra. 112 (S.B.) and (1966) 1 All E.R. 524, Rel. on]: A.I.R. 1982 Pat. 213: 1982 B.L.J.R. 372: 1982 B.L.J. 416: 1982 Pat.L.J.R. 314: 1982 B.B.C.J. (H.C.) 486: (1982) 2 D.M.C. 128 (S.B.). But at the same time any vague allegation of adultery cannot be accepted. The party making allegation has to lead either direct evidence or to prove the circumstances, on the basis of which the Court can come to a conclusion that such charge is established: (1991-1) 39 B.L.J.R. 356 (F.B.).

If the factum of adultery is sought to be proved by circumstantial evidence, the evidence should be such as would be incompatible with the innocence of the party charged. In any case it should lead a just and reasonable man to the conclusion that adultery has been committed. The fact that the respondent to a petition for dissolution of marriage introduced a woman to certain other person as his wife at a party where a number of people had assembled does not constitute an admission by the respondent of the fact that he had committed adultery with her: (1952) 54 Punj.L.R. 56: A.I.R. 1952 Punj. 39 (F.B.).

It is established that adultery is not likely to be proved by direct evidence; it is proved mainly by circumstantial evidence and on the Court being satisfied about want of collusion and availability of opportunity to have guilty intercourse; it is, however, necessary to remember that the petitioner's evidence must be such as would lead the guarded discretion of a reasonable and just man to reach the conclusion of adultery: A.I.R. 1982 Karn. 102 (S.B.).

It is a fundamental rule that it is not necessary to prove the direct fact of the adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion, and unless this were so, *held*, no protection whatever could be given to marital rights. But the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion: I.L.R. 55 All. 597: 1933 All.L.J. 1108: A.I.R. 1933 All. 427; 8 O.W.N. 168: A.I.R. 1931 Oudh 259. *See* also A.I.R. 1935 Nag. 49 (S.B.); A.I.R. 1955 Madh. Bh. 103 (F.B.); A.I.R. 1953 Mad. 792; A.I.R. 1954 Pat. 302; A.I.R. 1956 Assam 66; 62 I.C. 782.

The onus to prove adultery is upon the person alleging it and impossibility of procuring evidence is no excuse: A.I.R. 1992 Madh. Pra. 260: 1992 M.P.L.J. 466. As circumstantial and presumptive evidence assumes importance because direct evidence of adultery is normally not probable, uncorroborated evidence of the petitioner supported by such circumstantial evidence may be enough. But falsity of defence may be no substitute. Adultery assumes criminal character and demands of rather strict proof; yet the standard of proof required is not the same as in criminal trial; a proof beyond reasonable doubt is no longer necessary; preponderance of probabilities decides the issue. Thus, where there was evidence of the wife having earlier eloped with another person but was forgiven on her repentance, there was also quite satisfactory evidence of the co-respondent's presence at the petitioner's residence when he was supposed to be at his work place, and the milkman also testified that he had seen the wife and the co-respondent in bed, *held*, there was sufficient evidence to prove the wife having committed adultery: A.I.R. 1981 Madh. Pra. 112: 1981 Jab.L.J. 178 (S.B.).

It is extremely difficult to prove the fact of adultery, seclusion and secrecy being its most likely attributes, circumstances being infinitely diversified by the parties' situation and character, it is futile to compare evidence in a given case to that of an earlier reported case. Thus, where the petitioner-husband stated that he had one day found a co-worker of his wife lying in the bed in his wife's bed room when his wife was also there, *held*, having regard to the standard of society to which the parties belonged, it could not be said that the wife, a working lady, was not expected to

have male acquaintances; and as the wife was a working lady, visits by a co-worker were also not unusual; besides, despite the petitioner's plea of his friends and neighbours having confirmed the co-respondent staying at night in the wife's house, he examined no witness in support thereof. The petitioner's case not made out: A.I.R. 1982 Pat. 213: 1982 B.L.J.R. 372: 1982 B.L.J. 416: 1982 Pat.L.J.R. 314: 1982 B.B.C.J. (H.C.) 486: (1982) 2 D.M.C. 128 (S.B.).

It is not necessary that there should be direct evidence of adultery before a marriage can be dissolved for direct evidence of such a crime is rarely available. Association coupled with opportunity and evidence of illicit affection or familiarity creates an inference upon which the Court can act. Adultery may legitimately be inferred from evidence of opportunity, where the circumstances are such as would lead a reasonable and just person to the conclusion that adultery had been committed: I.L.R. (1947) Lah. 867: A.I.R. 1949 Lah. 34 (F.B.); A.I.R. 1964 Ker. 102 (S.B.); A.I.R. 1968 Cal. 133.

The charge of adultery or illicit connection made against the spouse is a serious matter and it must rest on evidence of unimpeachable character. For it not only results in the break up of the marriage but also exposes the party charged with adultery to perpetual blemish, with the result that apart from the social censure the party also cannot hope to settle down in matrimony again because of the stigma. Where apart from the interested testimony of the appellant and her father who accused respondent of adultery there was no one on whose testimony the Court could sustain that plea, *held*, respondent could not be accused of adultery as such a plea should have been supported by at least one independent witness or some reliable documentary evidence: A.I.R. 1988 All. 239: (1988) 2 D.M.C. 117: (1988) 2 Hindu L.R. 497.

Where one spouse alleged adultery against the other in its defence in the written statement, *held*, it was a negative burden which could easily be discharged by merely averring that the allegation of adultery was false. It would then be for the spouse alleging the adultery to substantiate the same: 1982 Hindu L.R. 50 (P.&H.) (D.B.).

Adultery—Proof—Mere fact that some male relation writes improper letters to a married woman, does not necessarily prove that there was illicit relationship between writer of the letters and the married woman who received them: A.I.R. 1967 S.C. 581.

Where the petitioner's evidence clearly showed that the respondent and co-respondent had guilty intention as well as opportunity to have sexual intercourse, *held*, the Court may presume adultery: A.I.R. 1982 Karn. 102 (S.B.).

Husband and wife—Desertion—Adultery committed before and that committed after desertion—Principal—Burden of proof: (1957) 1 All E.R. 848.

Where the petitioner-husband testified that he had seen one boy through the window chink having sexual intercourse with his wife and she did not open the door, closed from inside, till after the husband's repeated efforts to forcibly open it, and the husband, seeing the boy running away from the back-door, even chased him for some distance but without catching him, the fact of chasing being corroborated by a witness who, however, could not recognise the boy, *held*, adultery stood proved, coupled with the fact that the wife could not gather courage to deny the allegations by entering the witness box: A.I.R. 1986 Madh. Pra. 245: (1986) 2 D.M.C. 17: (1986) 2 Hindu L.R. 83 (F.B.).

Where the wife had left her matrimonial home next day after her marriage and her whereabouts for next 13 days were not known and the Medical Board's report indicated that she was habitual to sexual intercourse, *held*, it is possible that she may have committed adultery but this is no evidence of adultery; such a finding must necessarily be based on some sort of positive evidence superior to suspicion; the Board did not say—and was not asked—whether its opinion pertained to the pre or post marriage period. [A.I.R. 1946 Nag. 375 and A.I.R. 1916 Sind 46, Disting.]: A.I.R. 1971 Del. 208: (1971) 73 Punj.L.R. (Del.) 169 (D.B.).

The wife's refusal to live with her husband and her living together with another person and her giving birth to two children while living with said person are circumstances which are quantitatively and qualitatively sufficient to prove adultery: A.I.R. 1974 Madh. Pra. 88: 1974 M.P.L.J. 188 (S.B.).

21. Advancement.—There is no reason why the rule of advancement as in vogue in

England should not be applied to Indian conditions particularly in the changed and changing circumstances of the Indian Society: (1955-56) 60 Cal.W.N. 886.

Advancement—Onus—Deposit in joint names of father and daughter—Presumption not extended to Mahomedans in India: A.I.R. 1959 Madh. Pra. 359.

There is no presumption of advancement in Indian laws. A deposit made by a person of his money in the joint names of himself and his wife on condition that it is payable to either or survivor or a deposit in the name of his wife alone does not constitute a gift by him to his wife. In such a case without any declaration of trust, under the Trust Act there is a resulting trust in favour of that person who had the beneficial ownership of the amount, in the absence of any contrary intention or unless it can be proved that actual gift of the amount was intended. The onus of proof to establish the intention to benefit the transferee is on the transferee himself: A.I.R. 1985 Ker. 14: 1985 Ker.L.J. 34: I.L.R. (1985) 1 Ker. 281 (D.B.).

22. Adverse possession.—(*See* also Notes 85 and 101, *infra*). Adverse possession—Burden of proof—Suit for declaration and possession of vacant land not subjected to any kind of cultivation—Plaintiff proving title to the hilt but conceding that he had been dispossessed by defendant—Presumption held would be in favour of plaintiff and defendant's possession being that of a trespasser, burden was on him to prove adverse possession: 1969 Ker.L.R. 60.

As possession follows title, therefore the burden lies on the person who claims to have acquired title by adverse possession to prove his case. [(1900) I.L.R. 27 Cal. 943 (P.C.); A.I.R. 1957 S.C. 314; A.I.R. 1934 P.C. 77, Rel. on]: A.I.R. 1978 All. 555.

Person claiming adverse possession has to prove that adverse possession was hostile and open: (1990-1) 97 Punj.L.R. 206.

The onus of establishing ingredients necessary to prove adverse possession is upon the adverse possessor: A.I.R. 1922 P.C. 181; (1900) I.L.R. 27 Cal. 943 (P.C.); A.I.R. 1919 All. 403 (D.B.); A.I.R. 1934 P.C. 77.

Onus of proof—Onus to prove adverse possession lies on the party who claims to have acquired title thereby: A.I.R. 1966 J.&K. 45; 1983 M.P.W.N. 183; 1990 Punj.L.J. 1.

Where in a suit for possession, the plaintiff establishes his title, *held*, the burden to prove adverse possession pleaded by the defendant would lie upon the defendant. [A.I.R. 1970 All. 289 (F.B.); A.I.R. 1969 S.C. 1165, Rel. on]: A.I.R. 1982 N.O.C. 265 (All.).

The onus is on the defendants to plead and prove that they have acquired title by adverse possession: (1977) 44 Cut.L.T. 552.

The onus of proof of adverse possession is always on the party who alleges the same. Before declaring title on the footing of adverse possession, the Court must, first of all, carefully determine the point of time when adverse possession is said to have commenced and whether such adverse possession was continuous in duration for twelve years or more in the aggregate: (1976) 1 Cut.W.R. 222: (1976) 43 Cut.L.T. 358.

Adverse possession—Date of commencement—Burden of proof—Sales by *A* to *B*—Period of *B*'s possession: A.I.R. 1957 Trav.-Co. 14; A.I.R. 1957 S.C. 314; A.I.R. 1954 Assam 94.

Adverse possession—Mere possession of vacant piece of land does not constitute adverse possession—Burden of proof: A.I.R. 1964 All. 383.

Where adverse possession was pleaded by a purchaser on the ground of having come into possession of the land pursuant to an unregistered sale deed and after about 6 years a registered sale deed was executed between the same parties but without prior permission of the competent authority under S. 22 of the Orissa Land Reforms Act, 1960, *held*, as adverse possession is essentially a question of fact or in any case a mixed question of law and fact, no acquisition of title by adverse possession in such a case is possible when no evidence of the same is at all led by the claimant; besides, the later execution and registration of the deed amounts to acknowledgment of the transferor's superior title; on quashing of the deed for want of statutory permission, the purchaser is liable to be evicted from the land: A.I.R. 1995 Ori. 239 (F.B.).

Where in a suit for permanent injunction defendants pleaded adverse possession, *held*, the burden was on the defendant to prove that the suit had been filed beyond the period of 12 years from the date of dispossession of the plaintiff and the plaintiff cannot be burdened with the onus to prove as to on what date he was dispossessed: A.I.R. 1992 Karn. 254: (1991) 2 Karn.L.J. 567.

The burden of proof lies on the plaintiff, suing for declaration of title and recovery of possession, to show that he was in possession of the suit property within 12 years of the presentation of the plaint: A.I.R. 1982 Cal.

294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.). *See* also A.I.R. 1973 Mad. 170, cited under note 60, *infra*.

Where though the defendant contended that he had acquired title to the entire suit property by adverse possession but no fact indicative of ouster of the plaintiff was proved to have taken place at any time within 12 years before the date of the suit, *held*, plea of ouster was of no avail as the burden in this behalf was heavily and squarely upon the defendant which he failed to discharge: A.I.R. 1988 Bom. 348: (1987) 3 Bom.C.R. 252. *See* also A.I.R. 1970 All. 289 (F.B.).

Where there was no plea of adverse possession in the written statement which indicated that the defendant's possession was amicable and not adverse to other co-heirs, *held*, it was for the defendant to plead and prove that he was in adverse possession openly and to the knowledge of the real owner; a mere secret hostile *animus* on his part in derogation of other co-heirs' title is not enough: 1981 Hindu L.R. 462 (Cal.).

Where in a suit for specific performance of a contract and ouster of a trespasser from the suit-land against the Improvement Trust, the Trust admitted ownership and possession but the trespasser claimed adverse possession, *held*, the burden to prove that the Trust was not the owner lay on the party claiming adverse possession and not on the plaintiff to prove the Trust's ownership: A.I.R. 1982 Pat. 219: 1982 B.L.J.R. 403.

Where a land, having a few graves over it, was claimed to have been purchased by a Roman Catholic Church in 1869 but was described as *poramboke* in documents and records and its Revenue was remitted in 1900, *held*, *prima facie* it was Government property though subject to the rights of its use for burial; since the Church asserted to be its owner, the burden lay upon it to prove its adverse possession; burden not discharged by it: A.I.R. 1976 Kam. 75: (1975) 2 Kam.L.J. 468.

Co-tenants—Adverse possession—Onus: 1957 M.P.C. 265.

As between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. The burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession: A.I.R. 1975 Him. Pra. 60.

The burden of proving that the tenancy was determined more than 12 years before the filing of the suit lies on the defendant though that burden may be discharged by certain presumptions arising in favour of the tenant in the facts and circumstances of a given case. Where even after the efflux of time, limited by the lease deed, the defendant continued to pay rent to the plaintiff within 12 years of the filing of the suit, *held*, there was no escape from the conclusion that the tenancy did not stand determined: A.I.R. 1972 Raj. 284.

Where on purchase of demised property in an execution Court-sale, the tenants' title therein stood extinguished and the auction-purchaser sued the tenant's successors for confirmation of his title on the basis of possession obtained at the Court-sale with no allegation that the successors had dispossessed him, *held*, the burden lay on the tenant's successors-in-interest to plead and prove that they had obtained independent title to the property by adverse possession after the Court-sale to the purchaser's knowledge: A.I.R. 1988 Cal. 79.

Where the permissive occupation was in respect of the entire family and the son was also living in the family along with the father during father's lifetime, *held*, merely because the father died and the son came into possession, the son's possession cannot be said to have become adverse: A.I.R. 1971 Ori. 195.

Where in khasra girdwari, the defendants were not shown to be either in possession of land or in cultivation for long 8 years, *held*, their plea of title by adverse possession could not be accepted: 1982 Punj.L.J. 9.

Claimant of property must in addition to title show his possession of property within 12 years of suit—Onus to prove such possession is on claimant: 32 Cut.L.T. 1058: A.I.R. 1967 Ori. 44.

23. Age—Proof of.—*See* A.I.R. 1957 Him. Pra. 42: 1957 Cr.L.J. 847. Though entries in a birth register, being a public document, are admissible *per se* but mere production of their copy does not, as a matter of law, connect them with the person concerned. Where plaintiffs challenged a sale deed on the ground that they were minors at the time of its execution and they produced their birth entries as proof of their age, *held*, in absence of any material on record that the said birth entries related to the plaintiffs, and the fact that they failed to come in the witness box, an adverse inference could be drawn that they were not minors at the time of the sale: A.I.R. 1983 P.&H. 366.

Where the allegation as to the age of the plaintiffs made in a plaint is denied by the defendants, it is for the plaintiffs to establish the correctness of the facts alleged as to age in the plaint, and they must discharge the burden by adducing necessary proof: A.I.R. 1951 Mys. 38 (F.B.).

24. ***Alibi***.—(*See* also Note 3 under S. 105). There is nothing in the Evidence Act to suggest that where the law places the burden of proving something on the accused, the burden is to be discharged in any other way than the burden which is on the prosecution. The definitions of "proved", "disproved" and "not proved" in S. 3 of the Indian Evidence Act apply in either case. When it is the question of an *alibi* it is not a case of proving the existence of circumstances bringing the case within any of the general exceptions or special exceptions of the I.P.Code, and therefore, S. 105 of the Indian Evidence Act, does not apply. The section applicable is S. 103, illustration of which specially mentions the case of a plea of *alibi* and provides that it is for the accused who pleads *alibi* to prove it: (1953-54) 58 Cal.W.N. 279: A.I.R. 1954 Cal. 258.

The onus to establish *alibi* is on the accused: A.I.R. 1972 S.C. 109: 1972 Cr.L.J. 22; A.I.R. 1981 S.C. 1021: 1981 Cr.L.J. 714: (1981) 2 S.C.C. 300.

The burden of proving *alibi* undoubtedly lies on the accused setting up the defence. But even so, the burden of proving the case against the accused is on the prosecution irrespective of whether or not the accused have made out a plausible defence: 1956 Cr.L.J. 827: A.I.R. 1956 S.C. 460.

In the plea of *alibi* the absence at the exact time must be clearly made out. When the Court is concerned with the question of an *alibi*, it is not a case of proving the existence of circumstances bringing the case within any one of the general exceptions or special exceptions of the Indian Penal Code and S. 105 of the Evidence Act does not apply. It is incumbent upon the accused to establish that he was at a particular place at the relevant time: 28 Cut.L.T. 523: I.L.R. (1963) Cut. 67: (1963) 1 Cr.L.J. 550.

It is well settled that the burden to substantiate the plea of *alibi* and making it reasonably probable lies on the accused; *held*, on facts, the burden not discharged: A.I.R. 1978 S.C. 191: 1978 Cr.L.J. 141: (1978) 1 S.C.C. 178: 1978 All.L.J. 466.

Plea of *alibi*—Proof of—Duty of Court: A.I.R. 1958 All. 746: 1958 Cr.L.J. 1266.

Though, it is true that in criminal cases the burden is on the prosecution to prove the commission of offence by an accused but the moment an accused takes up the plea of *alibi*, it is for him to prove the said plea by cogent and convincing evidence: 1989 Cr.L.J. 2475 (Del.) (D.B.); 1985 All.W.C. 834: 1985 All.L.J. 870.

25. Assessment and recovery of tax—(*a*) Income-tax.—Sale of property of company to another company—Payment of consideration in shares—Burden of proving that consideration for sale was less than what it purported to be was on the transferor company: A.I.R. 1967 S.C. 788.

The onus to prove that a particular lot of shares purchased by the assessee is stock-in-trade lies on him: (1962) 44 I.T.R. 746 (Cal.); (1970) 77 I.T.R. 220 (Cal.).

Joint Hindu family carrying on business—Partition—Effect—Allotment of family property towards share of member is gain of capital asset by him—Contention that asset was converted into stock-in-trade of going business—Burden of proof: A.I.R. 1967 Mad. 328.

Attachment of property for recovery of arrears of income-tax assessed on joint Hindu family—Sons claiming property as their separate property—Burden *prima facie* lies on taxing authorities to establish that the sale deed was taken for and on behalf of the joint family or with aid of joint family funds: (1963) 2 I.T.J. 123: A.I.R. 1964 S.C. 880.

Where an undivided Hindu family did not include agricultural income derived from lands left behind in Pakistan in its return on the ground that it belonged to the individual members of the family in severalty, which contention was rejected by the Income-tax Officer as well as the Appellate Assistant Commissioner but allowed by the Tribunal on further appeal, *held*, as there was nothing in the orders passed by the Income-tax Authorities that the lands in Pakistan were acquired with the joint funds of the family, the burden lay on the Department to prove that the lands belonged to the joint family; no presumption could be raised in favour of the Department: A.I.R. 1976 S.C. 772: 1976 U.J. (S.C.) 23: (1976) 4 S.C.C. 776.

Claim for income-tax deduction—Burden of proving claim lies on the assessee: 1965 M.P.L.J. 357.

The burden to prove that the expenditure claimed by him satisfies all the ingredients of

S. 37(1) of the Income-tax Act lies on the assessee: (1972) 84 I.T.R. 544 (Punj.); (1974) 93 I.T.R. 385 (Cal.); (1979) 119 I.T.R. 817 (Bom.); (1981) 129 I.T.R. 507 (Guj.); (1979) 118 I.T.R. 261 (S.C.); (1979) 117 I.T.R. 945 (Bom.); (1979) 117 I.T.R. 549 (Cal.); (1980) 122 I.T.R. 977 (Del.); (1982) 137 I.T.R. 58 (Bom.); (1983) 141 I.T.R. 664 (All.); (1984) 149 I.T.R. 256 (Madh. Pra.); (1989) 176 I.T.R. 229 (Ker.).

Cash credit standing in the name of third party—Such item whether undisclosed profits of assessee—Onus of proof: (1966) 1 I.T.J. 677 (Cal.).

Cash credit entry—Nature and source of—Burden of proof—Amount credited in accounts of assessee firm in names of children by their mother—Letter of children's mother showing that amount had been gifted by her father to her children—Interest paid by firm to children—Sum representating credits, *held*, was not income of assessee from undisclosed sources: 12 Law Rep. 32 (Mys.).

The burden of proving the source of a cash credit appearing in the account books of assessee in the relevant year lies on the assessee: (1963) 49 I.T.R. 112 (S.C.).

The burden lies on the assessee to prove that cash received in the accounting year is not in the nature of "income"; once the assessee's explanation is rejected as unsatisfactory, the cash receipts may be taken to be income in that accounting year itself: A.I.R. 1971 Andh. Pra. 184 (D.B.).

The burden to prove the source and nature of receipt is on the assessee: (1972) 84 I.T.R. 202 (Andh. Pra.); (1972) 84 I.T.R. 519 (Andh. Pra.); 1972 Tax.L.R. 585 (All.); (1973) 88 I.T.R. 336 (Bom.); 1975 Tax.L.R. 4 (Andh. Pra.); (1975) 98 I.T.R. 657 (All.); 1975 Tax.L.R. 109 (Ori.); (1976) 105 I.T.R. 465 (Ker.); (1977) 107 I.T.R. 938 (S.C.); (1978) 112 I.T.R. 462 (Bom.); (1978) 113 I.T.R. 522 (Del.); (1979) 10 C.T.R. 348 (Pat.); (1980) 121 I.T.R. 901 (Cal.); (1980) 126 I.T.R. 446 (Punj.); (1980) 126 I.T.R. 663 (Punj.); (1981) 132 I.T.R. 488 (Cal.); (1983) 140 I.T.R. 148 (Punj.); (1983) 140 I.T.R. 151 (All.); (1983) 139 I.T.R. 928 (Cal.); 1983 Taxation 68 (Madh. Pra.); (1984) 150 I.T.R. 703 (Mad.); (1985) 155 I.T.R. (S.N.) 66 (S.C.); (1985) 151 I.T.R. 150 (Pat.); (1985) 151 I.T.R. 571 (Pat.) ; (1986) 158 I.T.R. 168 (Del.); (1986) 158 I.T.R. 826 (Mad.); (1986) 162 I.T.R. 669 (Ker.); (1988) 169 I.T.R. (S.N.) 85 (S.C.).

Where in income-tax proceedings, the assessee claimed that income from a particular premises was not his income and, therefore, should not be taxed in his hands and in support of his claim he produced a conveyance deed which showed that he purchased the premises purporting to act as the Trustee of the trust created by his wife, *held*, in a case of this kind the assessee who relies on the recitals in the documents has to establish the truth of those recitals otherwise it would be easy to make self-saving statement in documents either executed or taken by a party and rely on those recitals: A.I.R. 1971 S.C. 2439: 1971 U.J. (S.C.) 872.

Assessee in receipt of monies—He must show that he was beyond pale of taxable income—Doctrine regarding burden of proof is applicable to proceedings under S. 34, Income-tax Act—Income-tax Act, 1922, Ss. 34 and 7—Assessee associated with *S* daughter of Maharajah—*S* originally married to *K* but after her conversion and reconversion again married to *G* — Subsequently *S* making several payments to assessee amounting to about 7 lakhs of rupees—In proceedings under S. 34, the I.T.O. finding that payments represented remuneration in lieu of services rendered by assessee—On facts and circumstances held that payment could not be regarded as gifts but what was received was assessable to tax under S. 34: I.L.R. (1963) Andh. Pra. 1051.

The burden of proving that the premium or Salami is income lies on the Revenue: (1971) 82 I.T.R. 464 (S.C.); (1977) 110 I.T.R. 71 (Bom.); (1979) 116 I.T.R. 591 (Cal.); (1979) 120 I.T.R. 549 (S.C.).

Claim for set off of trading loss—Burden of proof is on assessee: A.I.R. 1967 Madh. Pra. 149.

Undisputed certificate of Excise Authorities produced in support of assessee's claim for loss carrying on liquor business, *held*, constitutes the best evidence which discharged initial burden which lay on assessee to prove loss: 1985 Tax. L.R. 1133: (1985) 154 I.T.R. 821 (Madh. Pra.).

Set-off of loss against profits of separate business—Burden of proof—Assessee claiming reliefs in succeeding years for losses suffered—Onus lies on assessee to satisfy Tax Authorities that the loss was suffered in respect of the "same business": (1963-64) 68 Cal.W.N. 752.

Losses in speculative business—Burden of proof: (1967) 2 An.W.R. 94; (1966) 60 I.T.R. 493 (S.C.).

The burden to prove that a particular transaction is merely a hedging transaction and not a speculative one is on the assessee: (1975) 101 I.T.R. 832 (Mad.); (1986) 67 I.T.R. 74 (S.C.).

The burden of establishing correctness of a return is on the assessee: (1970) 76 I.T.R. 559 (Mad.).

The burden is on the Revenue to prove concealment positively in a case where penalty is levied without taking recourse to Explanation to S. 271 (1) (*c*) of the Income-tax Act, 1961: (1988) 171 I.T.R. 649 (Andh. Pra.).

Penalty proceeding under Income-tax Act, for concealment of income—Onus lies on the Department to prove such concealment: A.I.R. 1970 Ori. 38 (D.B.).

Where the assessee is alleged to have concealed his income in the original return, *held*, the burden of proving concealment is on the Income-tax Department: 1982 Tax.L.R. 46 (Ker.).

Penalty proceedings under Income-tax Act, 1961—Are of penal nature—Burden and quantum of proof: A.I.R. 1968 Madh. Pra. 103.

Scope—Mere failure to pay tax is not offence—There should be fraudulent intent—Burden of proof is on prosecution: 1967 Mad.L.W. (Cr.) 27.

Default under S. 28(1)(*c*), Income-tax Act, 1922—Burden of proof is on Income-tax Department to show that default under S. 28(1)(*c*) is made by assessee: (1964) 2 I.T.J. 526 (Guj.).

Proceedings under S. 28(1)(*c*) of Income-tax Act, 1922—Nature of—Burden of proving offences: A.I.R. 1968 Cal. 345.

The burden of proving that income has escaped assessment lies on the Revenue: (1971) 79 I.T.R. 582 (S.C.); (1976) 103 I.T.R. 599 (Pat.); (1976) 104 I.T.R. 524 (Ker.); (1976) 104 I.T.R. 214 (All.); (1977) 107 I.T.R. 79 (Cal.); (1978) 111 I.T.R. 934 (Cal.).

The burden to prove that the assessee received any income, gain or profit within India is on the Revenue: (1970) 78 I.T.R. 12 (S.C.); (1974) 94 I.T.R. 303 (Bom.).

Income or capital—Burden of proof and shifting of onus—It is for the Revenue in the first instance to establish that particular receipt is income liable to tax—Burden shifts on to assessee when sufficient evidence either direct or circumstantial is disclosed by Revenue—Assessee failing to put before Department material in his exclusive possession—Adverse inference can be drawn against assessee: (1966) 1 An.W.R. 134: (1966) 1 M.L.J. 134: A.I.R. 1966 S.C. 1325.

Exemption from income-tax—Burden of proof: A.I.R. 1965 S.C. 568; (1971) 82 I.T.R. 333 (Guj.); (1973) 87 I.T.R. 623 (Mad.); (1973) 31 S.T.C. 559 (Ker.); (1976) 102 I.T.R. 40 (Punj.); (1976) 105 I.T.R. 433 (Mad.); (1976) 105 I.T.R. 593 (S.C.); (1977) 106 I.T.R. 758 (Bom.); (1977) 109 I.T.R. 517 (Cal.); (1978) 114 I.T.R. 253 (Mad.); (1978) 115 I.T.R. 505 (Mad.); (1980) 121 I.T.R. 806 (All.); (1984) 148 I.T.R. 333 (Mad.); (1984) 154 I.T.R. 10 (Guj.); (1985) 156 I.T.R. 412 (S.C.); (1989) 178 I.T.R. 653 (Punj.); (1990) 181 I.T.R. (S.N.) 19 (S.C.); (1990) 25 E.C.C. 62 (S.C.).

The burden to prove the facts which will entitle the assessee to the exemption under any of the clauses of S. 5(1) of the Income-tax Act, 1961 lies on him: (1969) 74 I.T.R. 328 (S.C.); (1972) 83 I.T.R. 296 (Ker.); (1972) 85 I.T.R. 396 (Ker.); (1975) 99 I.T.R. 477 (Andh. Pra.); (1989) 178 I.T.R. 577 (Ker.).

The burden is on the assessee to prove the facts that bring the assessee's case within the exception provided by latter part of S. 6(2) of the Income-tax Act: (1951) 19 I.T.R. 168 (S.C.); (1973) 87 I.T.R. 260 (Mad.).

Taxing statute—Burden is on Revenue Authorities to show that income is liable to tax under the statute—Onus of proving that particular class of income is exempt from taxation, however, lies on assessee: A.I.R. 1966 S.C. 1007. *See* also 1966 All.L.J. 11; A.I.R. 1957 Pat. 524.

Income or profits—Onus—Money-lending business—Lands purchased in discharge of loans advanced—Resale at higher price after long period—Excess price or profits—Liability to tax—Burden of proof: (1957) 1 An.W.R. 57: A.I.R. 1958 Andh. Pra. 546.

The onus to prove that a particular transaction is an adventure in the nature of trade and not in the ordinary course or line of business of assessee is on the Department or is on the person who asserts it to be so: (1976) 105 I.T.R. 633 (S.C.); (1972) 85 I.T.R. 220 (Del.); (1973) 88 I.T.R. 347 (All.); (1977) 108 I.T.R. 377 (All.); (1980) 123 I.T.R. 343 (All.); (1983) 139 I.T.R. 119 (Cal.).

Whether income was saved from operation of sub-S. (1) by sub-S.(3)—Burden of proof: A.I.R. 1966 S.C. 1453.

Whether remuneration paid to managing agents is for service—Onus is on assessee: (1966) 1 I.T.J. 195 (All.).

Bad debts—Question of fact—Onus of proof: A.I.R. 1957 Nag. 73.

The onus to prove a bad debt lies on the assessee: A.I.R. 1930 Bom. 201; A.I.R. 1931 Cal. 761; (1937) 5 I.T.R. 522 (Lah.); (1961) 43 I.T.R. 177 (Andh. Pra.); (1967) 63 I.T.R. 738 (Andh. Pra.); (1967) 64 I.T.R. 181 (Mad.); (1971) 80 I.T.R. 96 (Bom.); (1974) 97 I.T.R. 265 (Andh. Pra.); 1980 Tax. L.R. 1597 (All.); (1983) 142 I.T.R. 545 (Cal.); (1990) 83 C.T.R. 221 (Mad.). But the Department cannot insist on demonstrative proof which is infallible: (1963) 49 I.T.R. 874 (Mad.).

Assessment to income-tax—Non-resident having no income in India—Jurisdiction of Income-tax Officer—Burden of proof: A.I.R. 1957 All. 823.

In order to bring in the income of a non-resident under the deeming provisions of the first unit of S. 9(1)(*i*), the Department must establish that some of the operations were carried out in India in respect of which the income is sought to be assessed: (1977) 108 I.T.R. 335 (S.C.); (1974) 94 I.T.R. 85 (Bom.).

The onus of proving that the assessee was in India during the four years preceding the previous year for a period or periods in the aggregate of not less than 365 days, and was in India for at least 60 days during the previous year, lies on the Department: (1967) 66 I.T.R. 457 (S.C.); (1973) 89 I.T.R. 65 (S.C.).

Burden to prove that main purpose of transaction was avoidance or reduction of liability to excess profits tax: A.I.R. 1957 All. 110.

Appeal by assessee—Burden of proof: A.I.R. 1957 Cal. 230.

In any case of dispute regarding the quantum of a tax or any other financial burden between a subject and the State, the burden is on the State to show that the larger quantum is leviable, and not the smaller one: (1958) 71 Mad.L.W. 754: (1958) 2 M.L.J. 536.

Company claim for depreciation—Dispute as to—Burden of proof—Company must prove by legal evidence the amount claimed—Presumption of accuracy attaching to balance-sheet and profit and loss account not applicable to auditor's certificate—Mere production of auditor's certificate not conclusive—Employee should be given adequate opportunity to verify figures in certificate by cross-examination of employer and his witnesses: 1969 Lab.I.C. 995: A.I.R. 1969 S.C. 612.

Income-tax—Compensation for termination of managing agency—Claim for allowance under S. 10(2)(*xv*) of Income-tax Act, 1922 by assessee-company—Burden of proof lay upon Company to prove that expenditure was incurred wholly and exclusively for business of the Company—Absence of reliable evidence to prove that managing agency was rendering any service—Removal of managing agency, not connected with business—Expenditure in paying compensation held could not be said to be made wholly and exclusively in the interest of the business of the Company: A.I.R. 1969 S.C. 917.

Business with regular accounts—Determination of net value of assets—Whether written down value—Onus is on assessee to prove: A.I.R. 1970 S.C. 352: (1970) 1 S.C.R. 789.

Reserves and funds used as working capital—Proof of—It is not enough to show that amount were available for being utilised as working capital—Company must further show that funds were in fact utilised as working capital: 1968 Lab.I.C. 1201: A.I.R. 1968 S.C. 963.

Rehabilitation cost—Amount to be deducted—Onus of proving that certain amount was not available is on the company: 1968 Lab.I.C. 531: A.I.R. 1968 S.C. 538.

It is for the Department to prove that there has been a change in the method of accounting: (1954) 25 I.T.R. 17 (All.).

The burden to prove that the assessee was prevented by sufficient cause from complying with the direction under S. 142 (2A) of the Income-tax Act, 1922 lies on him: (1948) 16 I.T.R. 319 (Bom.).

The burden to show that there was a complete cessation of the old business is on the assessee: (1962) 46 I.T.R. 920 (Cal.).

The burden to place on record all the relevant facts for condonation of delay lies on the party who claims condonation of delay: (1989) 175 I.T.R. 14 (Madh. Pra.).

Where at the time of transfer of land agricultural operations are carried on and if the

entries in the Revenue records shows that the land is agricultural then a presumption as to land being agricultural in character arises and unless Revenue rebuts that presumption by cogent evidence, it must be held that the land was agricultural at the time of transfer: (1981) 127 I.T.R. 671 (Guj.).

Where the Department wants to controvert the contention of the assessee that the concerned land was agricultural land, it has to lead convincing evidence on its point: (1976) 105 I.T.R. 133 (S.C.); (1976) 105 I.T.R. 593 (S.C.); (1978) 112 I.T.R. 9 (Ker.).

The burden of proof lies on the assessee to establish that income sought to be taxed is agricultural income exempt from taxation: (1959) 35 I.T.R. 312 (S.C.); (1956) 29 I.T.R. 529 (S.C.); (1955) 27 I.T.R. 1 (S.C.); (1954) 26 I.T.R. 573 (Pat.); (1951) 20 I.T.R. 151 (Mad.); (1948) 16 I.T.R. 330 (P.C.); (1948) 16 I.T.R. 433 (Nag.).

If the Revenue seeks to invoke R. 2B(2) of the Wealth-tax Rules, 1957 then the burden of proving that the balance sheet values of the assets were not their true value lies on the Revenue: (1988) 174 I.T.R. 379 (Raj.); (1989) 175 I.T.R. 599 (Raj.); (1990) 186 I.T.R. 603 (Raj.); (1992) 195 I.T.R. 738 (Raj.); (1992) 198 I.T.R. 530 (Raj.); (1993) 202 I.T.R. 253 (Raj.).

It is for the Revenue to prove that a particular transfer is without consideration or for an inadequate consideration and is, thus, a gift: (1969) 74 I.T.R. 343 (Guj.); (1979) 120 I.T.R. 613 (Bom.); (1982) 134 I.T.R. 492 (Karn.).

Deduction claimed by assessee as expenses incurred under U.P. Agricultural Income-tax Act, 1948 (III of 1949)—S. 6(2)(*b*)(*iv*)—Salaries paid to Farm Manager, Cashier, Time-keeper and Fieldman employed by assessee—Assessee has to prove that their duties were connected with acts of raising crops: 1963 All.L.J. 1082: A.I.R. 1964 All. 439.

(*b*) Sales tax.—In all cases of tax, the burden of proving the necessary ingredients laid down by law to justify taxation is upon the taxing authority: (1967) 20 S.T.C. 520 (S.C.); (1966) 17 S.T.C. 624 (S.C.); (1974) 34 S.T.C. 84 : 1974 Tax. L.R. 1700 (Ori.); (1975) 35 S.T.C. 104 (Karn.).

In all cases of taxation the burden to prove that something is liable to be taxed is on the Department: (1983) 52 S.T.C. 206 (Karn.). The burden is not lessened if the assessee is absent. They have to bring material on record to show that the assessee's turnover was taxable: 1979 U.P.T.C. 1088; 1980 U.P.T.C. 1010: 1980 A.T.J. (S.) 223: 1980 S.T.J. 366.

Burden to prove a negative fact cannot be imposed on the assessee: 1980 Tax.L.R. 1616: 1979 U.P.T.C. 1457 (All.).

The onus to prove that the assessee is liable to tax is initially on the Revenue. Thus, where under Voluntary Disclosure of Income and Wealth Act of 1976, the assessee had disclosed certain income from stock, the said disclosure could not be utilised by Sales Tax Authorities for making an assessment under the Act on the assumption that the income arose out of sale of goods: (1984) 57 S.T.C. 274 (Andh. Pra.).

The initial burden is on the Revenue that the seized books of account relate to a particular period, as until such correlation is established, the accounts cannot be utilised as the basis of a finding even *prima facie* for holding that there has been a suppression or escapement.

The assessee can rebut the *prima facie* view of the Department.

But if the account books were seized in the very first year of business, that position would not arise: (1974) 33 S.T.C. 573 (Ori.).

Recovery of account books from assessee's residence—Assessee has to explain them: (1974) 34 S.T.C. 197 (Mad.).

Assessee carried on business as broker—Documents were seized which showed transactions of sale—Dealer has to show that they were transactions as a broker and not of sale: (1980) 46 S.T.C. 492 (Andh. Pra.).

By non production of a document by a dealer when required to do so, an adverse inference can certainly be drawn against the dealer, but the ultimate burden of proving the taxability is upon the Department and adverse finding that taxable event had taken place, cannot be arrived at merely on the basis of failure or refusal of the dealer to produce the relevant material when called upon to do so: (1983) 54 S.T.C. 1 (Andh. Pra.) (D.B.).

The provisions of S. 12-A of the U.P. Sales Tax Act, 1948 lay the burden of proof on the assessee to furnish explanation to the adverse material: 1991 U.P.T.C. 751.

Contract for work involving transfer of contractor's goods—Burden of showing that transfer constituted taxable sale is on Revenue: (1965) 16 S.T.C. 240: A.I.R. 1965 S.C. 1396, affirming A.I.R. 1961 Andh. Pra. 520 (F.B.).

Orissa Sales Tax Act (XIV of 1947), S. 5—Permissible deductions—Onus—Onus initially lies on assessee—Onus discharged on production of certificate of registration of purchasing dealer—Department competent to prove that holder of certificate is not registered dealer—Taxing authority not estopped to challenge entries in certificate: I.L.R. (1964) Cut. 575: A.I.R. 1965 Ori. 44.

Sales tax—Liability—Exemption from tax—Onus of proof: (1958) 1 M.L.J. 30: A.I.R. 1958 Mad. 176.

To show an item is exempted from sales tax, the burden is on one who claims exemption: (1973) 31 S.T.C 559: 1973 Tax. L.R. 2413 (Ker.).

If the assessee claims any exemption, the burden to prove that goods in which he dealt were exempt, is on the assessee: 1984 U.P.T.C. 25.

Where the assessee furnishes all the necessary particulars to substantiate his claim for exemption, the assessing authority should verify the facts or else the burden will stand discharged: (1978) 42 S.T.C. 142 (Andh. Pra.).

In the case of tax on last purchase, where purchase is admitted, the dealer has to prove that he was not the last purchaser: (1980) 46 S.T.C. 492 (Andh. Pra.).

Where tax is at single point on import or manufacture, in such cases even while fixing turnover by best judgment, there has to be material on record that the assessee was either a manufacturer or importer: (1983) 52 S.T.C. 238 : 1982 U.P.T.C. 408: 1982 A.T.J. 221: 1982 S.T.J. 247 (All.); (1983) 52 S.T.C. 239: 1982 U.P.T.C. 432: 1982 S.T.J. 342 (All.).

Where tax is on the last sale within the State and the assessee claims non-taxability, the burden is on the Department to prove that the goods sold by the assessee were either consumed in the State or consigned or were exported. [A.I.R. 1968 S.C. 194, Expl.]: (1983) 53 S.T.C. 397: 1984 Tax. L.R. 2856 (Andh. Pra.).

Initial burden to prove that the goods in which he dealt were locally purchased and were not imported is on the assessee, but once the assessee produces details of the transactions showing that purchases were made by him from people who used to sell the old utensils to him, it is for the Department to rebut the transaction by some evidence that the assessee had imported the goods, namely, brass scrap: 1984 U.P.T.C. 1006.

Where the assessee had discharged his initial burden and produced the purchase vouchers showing that he had made the purchase locally, if the Department's contention be that the goods were imported, some material will have to be brought on record to show that the assessee had imported the goods: 1984 U.P.T.C. 1007: 1984 A.T.J. 539.

Where assessee denied liability to tax on the ground that he did not import any timber and what he sold was timber purchased by him within the State, *held*, the burden did not lie on assessee to establish that commodity sold by him was not imported: 1982 U.P.T.C. 432: 1982 S.T.I. 164 (All.).

Where the assessee-dealer filed an affidavit stating on oath that he made the purchases only from pheriwalas within the State of U.P. and there was no evidence to the contrary, *held*, it could not be said that the dealer did not discharge the burden under S. 12-A of the U.P. Sales Tax Act, 1948: (1994) 28 S.T.I. 95 (All.).

Assessee claiming that he dealt in locally purchased goods only, he has to prove the fact that they were locally purchased failing which assessment order would be valid: 1984 U.P.T.C. 64 (All.).

To prove a fact within the exclusive knowledge of the dealer is on him. Thus, where part of the goods were admittedly purchased from outside and were imported in the State, the claim that rest were not imported should be proved by the assessee: 1980 U.P.T.C. 76: 1980 A.T.J. 197.

The onus of proving special facts which are exclusively within the knowledge of the assessee, in order to claim benefit for himself is undoubtedly on the assessee in view of the principles contained in S. 106 of the Evidence Act: (1975) 35 S.T.C. 104 (Karn.).

Where the assessee was dealing in purchase and sale of foreign liquor imported in the State, the fact that the goods sold by him were smuggled in the State being within his

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exclusive knowledge, the burden to prove that the goods were not imported was on him: 1981 U.P.T.C. 431 (All.).

The burden to prove that sales were inter-State sales is on the assessee and he has to prove the same by producing relevant documents: (1974) 33 S.T.C. 601 (Mad.).

Steam—May be considered as goods—Liability to pay sales tax—Burden of proof: A.I.R. 1956 Hyd. 194.

Item whether assessable—Onus: A.I.R. 1957 Nag. 73.

Transaction between hotelier and resident customer—Hotelier making consolidated charge for residence services and supply of food—No rebate allowed if food is not taken—Question whether supply of food amounts to "sale"—Burden of proving that it was "sale" is on Revenue: A.I.R. 1966 Punj. 449.

Word capable of being construed either in its popular sense or as a word of art—Party asserting that it is used in a technical, and not in a popular sense, must establish the fact: (1967) 19 S.T.C. 531 (Punj.).

The burden of proof lies on the Department to establish positively that the assessee deliberately concealed the turnover: 1980 S.T.D. 240.

Where on the ground of concealment of turnover and furnishing of inaccurate particulars proceedings for imposing penalty are initiated, the assessing authority must establish concealment and furnishing of inaccurate particulars: (1974) 34 S.T.C. 225 (All.).

Burden lies on the Revenue to prove that turnover sought to be taxed has escaped assessment: 1985 U.P.T.C. 848 (All.).

In determining the question of turnover the decision of the Tribunal does not rest on the legal question of burden as envisaged by S. 12-A of the U.P. Sales Tax Act, 1948: 1988 U.P.T.C. 649 (All.).

The burden to establish that assessee was in default in filing the return and depositing tax is on the Department: 1981 S.T.D. 21.

(*c*) Others.—Payment of octroi duty—Burden on tax payer—Anonymous letter is no proof—The burden is on the taxpayer to prove payment of the requisite octroi duty. The anonymous report can at best, be suspicion, which cannot take the place of proof so as to form basis for imposition of a penalty for non-payment of octroi tax. Nor can th presumption be drawn that the octroi au thorities must have recovered the duty whe the article was imported: 1960 M.P.C. 1 1960 M.P.L.J. 54: 1960 Jab.L.J. 214: A.I.R. 196 Madh. Pra. 223.

Reasonable restriction—Question o fact—Burden of proof—Tax imposed unde Ss. 108 and 114, U.P. District Boards Act– Taxation, if infringement of Art. 19(*b*). *Se* A.I.R. 1957 All. 527.

Burden to establish that a particular ar ticle attracts the tariff item for excise duty un der the Central Excise and Salt Act, 1944 is o the Department: 1979 E.L.T. (J) 543 (Bom. *See* also 1979 E.L.T. (J) 298 (Guj.) (D.B.).

Where the assessing authority while de termining the annual rateable value for as sessing the property tax due under th Bombay Provincial Municipal Corporatio Act, 1949 computed it on the basis of the ren realised by the assessee and the assessee pre ferred an appeal, contending that contractua rent is excessive and more than the standar rent, *held*, the onus is not on the Municipalit to prove that the gross-rateable value fixe by it was in accordance with law; the onu rather lies on the assessee to prove that star dard rent is lower than the rent charged b him; he may discharge the onus by leadin evidence of the cost of land and of construc tion or the actual rent received in th neighbourhood for identical or similar pre mises: A.I.R. 1994 Guj. 167 (D.B.).

According to the provisions of the U.I Consolidation of Holdings Act, the perso who wants to dispute the correctness of th basic year entry has to prove the fact that th basic year entry is incorrect and further ac cording to S. 44 of the U.P. Land Revenue Ac there is a presumption about the correctnes of the entry and the burden lies on the perso who wants to dispute it: 1981 All.W.C. 204.

Whoever wants the judgment from th Court, has to lay proper basis in materials o the strength of which the relief or reliefs is c are claimed. If the plaintiffs wanted that th Court should declare the imposition of th entertainment tax levied under the Gujara Panchayats Act, as invalid, they must specif cally first plead the ground on which the challenged the imposition of the tax, and se ondly they should adduce sufficient ev dence to substantiate those grounds: 197 Guj.L.R. 1114.

26. Bailment.—(*See* also Notes 32 and 36, *infra*). In bailment, the burden of proof is on the bailee to disprove negligence when damages or loss is established: A.I.R. 1970 Mad. 48 (D.B.); A.I.R. 1917 P.C. 173.

The burden of proof lies on the bailee to show that care as a man of ordinary prudence would have exercised, was duly exercised by him in respect of goods entrusted to him: A.I.R. 1923 Rang. 74 (D.B.); A.I.R. 1952 Kutch 50. Plaintiff proving *prima facie* case of damage in respect of goods entrusted by him, need not prove how such damage was caused: A.I.R. 1924 Rang. 356.

Bailor has to prove negligence or lack of sufficient care on the part of bailee from materials produced by bailee to prove absence of negligence on his part—He may show that bailee has failed to place before Court all the materials available to him as required of him by S. 106, Contract Act, and ask the Court to presume that if produced, it would have gone against the bailee—He may also show on the materials produced that he has not taken as much care as is required of him under S. 151, Contract Act—In case of damage by fire, the burden on bailor ends once he establishes that bailee has failed to take such reasonable precautionary measures as a prudent man would have taken to avert the fire: (1963-64) 68 Cal.W.N. 554: A.I.R. 1964 Cal. 374 (D.B.).

Loss of subject matter of bailment, is in itself a *prima facie* evidence of negligence of bailee. In order to escape liability, onus of proof will be on bailee to show that he had taken the necessary standard of care as imposed upon him by the statute: A.I.R. 1962 Mad. 244 (D.B.).

Where in a suit for compensation against the Union of India for non-delivery of goods, the goods booked had to pass over 4 Railways including a foreign Railway and the accepted position by both the parties was that the loss occurred in the foreign Railways after the goods were consigned to it and it had not delivered the goods to the State Railways for transit of the same to the place of delivery, although the transfer of goods to the foreign Railways was in the special knowledge of the State Railway and it was their duty to prove the transfer of goods as a fact, the burden no longer rested on the State Railway to prove the same in view of the accepted position.

Nor could the Union of India be made liable as a bailee, as the articles were lost in the foreign Railway. The liability as a bailee would have surely accrued if it were established that the articles were lost when under the control of any of the Union Railways, which is not found to be fact: A.I.R. 1956 Assam 188.

27. *Benami*.—The onus of proving by parol evidence—Even when permissible in law—That the document is not what it purports to be is heavily on the person who makes that allegation and not on the other side and that onus becomes still heavier when the challenge is advanced after a long time: 1954 B.L.J.R. 486: A.I.R. 1954 Pat. 562.

It is well settled that the burden of showing that a particular transaction is *benami* and the appellant-owner is not the real owner always rests on the person asserting it to be so and this burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of *benami* or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of *benami* is the intention of the parties and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be *benami* of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises as a substitute for proof. It is not enough merely to show circumstances which might create suspicion, because the Court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. [A.I.R. 1974 S.C. 171, Foll.]: A.I.R. 1977 S.C. 796: (1977) 1 S.C.C. 816: 1977 Cr.L.J. 566.

It has been repeatedly held that the burden to prove that a transaction is *benami* lies heavily on the party which asserts that the ostensible vendee was a mere name-lender and the property was in fact purchased only for that party's benefit; such burden has to be discharged on satisfying the well-known criteria: (*1*) the source of purchase money; (2) the possession of the property; (3) the parties' mutual relationship; (*4*) the pecuniary and other circumstances of the transaction; (*5*) the motive for the transaction; (*6*) the custody of the title deeds; and (*7*) the parties' previous and subsequent conduct. Each of them taken separately may not prove the real

title, but a combination of some of them might; the real test is the parties' intention. The true test to determine whether the transaction is *benami* or not is to look to the intention of the parties, *viz.*, whether it was intended to operate as such or whether it was only meant to be colourable; if colourable, the transaction is *benami*, otherwise the transaction is not *benami*: A.I.R. 1977 Mad. 19: (1976) 1 M.L.J. 1 (D.B.). The above indicia are not exhaustive and there efficacy varies according to the facts of each case. Nevertheless No. 1, *viz.*, the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another: A.I.R. 1974 S.C. 171: (1974) 1 S.C.C. 3.

One who pleads *benami* must establish it; the source or consideration is a strong piece of evidence showing the nature of the transaction; the relationship of the parties is another circumstance to be considered; the existence or the absence of any motive for a *benami* purchase has also a bearing; the possession and enjoyment of the property is another strong circumstance; and the possession of the title deeds yet another relevant consideration. In short, the question of *benami* has to be decided from all the circumstances and facts of each case. Further *benami* is a question of intention to be gathered from all the facts and circumstances whether the beneficial interest was intended to be retained in one against the apparent tenor of the document: 1967 Ker.L.J. 588: 1967 Ker.L.T. 1156: A.I.R. 1968 Ker. 154.

The principles to ascertain whether a transfer is a *benami* or not are: (*1*) the burden of proving a transfer to be *benami* lies on the person asserting it to be so; (*2*) if the purchase money is proved to have come from a person other than the transferee named, the property is *prima facie* assumed to be for the benefit of the person paying the purchase money, unless contrary is shown; (*3*) the true character of such a transaction is governed by the intention of the person paying purchase money; and (*4*) his intention is to be determined on the basis of the surrounding circumstances, the parties' relationship, the motive for bringing about the transaction and their subsequent conduct, etc.: A.I.R. 1985 Cal. 2.

In order to determine whether a transaction is *benami*, the factors to be taken into account may include: (*a*) source from which consideration was paid; (*b*) possession; (*c*) motive; (*d*) previous and subsequent conduct; and (*e*) custody of the document. Where a plea of *benami* transaction is raised, the ostensible title cannot be displaced except on cogent and clear proof of the *benami* character of the impugned transaction: (1974) 40 Cut.L.T. 818.

In is well settled that the burden to prove *benami* rests on the party claiming it to be so; the apparent state of affairs is presumed to be real unless the contrary is proved; however, when evidence does not conclusively establish or rebut the plea, the decision has to be made on reasonable probabilities and legal inferences from proved or admitted facts; thus, where a property was purchased by his own money by a father in the name of his son, having no money of his own, *held*, the father was the real owner: A.I.R. 1983 Ori. 36.

The Court will presume an ostensible title to be the real title unless the plaintiff who seeks to assert the contrary, pleads and prove that ostensible owner is not the real owner and also the essence of *benami* is the intention of the parties. Such intention may be shrouded in a thick veil which cannot be easily pierced through. Nevertheless the person alleging so has to prove either by legal evidence or unerring circumstances the fact of *benami*: A.I.R. 1985 Madh. Pra. 73: 1984 Jab.L.J. 745: (1987) 1 Hindu L.R. 2 (D.B.); (1979) 20 Guj.L.R. 148 (D.B.).

Benami—Onus of proof: A.I.R. 1933 Rang. 393; A.I.R. 1965 Him. Pra. 2; I.L.R. (1955) 1 Cal. 207; 1959 Cal.L.J. 1: A.I.R. 1958 Cal. 733; I.L.R. (1962) Cut. 641.

The onus to prove a transaction as *benami* lies on him who alleges it; mere suspicion is not enough, there should be direct evidence: A.I.R. 1985 Pat. 110; 1983 Tax.L.R. 811 (All.).

Benami cannot be a matter of mere presumption. It should be averred in the pleadings and proved. The proof of *benami* rests not only on the relevant circumstances but also on direct proof. In the absence of convincing direct proof, the circumstantial evidence may clinch the issue. In the absence of all other relevant circumstances, the criterion in the cases of *benami* in India is to consider from what source the money comes with which the purchase money is paid: I.L.R. (1956) Hyd. 733: A.I.R. 1957 Hyd. 37.

The onus to prove a transaction to be a *benami* one is on the person who alleges the same to be *benami*. The apparent state of affairs must be taken to be the real state of affairs unless the contrary is proved. If the purchase is made in the name of wife or sons, the presumption of Hindu law is in favour of its being a *benami* purchase and the burden of proof lies on the party in whose name it was purchased to prove that he was solely entitled to the legal and beneficial interest in such purchased estate. The burden of proof is to begin with on the party pleading that the transaction is *benami*. The burden, however, does not rest in one place, but shifts to the other side and it increases if the original parties to the transaction are dead. Suspicious circumstances are not sufficient to prove the *benami* character of a transaction but if the evidence on the other side does not exist, even slight but forceful evidence on the part of the person alleging the *benami* nature of the transaction may be sufficient. A variety of circumstances are relevant in examining the *benami* character of a transaction like the source of consideration for acquisition of the property, the possession of the property, the conduct of the parties or their predecessors in relation to it, the custody of the title deeds and so on. The most important fact, however, is the source of money, but the other facts also play varying parts. The tests to be applied to find out a *benami* transaction are (*i*) motive for the *benami* transaction, (*ii*) relationship between the parties, (*iii*) possession of the property in question, (*iv*) custody of the title deeds, and (*v*) the payment of the consideration money. *Benami* transactions are entered into in India without any motive or reason. Therefore, absence of motive cannot be taken to be a circumstance against the *benami* character of a transaction: 1965 B.L.J.R. 800: A.I.R. 1966 Pat. 110 (D.B.).

In deciding the question of *benami* the source of funds for the acquisition is an important test. In case where there is no scope for applying some of the other tests such as possession of the property, possession of the title deeds, etc., the burden of proof is heavy on the plaintiff who sets up the case of *benami* and he has to give the best evidence possible under the circumstances: A.I.R. 1957 Ker. 121.

The burden of proving *benami* character of the transaction lies on him who sets up the plea, and in the absence of clear and cogent proof to that effect, the apparent title must prevail. Before, therefore, the ostensible owner may be called upon to prove that he is the real owner, the person who sets up the plea of *benami* character of the transaction, must prove by clear and cogent evidence that it was he who had supplied the consideration for the transaction. What he has to prove is the fact that it was actually his money that was paid to the transferor, and not merely the fact that the money passed from his hand to that of the transferor: A.I.R. 1983 J.&K. 44: 1982 Srinagar L.J. 546 (D.B.).

The onus of establishing a transaction as *benami* is on the person who asserts benami nature of the transaction and it must be strictly made out. In the absence of evidence the apparent title prevails: 1962 M.P.L.J. (Notes) 144. *See* also 1961 Jab.L.J. 1263.

The person impugning the apparent character of the deed has to show something or other to establish that it is a *benami* or a sham transaction: 1954 B.L.J.R. 82: A.I.R. 1954 Pat. 280; A.I.R. 1959 Andh. Pra. 407.

It is well settled that the burden of proving that a transaction was *benami* lies upon the party which asserts it to be so. [A.I.R. 1965 S.C. 1364; A.I.R. 1974 S.C. 171; A.I.R. 1980 S.C. 727, Foll.; A.I.R. 1947 All. 399; A.I.R. 1955 Pat. 404, Not good law]: A.I.R. 1983 All. 296 (D.B.); A.I.R. 1989 N.O.C. 65 (Pat.); A.I.R. 1981 Bom. 406; A.I.R. 1971 Andh. Pra. 179: (1970) 1 An.W.R. 20 (D.B.) [It requires clear and unambiguous evidence, not mere surmises or suspicion; the real test is the source whence the consideration came].

A sale deed executed before the Sub-Registrar carries a presumption of genuineness and the burden to prove that it was *benami* is on the person who alleges it: A.I.R. 1979 All. 47.

Burden of proving *benami* is on the person who alleges it—But where all relevant facts are before Court all that remains is what inference should be drawn from them and question of onus becomes academical: A.I.R. 1970 Cal. 38: (1969-70) 74 Cal.W.N. 168 (D.B.).

The principle that the burden to prove *benami* transaction lies on the person alleging it is not a rule of law; nature of transaction may also be presumed or inferred from proved or admitted facts: 1983 M.P.W.N. 120.

System of putting property *benami* being extremely common, even slight quantity of evidence to show that transaction was sham transaction will suffice for the purpose: A.I.R. 1970 Cal. 38: (1969-70) 74 Cal.W.N. 168 (D.B.).

The onus in a *benami* case is important only in the earlier stages; it may assume importance in the absence of evidence; but once evidence has been led, an abstract consideration of onus is out of place; the case has to be decided on the evidence adduced by the parties about the source of the consideration paid. [A.I.R. 1946 P.C. 59 and A.I.R. 1954 S.C. 526, Rel. on]: A.I.R. 1982 Cal. 251.

Burden of proof—Suit for pre-emption—Plea that pre-emptor is *benami*—Plea must be established by strictest evidence: A.I.R. 1966 Punj. 36 (F.B.).

Plea of *benami* referring to sham transaction—Onus—Want of consideration for transaction must be established by party pleading: A.I.R. 1970 Assam 75.

Motive, the source of consideration, possession of the property and its enjoyment, custody of title deeds, are various features, which may severally or cumulatively weigh and tilt the scale one way or other in the matter of determining the *benami* transaction. But these features are not exhaustive of the circumstances on which the final conclusion of the Court has to be based. Nor can it be said that in all cases the presence or absence of one or the other of these circumstances will be helpful in deciding the real position. At times other consideration than motive, possession and source of consideration may play a vital part in the determination. In certain circumstances only one or the other of the above specified elements may alone be of assistance. Motive for *benami* is not always conclusive. But when the purchase in the names of one or other or some of the members of the family is consistent with an intention to make the acquisition, for the family and there is nothing unusual in such acquisition, certainly, the Court may give some weight to the absence of motive and absence of an acceptable explanation for taking the sale deeds by the father in the names of his sons. Even as the absence of a motive need not necessarily exclude the theory of *benami*, the fact that some motive is shown will equally not bar the rejection of the plea of *benami*.

As regards consideration it is not whose hand that physically passed the consideration that is material; it is the source of the money that is important. The source of consideration is only one of the tests and it cannot conclude the matter.

The onus initially lies on the person who pleads that the transaction is *benami*: (1968) 81 Mad.L.W. 561: A.I.R. 1969 Mad. 252.

Possession-title—*Benami*: 1965 B.L.J.R. 119.

Onus to prove that person in whose name property stands in settlement and other records is not real owner but is benamidar lies on party who contends so: 34 Cut.L.T. 758: A.I.R. 1968 Ori. 183.

Transaction in name of wife—No presumption in Hindu law that it is husband's transaction—Onus of proving *benami* is on person asserting it: A.I.R. 1964 Pat. 543.

Onus of proving that transaction is *benami* is on party that sets up such a case—*Benami* transactions between husband and wife—Slight proof is sufficient to discharge onus: A.I.R. 1961 J.&K. 66.

In order to prove the *benami* nature of the transaction in favour of the wife, following evidence can be given, (*i*) that the husband paid the consideration, (*ii*) that he had the custody of the sale deed, (*iii*) that he was in possession of the property, and (*iv*) the motive for the transaction: A.I.R. 1980 S.C. 1040. *See* also A.I.R. 1932 P.C. 13.

There is no presumption that when a property stands in the name of a female, the Court will immediately jump to the conclusion without any proof that it really belongs to the husband of the female. Before such a presumption is raised or attracted it is necessary for the person who wants to make out that the property is not the property of the female, in whose name the document stands, to establish the fact that the consideration money for the purchase had come from the husband. The ordinary rule that the onus is on the person to prove that the property belonged to somebody other than the person in whose name the title deed stands is not shifted if the property stands in the name of a married woman: (1955-56) 60 Cal.W.N. 886; A.I.R. 1948 Mad. 349 (D.B.); A.I.R. 1932 Cal. 829.

Where the property was purchased in the name of the wife when the wife, an income-

tax assessee, had her own funds in her individual bank account as well as in the bank account held jointly with her husband, but the consideration money was found to flow from the husband's account, *held*, the purchase was clearly *benami* and for the benefit of the husband; their conduct, the other factor, also indicated that the transaction was indeed *benami*: 1984 Raj.L.W. 321.

Where a person makes a purchase in the name of his wife or unmarried daughter, a statutory presumption arises under S. 3(2) of the Benami Transactions (Prohibition) Act, 1988 that such a transaction has been entered into for their benefit. However, the presumption is only a rebuttable one: (1990-1) 38 B.L.J.R. 601.

Apparent things should be taken as real until the contrary is proved. Thus, though doubtless, as the plaintiff in the suit brought to recover the commission by an insurance agent, the primary duty of proving his case rests on him, yet where the admitted position is that the plaintiff was shown as the agent in respect of the business, the burden shifts on defendant, the chief agent, who claims that very business as his own, to show that the plaintiff was merely a name-lender: I.L.R. (1953) Cut. 630: A.I.R. 1954 Ori. 44.

Where the findings about the transaction being *benami* is arrived at due to wrong placing of onus, *held*, it is a mixed question of law and facts; a second appeal against a judgment based on wrong placement of burden is competent: A.I.R. 1975 Cal. 211: (1974-75) 79 Cal.W.N. 282 (D.B.).

In all cases where the real owner comes before Court alleging that the property stands in the name of the ostensible owner and thereby projects the theory of *benami*, it is fundamental that it is for that person to establish beyond doubt that he had requisite money with him for purchase of specified property. It is only in a case where there is *prima facie* evidence let in by the person challenging the title to the property in another, who claimed title to the property in himself and proving his capacity to purchase such property, at or about the time when the purchase was made, the onus would shift to the other side. Until then, the title, as it stands, would survive and has to be upheld: A.I.R. 1975 Mad. 95: (1975) 1 M.L.J. 47: (1974) 87 Mad.L.W. 111 (D.B.).

Where a transfer of property is asserted to be *benami* and not for the benefit of the ostensible purchaser, the initial burden to prove it would rest on the party who would fail if no evidence was led on the point; after evidence is recorded to give proof of *benami*, the burden would shift to the other party to rebut that evidence. The burden of proof is not static; it does shift during the course of evidence. [(1968) 70 Punj.L.R. (Del.) 71, Reversed]: A.I.R. 1977 S.C. 409: (1977) 1 S.C.C. 60: (1977) 1 S.C.R. 967: (1977) 90 Mad.L.W. (S.N.) 111.

Registered partnership whether *benami* or sham—Onus: (1957) 1 M.L.J. 365: A.I.R. 1957 Mad. 488. Sale deed—Plea that document was intended to be mortgage—Onus. *See* A.I.R. 1960 Manipur 11.

The onus of proof that the transaction in suit was a *benami* transaction was on the defendant when it was his case that the sale deed was taken *benami* in the name of the plaintiff by him with a view to prevent any trouble from the Income-tax Department: (1959) 61 Bom.L.R. 103: I.L.R. (1959) Bom. 680.

Burden of proving that a particular sale is *benami* and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser of transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs: A.I.R. 1974 S.C. 171: (1974) 1 S.C.C. 3; A.I.R. 1977 S.C. 796: (1977) 1 S.C.C. 816: 1977 Cr.L.J. 566.

Burden of proof in the matter of assignment of copyright—Burden of proving that transaction is *benami* is on person alleging it: A.I.R. 1970 Madh. Pra. 261: 1970 M.P.L.J. 475 (D.B.).

Where a property was purchased in certificate proceedings by the brother-in-law of the certificate debtor and there was no evidence to show that the consideration passed was provided by the certificate debtor, *held*, merely because the certificate purchaser did not belong to the area and had no other property in the vicinity is no reason to shift the burden on the certificate purchaser to prove that the purchase was not *benami*; the burden to prove the *benami* nature would continue to

lie on the party asserting it to be *benami*; merely because evidence had been led by both the parties, the question of the burden would not lose its importance: A.I.R. 1982 Ori. 131 (D.B.).

Where in a suit brought by the plaintiffs for a declaration that a certain quantity of mustard seeds pledged by the defendants to a bank are the properties of a firm of which the plaintiffs are the partners and that in the surplus sale proceeds of the said mustard seeds they have a right of property as such partners, if it is found as a fact that the railway receipts in respect of the disputed seeds stood in the name of the firm as the consignee, then the plaintiffs start with an initial presumption in favour of their case that the said seeds belonged to the firm. In law the railway receipts are documents of title. It may be that the named consignee was the benamidar for some other person but then the onus would be on the said other person to prove the *benami* and, in that connection, the source of the purchase money would certainly be very relevant and may even be a settlor, but in any case, the onus would be not on the named consignee to prove that he paid the purchase-money but on the other side to show the contrary: 1959 Cal.L.J. 1.

Where certain property was purchased in the name of female member of a joint Hindu family but it was alleged by the other members of the joint family that the property was joint family property as it was purchased *benami* by the manager of the joint family in the name of the female with the funds of the joint family and the female member had proved that she had taken the sale from the vendor and the question was about the burden of proof of the *benami* transaction, *held*, that the initial burden of proving title as emanating from the sale deed which lay on the female member had been discharged and it was then for the persons challenging the sale as *benami* to prove that the sale was *benami*: 1961 Nag.L.J. (Notes) 5; A.I.R. 1985 N.O.C. 244: 1985 Pat.L.J.R. 480.

Where shortly after the preliminary mortgage decree was drawn, the judgment-debtor sold the house worth Rs. 15,000 for Rs. 1,000 to his brother, not a man of affluence but having only meagre income not sufficient even to repair the house, *held*, the transfer was apparently for the purpose of defeating or delaying satisfaction of the final decree that might be passed against the vendor; as found by the Court below, it was highly suspicious; solemnity of the transaction lost much of its importance; a slight evidence challenging the genuineness of the transaction shifts the onus on to the vendee that the transaction was not *benami*; it is, thereafter, no longer necessary for the party challenging its genuineness to prove that it was *benami*: A.I.R. 1975 Cal. 211: (1974-75) 79 Cal.W.N. 282 (D.B.).

From the mere fact that settlement khatian stands in the name of married woman, it cannot be presumed that the property has been purchased from out of the joint family funds, especially so in the absence of any evidence that the property belonged to her husband or to the joint family: 32 Cut.L.T. 782.

Benami auction-purchase in contravention of Rule—Burden of proof—Person making allegation of *benami* must prove it—No allegation or proof that some persons other than auction-purchaser has been managing shops and selling liquor in contravention of S. 15—Confirmation of highest bid of purchase without any objection—Purchase held not *benami* or illegal merely because he obtained necessary funds from some financiers: A.I.R. 1969 S.C. 655.

Where in a suit to recover business dues, the plaintiff claims that the accounts in his books in the name of defendant 2 were only as nominee of defendant 1, the burden of proving such claim is on the plaintiff. But if he is unable to prove it by direct evidence, it does not follow that he is to be non-suited. Even if the plaintiff's claim is taken as *benami*, such a result does not ensue. Though the source of money is a very important test in deciding a question of *benami*, it does not follow that unless the source is established there can never be a finding of *benami* however good and numerous the other facts and circumstances there may be indicating such a finding. A *benami* transaction may be innocent or fraudulent and in the case of *benami* transaction with an object, it is not possible to expect direct evidence of *benami*. The whole object of such a transaction is to suppress the evidence of real facts which can be proved by circumstantial evidence. Thus, the plaintiff cannot be non-suited merely because of his such inability: 1967 Ker.L.J. 237.

Money decree against *A* personally and against assets of *A* in hands of *A's* wife, *B*—Attachment in execution—Objection by *B* that attached property was her stridhan—Allegation of *benami* by decree-holder—Objection falls under S. 47 and not under O. 21, R. 58—Burden of proving *benami* lies on decree-holder: I.L.R. (1961) Cut. 617: A.I.R. 1962 Ori. 69.

Where in a suit for partition and rendition of accounts, the defendant alleged that the plaintiff was only a *benamidar* of one-half share in the disputed property and defendant was the real owner, *held*, onus heavily lies on the defendant to prove such allegation: A.I.R. 1978 Del. 276.

Where the plaintiff sued her resident paramour, living as husband and wife without marriage, for a declaration that the sale deed was obtained from her by fraud or in the alternative he was a mere *benamidar*, *held*, the plaintiff having taken the plea (alternative) of *benami* had first to discharge her burden by proving her case to a certain extent and it was only thereafter, that it would shift on her "husband" to prove that the sale was not *benami* but he was the real beneficial owner: A.I.R. 1990 Mad. 46: (1989-2) 104 Mad.L.W. 294 (D.B.).

28. Carrier.—(*See* Note 36, *infra*). Loss or damage of goods is not *prima facie* proof of negligence in a case governed by Ss. 74-A and 74-C of the Railways Act; the plaintiff has to produce necessary evidence to prove negligence or misconduct on the part of the Railways or its servants: A.I.R. 1959 Pat. 473; (1961) 3 Ori. J.D. 264; A.I.R. 1957 Pat. 147; A.I.R. 1917 P.C. 173.

29. Citizenship/domicile.—(*See* also S. 106, Note 19, *infra*). Citizenship at commencement of the Constitution—Arts. 5, 7, and 9 are to be read together—Person claiming to be a citizen of India at commencement of the Constitution—Burden lies still on him to show that requirements of Arts. 7 and 9 are fulfilled: (1963) 4 Guj.L.R. 1073: (1963) 2 Cr.L.J. 265: A.I.R. 1963 Guj. 226.

Citizenship—Loss of—Presumption and onus: (1963) 1 Cr.L.J. 724: A.I.R. 1963 All. 260.

Domicile—Change of—Burden of proof: A.I.R. 1966 S.C. 160; A.I.R. 1943 Lah. 260; A.I.R. 1956 Bom. 501; A.I.R. 1963 Raj. 11. Facts to be proved for establishing change of domicile. *See* A.I.R. 1924 Rang. 193.

30. Company matters.—Rival allegations impeaching authority of director—Person who alleges that he is director should give satisfactory proof: (1967-68) 72 Cal.W.N. 805: (1968) 1 Comp.L.J. 311: 39 Comp. Cas. 223.

Companies Act, 1913, S. 153-B—Scheme involving transfer of shares—Application by dissenting shareholder—Power of Court—Offer when to be considered fair and proper—Misrepresentation — Burden of proof: A.I.R. 1957 Mad. 225.

Genuineness—Resolution of company signed by its Chairman—*Held*, it was for the company to disprove that something properly recorded in resolution did not represent correct position: A.I.R. 1968 Del. 68.

Burden to show existence of sufficient cause lies on applicant. *See* Companies Act (1956), S. 155(1)(*a*): A.I.R. 1965 All. 135.

Onus of proving that certain amount was not available for deduction towards rehabilitation cost is on the company: A.I.R. 1968 S.C. 538.

Once the liquidator shows that there was a declaration of dividend amounting to misapplication of capital of company resulting in loss, the burden shifts on the director to show that the dividend thus declared had not actually been paid. This is so by reason of S. 45-H, Banking Companies Act according to which, on the liquidator making out a *prima facie* case, the burden shifts to the directors (in this case) to disprove liability: A.I.R. 1970 Ker. 131: 1969 Ker.L.J. 129 (D.B.).

Claim for depreciation by company—Dispute as to—Company must prove by legal evidence—Mere production of auditor's certificate not conclusive. *See* A.I.R. 1969 S.C. 612. *See* also A.I.R. 1962 Cal. 375.

Burden of proof that list of shareholders was forwarded to the Registrar in time, is on the company. *See* A.I.R. 1954 Hyd. 49.

31. Consideration.—(*See* also Notes 47 and 77, *infra*). Once the execution of a document by a debtor is proved by the creditor-plaintiff, the burden of proving want of consideration shifts on the debtor. The burden continues even on the legal representatives of the deceased debtor and it does not shift back on the creditor simply because the original debtor is no more alive: 1960 Raj.L.W. 461: I.L.R. (1960) 10 Raj. 394. *See* also 1971 M.P.L.J. 219.

Though as between parties the admission of proof of execution of a document would shift the onus on the party denying consideration, yet a person who is not a party to the document in question cannot be held liable on alleged receipts of payments unless there is evidence to prove that the money was actually paid: A.I.R. 1935 Lah. 14. But *see infra*. It is for the persons who plead want of consideration to prove it notwithstanding the fact that they are not parties to the original document and that the persons claiming it do not claim under executant: A.I.R. 1954 Andhra 17: 1955 An.W.R. 28.

Where it has been admitted or proved that an admission of passing of consideration has been made in the document, the burden of proving want of consideration rests on the person asserting the same: 104 I.C. 173: A.I.R. 1927 Lah. 823; A.I.R. 1926 Lah. 653. *See* also I.L.R. 12 Lah. 546: A.I.R. 1931 Lah. 419; A.I.R. 1963 Assam 41: I.L.R. (1963) 15 Assam 104 (D.B.).

But where the person alleging want of consideration was found to be a man of weak intellect and hard of hearing who played in the hands of the opposite party, *held*, the onus is mitigated and the Court might for its own satisfaction demand proof of consideration from opposite party: A.I.R. 1915 Oudh 151 (D.B.).

Execution of document either admitted or proved—Question of consideration—Onus is on executant to prove that consideration did not pass—Executant himself challenging payment of consideration—Onus is on executant to establish that he executed the document: I.L.R. (1966) Cut. 839: (1967) 33 Cut.L.T. 86: A.I.R. 1967 Ori. 89. *See* also A.I.R. 1963 Madh. Pra. 15: 1962 M.P.L.J. (Notes) 143: 1963 Jab.L.J. 113, cited under Note 5, *supra*.

Mere execution of a document does not prove that it was for consideration. If the document is a promissory note there is a statutory presumption that the amount mentioned in it is given for consideration; but when the document is a bond and its execution is proved the onus no doubt lies on the defendants to show that it was without consideration. Still, if they succeed in establishing a probability that the debt was not due or that consideration did not pass, the onus shifts to the plaintiff and he has to prove fully that consideration did pass: I.L.R. (1956) Hyd. 707: A.I.R. 1957 Hyd. 18. *Held*, that the burden lay on the defendant to substantiate his denial of the receipt of consideration in the face of the document itself, which in clear terms admitted his indebtedness to the plaintiff to the tune of Rs. 8,700: I.L.R. (1955) Nag. 151: A.I.R. 1955 Nag. 170; A.I.R. 1946 All. 493.

Where in a suit for recovery of a sum due on the promissory note, the party admits the execution, *held*, when once the execution of the instrument is admitted, the burden of proof of passing the consideration lies entirely on the shoulders of the promisors: A.I.R. 1987 Mad. 156: (1986) 2 M.L.J. 329. *See* also A.I.R. 1938 P.C. 123; A.I.R. 1982 Ori. 264.

Once the defendant shows either by direct or by circumstantial evidence or by use of other presumptions of law or fact that the promissory note is not supported by consideration in the manner stated in the promissory note or in the manner stated in the suit notice or in the pleading, the evidential burden shifts to the plaintiff and the legal burden of the plaintiff is revived, *i.e.*, to prove that the promissory note is supported by consideration and at that stage, the presumption of law covered by S. 118 of the Negotiable Instruments Act, 1881, "disappears" and no longer subsists. [A.I.R. 1949 Bom. 253; A.I.R. 1973 Ker. 210; A.I.R. 1935 All. 509; A.I.R. 1936 Nag. 130; A.I.R. 1936 Pat. 498 and (1911) 21 M.L.J. 1013, Dissent. from; A.I.R. 1973 Andh. Pra. 103, Overruled]: A.I.R. 1987 Andh. Pra. 139: (1987) 1 An.L.T. 1: (1987) 1 A.P.L.J. (H.C.) 241 (F.B.).

Debtors-major—Literate—Business men—Creditor—Not professional moneylender—Execution admitted—Onus to prove word of consideration lies on debtors: A.I.R. 1930 Lah. 65.

When in a sale deed there is an admission of a party admitting the receipt of consideration, *held*, it is for him to prove by cogent evidence that the statement contained in the document was false: A.I.R. 1971 All. 151. *See* also A.I.R. 1954 Pepsu 39: I.L.R. (1953) Patiala 351, cited under Note 6, *supra*.

Sale of house—Receipt of full consideration admitted by owner in sale deed—Plea of non-receipt of consideration—Burden is on the owner to explain the admission in the sale deed and prove non-receipt of consideration: 1969 M.P.W.R. 994: 1970 M.P.L.J. 50: 1970 Cr.L.J. 1176.

Where the scribe appearing as a witness had clearly deposed that consideration for the sale deed was paid by the vendee in his presence and in his house, and the vendee too had, though not in her examination-in-chief but in her cross-examination stated that she had paid the consideration, and there was nothing on record to disbelieve them, *held*, the onus clearly lay upon the defendant to show non-payment of consideration; his statement that no consideration passed but without disclosing the source of his knowledge could not rebut the plaintiff's evidence: A.I.R. 1986 Cal. 27.

Sale of land—Agreement containing fact of consideration having been received—Seller admitting execution of agreement but alleging partial failure of consideration—Onus: A.I.R. 1956 Him. Pra. 28.

Where a sale deed was sought to be cancelled by an illiterate, old rustic woman with weak eye-sight and entitled to special protection accorded to *pardanashin* ladies and there was no mention of any consideration having been passed to her before the Sub-Registrar and she was not cross-examined about having received moneys allegedly paid to her otherwise than before the Sub-Registrar, *held*, the finding about non-passing of consideration could not be assailed on the ground of wrong placement of burden; the burden of proof was rendered of no importance: A.I.R. 1981 All. 222.

Plaintiff basing title on sale deed—Defendant admitting sale deed but alleging absence of consideration—Onus: A.I.R. 1961 Ori. 19.

Burden of proof—Advances made by purchaser to vendor—Contract falling through on purchaser's default—Vendor has to prove damage suffered by him: A.I.R. 1970 Mad. 391.

Good faith and consideration—Onus. *See* A.I.R. 1958 Mys. 35.

Suit on bond—Consideration shown different than that stated in bond—Burden of proof: 1959 Raj.L.W. 295.

Where it is established that the consideration for the bond is different from that recited in the bond, the onus shifts on the plaintiff to prove affirmatively that the bond was executed by the defendant for the full consideration: 1939 M.L.R. 12(*c*); 1959 Raj.L.W. 295; (1900) 4 Cal.W.N. 82 (P.C.).

Where a mortgage deed contains an admission of receipt of consideration before the Sub-Registrar, the onus is upon the mortgagor to disprove this admission: 109 I.C. 149. *See* also 1939 M.L.R. 118; 1939 M.L.R. 86; A.I.R. 1926 Lah. 449 (D.B.); A.I.R. 1940 P.C. 114.

Where execution of a mortgage deed has been proved as required by law, an acknowledgment contained therein of receipt of consideration is evidence not only as against the mortgagor but also as against a purchaser from the mortgagor or an auction-purchaser at a sale held in execution of a money decree. And if such a purchaser pleads want of consideration then the burden lies on him to prove it: 1957 All.L.J. 475: 1957 All.W.R. (H.C.) 814.

Mortgagor admitting execution but pleading want of consideration—Burden of proof: I.L.R. (1963) 13 Raj. 866: A.I.R. 1964 Raj. 72. *See* also Note 76, *infra*.

Holder in due course—Endorsement of cheque—Presumption—Onus to prove contrary is on drawer: 1967 Ker.L.J. 237.

Even where the sale of property was to finance a litigation, no plea was specifically raised that the transaction was unfair or unconscionable but it was merely described as champertous, *held*, the burden of proving it, to be fair, would nevertheless lie on the party which relies upon the transaction; whether the transaction was fair or not is to be ascertained from the entirety of circumstance and not merely from the disparity in fair consideration and the consideration actually passed: A.I.R. 1955 All. 393 (D.B.).

32. Contracts.—(*See* also Note 89, *infra*). The principle that the onus of proving that reasonably sufficient steps have been taken to bring home the conditions on the ticket to the passenger is on the authority issuing the ticket, applies only where the contract is unsigned, *e.g.*, a passenger ticket. Where a person signs a contract he is bound by the conditions contained in it whether he reads them or not: I.L.R. (1951) 1 Cal. 420. *See* also A.I.R. 1927 Lah. 481 (D.B.).

Vendor and purchaser—Agreement to sell property—Party to agreement claiming specific performance of agreement—Party must prove that he was always ready with funds and willing to take sale deed: 1953 Ker.L.T. 397: I.L.R. (1953) Trav.-Co. 1011: A.I.R. 1953 Trav.-Co. 377 (F.B.).

Burden of proof—Suit for specific performance of contract for sale. *See* A.I.R. 1957 Pat. 233.

In a suit for specific performance of a contract, *held*, the fact of his being ready and willing to perform his part of the contract, being within the special knowledge of the plaintiff, he must plead and prove them, and though the non-denial of the plea by the defendant may be taken into consideration in appraising the evidence but that does not absolve the plaintiff from adducing evidence of his being so ready and willing: (1993-1) 111 Mad.L.W. 219 (D.B.).

Suit for specific performance of contract—Want of notice—Burden initially lies on subsequent purchaser—Burden is light and mere denial is sufficient to discharge burden—Both parties giving evidence—Question is one of appreciation of evidence—Husband of subsequent purchaser deposing about wife's want of knowledge about agreement—This portion not challenged in cross-examination—Initial burden, *held*, discharged—Importance to her avoidance of witness box not attached: 1968 B.L.J.R. 28.

Contract—Impossibility of performance —Burden of proof. *See* A.I.R. 1957 Madh. Bh. 53.

Specific performance of agreement—Suit for—Defendant alleging abandonment of contract by plaintiff—Burden of proving abandonment is on defendant: (1965) 1 Mys.L.J. 442: A.I.R. 1966 Mys. 154.

Agreement to sell immovable property—Subsequent registered sale—Right of first vendee to specific performance—Onus: 61 I.A. 115: I.L.R. 13 Pat. 242: (1933-34) 38 Cal.W.N. 393: A.I.R. 1934 P.C. 68: 66 M.L.J. 255 (P.C.).

Mention of partition of property in document of sale—Vendor under document is estopped to deny partition: I.L.R. (1963) Cut. 657.

Recitals in the sale deed about existence of the necessity are admissible in evidence; but they are not evidence by themselves of its existence; there must be some evidence *aliunde*. [A.I.R. 1971 S.C. 1028, Rel. on]: A.I.R. 1972 Gau. 107 (D.B.).

Where the fact that the goods had been sent to the defendant-firm by the plaintiff and had been received by the former was admitted, *held*, it was sufficient to raise a presumption, till the contrary was proved, that an order had been placed for the supply of the goods with the plaintiff by the defendant. Thus, the plaintiff could bank upon the said fact for the purpose of discharging the initial onus which lay on him to prove privity of contract between the parties: A.I.R. 1981 S.C. 977: 1980 (Supp.) S.C.C. 1.

Where in a suit for recovery on an agreement of sale, the Court found several discrepancies in the evidence and account books and several erasures and over-writings in the purchase register produced by the defendant but not connected with suit transaction, *held*, the suit could not be decreed on such suspicious circumstances; the plaintiff must discharge the primary burden of proving his case: A.I.R. 1978 N.O.C. 280 (Cal.).

The burden to prove that the suit contract is wagering contract lies heavily on the party who raises the plea: A.I.R. 1959 Raj. 27: I.L.R. (1958) 8 Raj. 1162.

Wagering contract: I.L.R. (1960) 10 Raj. 1304: A.I.R. 1961 Raj. 52.

Wagering contract—Gali and Nazrana transactions—Burden of proof. *See* A.I.R. 1957 Madh. Pra. 194.

The burden to prove the condition in a conditional contract, *held*, lies on the party which relies upon the contract: A.I.R. 1978 N.O.C. 309: 45 Cut.L.T. 597: (1978) 1 Cut.W.R. 264.

Terms and conditions printed on the reverse of a receipt issued by the owner of the laundry or any other bailee do not necessarily form part of the contract of bailment in absence of the signature of the bailor on the document relied upon. In absence of signature of the bailor on the document relied upon, the onus is on the bailee to prove that the attention of the bailor was drawn by the bailee to the alleged special conditions before the contract was concluded and the bailor had consented thereto expressly or by necessary implication as a contractual term: A.I.R. 1995 Bom. 68.

Party alleging that a contract is conditional must prove the condition—Debtor paying debt to a person other than creditor—Onus is on debtor to prove that the person was authorised by creditor to receive payment: I.L.R. 49 Mad. 436: 53 I.A. 84: 51 M.L.J. 570 (P.C.).

Person introduced as partner—Liability for obligations incurred before introduction—Determination of agreement between partners—Proof of novation by creditor: A.I.R. 1957 Mad. 8.

Lost grant—Burden of proof: A.I.R. 1958 Pat. 571.

Burden of proving that a contract is outcome of undue influence. *See* (1978) 2 M.P.W.N. 256. *See* also Note 105, *infra*.

Burden of proving substituted contract. *See* A.I.R. 1917 P.C. 214.

Contract—Suit on—Burden of proving that suit contract was illegal as being prohibited by law lies heavily on defendant who takes that defence—But it is certainly for plaintiff to plead and prove an exemption which would take out contract from the operation of Control Orders: 1963 Jab.L.J. 218: 1963 M.P.L.J. 325: A.I.R. 1963 Madh. Pra. 323.

Where the defendant pleaded that the contract under which the claim was made by the plaintiff was hit by S. 23 of the Contract Act as a contract forbidden by law, in so far as no licence had been taken for the business carried on under the agreement, *held*, the burden was on the defendant to prove very satisfactorily that the said agreement was forbidden by law, and the business carried on under the agreement required a licence under a valid law. [A.I.R. 1963 Mad. 413; A.I.R. 1950 Mad. 444 (F.B.); A.I.R. 1955 Mad. 536; A.I.R. 1957 Mad. 186 and A.I.R. 1962 Mad. 240 (F.B.), Dissent. from]: A.I.R. 1985 Ker. 199: 1985 Ker.L.T. 207.

Agreement challenged as being a restraint on trade—Onus of showing that restrictions were reasonably necessary to his interest is on the party supporting the contract: A.I.R. 1967 S.C. 1098; A.I.R. 1934 P.C. 101.

Agreement putting an unreasonable restraint on trade is illegal and void, as being contrary to public policy but it must be shown that it is manifestly injurious to public welfare—Covenants of contract have to be studied with a view to determine whether primary object of parties is in sale or in restrictive covenant or whether case is one of restrictive covenant in sale, and whether restriction is reasonable—If Court is satisfied that restraint is reasonably necessary to protect interest of merchant and was not inimical to interests of public, then it will treat that contract as valid—To apply principle of public policy to each and every contract is dangerous—Condition at auction among members of Senayar community to sell their betel leaves only to highest bidder at auction and to none else, *held*, valid: (1966) 79 Mad.L.W. 676.

Burden of proof—Part-performance—Claim of by tenant in possession—Purchaser claiming advantage of S. 53-A, proviso, T.P. Act, 1882—Burden of proving that he had no notice of "contract to transfer" lies on him and not on tenant: 1965 B.L.J.R. 213: A.I.R. 1965 Pat. 467.

"Mistake" under S. 72 of the Contract Act enfolds mistakes of law and fact and confers right to refund even a tax mistakenly paid; however, if the plaintiff pleads discovery of mistake on a particular date, the initial burden would lie on him to lead evidence, *prima facie* at any rate, to establish the date of such mistake; it is only in extraordinary cases where the plaintiff's plea is emphatic and the defendant's denial is evasive that the Court in its discretion might dispense with further proof of such knowledge or date of discovery: A.I.R. 1976 Mad. 323: (1976) 89 Mad.L.W. 426: (1976) 2 M.L.J. 214 (D.B.).

Assignment of option under contract—Contract of sale of property containing option to repurchase reserved to vendor—Option is assignable in absence of contract to contrary—Burden of proving contrary is on him who pleads it: A.I.R. 1965 Mad. 506.

Stipulation as to time of shipment—Onus of proof: A.I.R. 1968 Guj. 57.

When in a suit for specific performance of an agreement to sell a share in managing agency, it is alleged that the agreement was void on the ground of its being against public policy because the share was offered as a bribe, the burden is on them who allege, to establish the plea: 1959 M.P.C. 143: A.I.R. 1959 Madh. Pra. 151 (F.B.).

33. Corruption.—If the prosecution proves the acceptance of the amount by the accused and the amount does not represent legal remuneration in any form or of any kind, the accused must establish that the amount was not accepted by him as a motive or reward such as is mentioned in S. 161, Penal Code. Further, the accused can establish his case by preponderance of probabilities, that is to say, he need not prove his case beyond a reasonable doubt: A.I.R. 1974 S.C.

773: 1974 Cr.L.J. 509. *See* also A.I.R. 1966 S.C. 1762; A.I.R. 1966 S.C. 97.

Though in corruption cases, the burden of accounting for the assets disproportionate to his income does shift to the accused and he is required to lead evidence and produce material to satisfy the Court but even in such cases the presumption of innocence does not disappear nor does the basic principle of criminal law that if a plausible explanation is put forward by the accused which fits in with the facts and circumstances of the cases that the Court is duty bound to accept that explanation: 1993 Cr.L.J. 2051 (Bom.).

The degree and character of proof which the accused is required to adduce for rebutting the presumption under S. 4(1) of the Prevention of Corruption Act, 1947, cannot be equated with the burden resting on the prosecution to prove its case beyond reasonable doubt; a mere plausibility of his explanation under S. 342 of the (old) Code of Criminal Procedure may not be enough but the presumption may be discharged if the material on record renders the fact presumed to be improbable; the accused may do so by mere preponderance of probability in his favour and not by evidence beyond reasonable doubt; besides if the story set up by the prosecution is inconsistent with the fact presumed, the presumption would be rendered sterile *ab initio* if not rejected, out of judicial courtesy, as still-born: A.I.R. 1977 S.C. 666: 1977 Cr.L.J. 254: (1975) 4 S.C.C. 761; (1987) 1 Rec.Cr.R. 385 (Del.).

Prevention of Corruption Act, 1947, S. 4—Nature of presumption under section—Benefit of presumption when arises: A.I.R. 1957 Raj. 138.

When there was sufficient evidence to indicate acceptance of bribe by the accused, *held*, statutory presumption under S. 4(1), Prevention of Corruption Act, 1947, was attracted and burden that he did not receive amount as bribe shifted to him: (1984) 25 Del.L.T. 134: I.L.R. (1984) 1 Del. 640. *See* also 1984 Cr.L.J. (N.O.C.) 93 (Raj.); (1982) 23 Guj.L.R. 689: 1982 Cr.L.J. 1883: (1982) 2 Guj.L.H. 472.

Prevention of Corruption Act, S. 4—General burden to prove ingredients of offence under S. 161, Penal Code does not lie on prosecution—Creating reasonable doubt in mind of Court not sufficient—It is enough for accused to prove preponderance of probability: 1968 Cr.L.J. 150: A.I.R. 1968 Guj. 17. *See* also A.I.R. 1964 S.C. 575 [It must be shown that the explanation offered by the accused is true].

Accused shown to have accepted money as gratification other than legal remuneration—Presumption under S. 4(1) that amount was received as motive or reward such as is maintained in S. 161 of Penal Code must arise and burden will be on accused to rebut that presumption—Rebuttal must be by explanation supported by proof within meaning of S. 3 and not merely by putting forth reasonable and probable story: 1967 Cr.L.J. 21: A.I.R. 1967 Bom. 1.

Enquiry into integrity of public servant—Defence that assets were increased on account of gifts from father or mother—Onus to prove: A.I.R. 1964 Cal. 415.

The burden to prove requisite to raise a presumption under S. 5(3) of the Prevention of Corruption Act, 1947, lies on the prosecution, that the money standing in the name of his wife in a Bank is a *benami* asset of the accused: A.I.R. 1977 S.C. 796: (1977) 1 S.C.C. 816: 1977 Cr.L.J. 566.

Once the requisite proof to convict a public servant for having committed criminal misconduct under S. 5(2) read with S. 5(1)(*e*) of the Prevention of Corruption Act, 1947 has been placed on the record, *held*, the burden to account for the disproportionate assets possessed by him shifts on to the accused; however, he need not prove it beyond reasonable doubt; he has only to establish his defence by preponderance of probabilities: A.I.R. 1981 S.C. 1186: 1981 Cr.L.J. 884: (1981) 3 S.C.C. 199. *See* also A.I.R. 1970 S.C. 1514.

In a criminal trial under the Prevention of Corruption Act, *held*, the burden lies on the prosecution to examine all material witnesses and original documents and not conclusions of witnesses to questionnaires relating to documents seen by them but not produced in the Court: 1983 Raj.L.W. 226.

Criminal trial—Bribery case—Burden of proof—Benefit of doubt—Factors inconsistent with theory set up by defence do not necessarily exclude probability of defence version being true—If the circumstances show a reasonable probability of the version of the accused being true there is no option but to acquit the accused: 1961 Jab.L.J. 160: (1961) 1 Cr.L.J. 670.

Accused Sarpanch of Gram Panchayat receiving money—Onus of accused having paid money to Ward Member is on accused: (1965) 31 Cut.L.T. 523.

34. Cruelty.—In proceedings under the Hindu Marriage Act, 1955, the burden to prove the charge of cruelty lies on the petitioner, and not on the party denying it: A.I.R. 1975 S.C. 1534: (1975) 2 S.C.C. 326; (1986) 2 D.M.C. 301; (1987) 1 Hindu L.R. 69 (P.&H.); A.I.R. 1989 Del. 121: (1988) 2 Hindu L.R. 682 (D.B.).

The burden to prove cruelty lies on the person alleging it; no rule of law says that the husband's uncorroborated testimony as a solitary witness is not to be accepted and cannot discharge the burden if his testimony otherwise inspires confidence; though his evidence regarding non-access is to be considered with certain amount of caution but all the same it is admissible and can well be acted upon. Thus, where the husband had pledged his oath to say that the wife had completely denied to him access and would become violent when asked to share the bed with him, *held*, his testimony even if uncorroborated was sufficient to hold the wife guilty of cruelty; husband was granted decree for judicial separation: A.I.R. 1989 Madh. Pra. 326: 1989 Jab.L.J. 573: 1989 M.P.L.J. 571 (S.B.).

Where plaintiff wife pleaded that she was ill-treated and driven out of the house by the defendant husband and the defendant contended that the plaintiff left the house with valuables of his house but he did not produce any evidence supporting said contention, *held*, it was futile to expect the plaintiff to prove her story by independent evidence that she was severely assaulted and was driven out of the house to which the only witness would be the members of the family of the defendants and further it could not be believed that she took away valuables with her while leaving the house: A.I.R. 1987 Ori. 134 (D.B.).

One must prove ill-treatment complained of and secondly result and danger or apprehension thereof: (1966) 1 An.W.R. 346: A.I.R. 1966 Andh. Pra. 289.

Petition for judicial separation on ground of cruelty—Onus lies heavily upon suing spouse to prove his or her case—Proof required in such case is one required in criminal prosecution: (1968-69) 73 Cal.W.N. 143.

35. Custom.—(*See* also S. 106, Note 7, *infra*). The onus to prove the existence of custom is on the person who alleges such a custom: A.I.R. 1959 J. & K. 28; A.I.R. 1946 P.C. 129; A.I.R. 1954 Pepsu 28; A.I.R. 1957 J.&K. 3; A.I.R. 1957 Manipur 25; A.I.R. 1957 Pat. 70; (1957) 59 Punj.L.R. 609; A.I.R. 1958 S.C. 199; A.I.R. 1958 Ori. 160; A.I.R. 1960 Madh. Pra. 46.

Custom—Onus of proof—Community custom: A.I.R. 1960 Cal. 494.

When it is established that the parties of non-Hindu origin have been Hinduised, *prima facie* they are governed by the rules of Hindu law and the burden of proving that the old custom of that community still exists is upon the party who sets it up: A.I.R. 1971 Pat. 185: 1970 Pat.L.J.R. 573 (D.B.).

Custom—Onus of proof is on the party relying upon it: (1967) 33 Cut.L.T. 1077; A.I.R. 1992 Gau. 66: (1992) 1 Gau.L.R. 299 (D.B.).

Party asserting to be governed by a custom in derogation of personal or statutory law has to prove it: A.I.R. 1937 Lah. 449; A.I.R. 1956 S.C. 548; A.I.R. 1951 S.C. 210; A.I.R. 1943 P.C. 111; A.I.R. 1919 Lah. 145 (F.B.); A.I.R. 1917 P.C. 181.

It must be established that the practice which developed into a customary usage in derogation of the personal law of the parties, must be proved to have been exercised not merely by virtue of an agreement between the parties but as of right. The evidence must show that a claim was made by any of the heirs but such was the force of the usage and the custom that the claim was denied and the custom prevailed: A.I.R. 1973 J.&K. 28 (D.B.).

It is well established that a custom must be specifically pleaded and proved, and a custom not pleaded cannot be proved. Thus, where the plea was that the Kanikkara tribe was governed by Marumakkathayam law and no family custom was set up when there was no uniform customary law of inheritance governing that tribe, *held*, the family custom could not be proved; the property will thus devolve, under the general law, upon the deceased's son. [1965 Ker.L.T. 1214, Reversed]: A.I.R. 1971 S.C. 1398: 1971 Ker.L.T. 458.

The party claiming office of a Mahant on the strength of any usage must establish it affirmatively: A.I.R. 1965 S.C. 1506.

The burden to prove the custom that succession to Mahantship devolves from Guru to Chela on the basis of seniority lies on the party which propounds it: A.I.R. 1972 S.C. 814.

Where allegations about a custom governing succession to the *mahantship* of a *dharmashala* made in two paras of the plaint were denied in the corresponding paras of the written statement, *held*, it constituted a sufficient denial. The Department was neither required to plead a different custom nor to adduce or prove a different custom. It was for the plaintiff to prove the custom pleaded by cogent and reliable evidence. [A.I.R. 1964 S.C. 538; A.I.R. 1966 S.C. 1361, Disting.]: A.I.R. 1977 S.C. 2002: 1977 U.J. (S.C.) 555: (1977) 4 S.C.C. 65.

Custom—Antiquity of custom—Proof: A.I.R. 1968 Tripura 11.

Customary right—Right of way—Burden of proof: A.I.R. 1967 Mad. 164.

Custom—Entry in mutation papers does not conclusively prove the nature of a holding—Customary right claimed must be proved as having become part of the law of the locality—Custom should also be reasonable: (1967) 33 Cut.L.T. 1077.

Custom—Succession—Malayala Kammalans in Travancore area—Married daughter's right to share—Burden of proof: 1957 Ker.L.T. 1020.

Religious endowment—Worship—Ritual of—Since A.I.R. 1947 P.C. 53, Rituals in Govindaraja-swamy's temple are being conducted in Tengalai form while in Vedanta Desikar's temple, in Vadagalai form—Claim for use of Vadagalai ritual at time of Mangalasanam of Vedanta Desikar in Govindaraja-swamy's temple to the exclusion of Tengalai ritual—*Held*, onus of proving that claim was supported by custom was on claimant and that same must be proved by clear and cogent evidence—Claimant had failed to establish his claim: (1967) 1 An. L.T. 406.

Where plea of plaintiff regarding acquisition of a customary right is refuted, *held*, the burden is on the plaintiff to establish acquisition of such a customary right, as pleaded: (1976) 42 Cut.L.T. 488: (1976) 1 Cut.W.R. 503.

Rajputs in Bilaspur district—Near collaterals exclude daughters in succession—Burden of proving custom is on collaterals—Instances in other caste—Admissibility: A.I.R. 1966 Him. Pra. 22.

Non-ancestral property—Succession to, among the Sidhu Jats of Muktsar Tehsil, Ferozepore District—Exclusion of—General custom—Onus of proof: A.I.R. 1968 S.C. 806.

Custom regarding adoption. *See* Note 19, *supra*.

36. Damages.—(*See* also S. 106, Note 9, *infra*). In a suit for damages it is for the plaintiff to adduce reliable evidence to show what damage he has suffered: I.L.R. 35 Pat. 967: A.I.R. 1957 Pat. 350.

Pecuniary loss to defendant—Calculation—Factors to be considered: A.I.R. 1962 S.C. 1: (1962) 1 M.L.J. (S.C.) 105.

Loss—Proof—Loss of a thing can never be proved absolutely: (1963-64) 68 Cal.W.N. 786: 1963 Cal.L.J. 75.

It is well settled that where in a contract of sale, an advance payment was not made by way of earnest money but merely as part payment of consideration and the transaction fell through even if the breach of contract was made by the purchaser, *held*, the seller has to refund it to the purchaser; if the purchaser contends loss or claims damages for breach, the burden lies on him to plead and prove it: A.I.R. 1980 All. 253 (D.B.).

Sale of goods—Breach of contract—Damages—Contract for purchase of car at fixed retail price—Breach—Damages—Burden of proof: (1957) 1 All E.R. 809.

Burden of proof—Conversion of goods—Essentials necessary to be established by plaintiff: A.I.R. 1957 S.C. 357.

There was imposed an obligation upon the treasury staff to honour the District Board's cheques. To that end they were bound to know the signature of the Chairman of the Board. If in any way a member of the treasury staff was deceived without any fault on the part of the District Board, the Board could not be made to suffer the loss caused by an amount having been paid without authority. In circumstances of this nature where the issue was confined to negligence—though good faith was not challenged—the onus of proving absence of negligence was cast upon the treasury. In the absence of such proof the various amounts must be held to have been paid upon the forged cheques by reason of negligence on

the part of the treasury staff: I.L.R. (1954) Pat. 563: A.I.R. 1954 Pat. 529.

Responsibility of carrier as bailee—Negligence—Onus of proof. *See* A.I.R. 1957 Cal. 573.

Under Ss. 8 and 9 of the Carriers Act, 1865 which deal with the liability of the common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, the burden of proof that there was no criminal act or negligence on the part of the carrier or its agents or servants is upon the carrier: A.I.R. 1989 Pat. 303.

When a plaintiff discharges the initial burden of proving the "wilful misconduct", the burden shifts on the defendant-Air India, in view of Rr. 22(2) and 25 of Schedule I to the Carriage by Air Act: (1987) 1 Kam.L.J. (S.N.) 141: I.L.R. (1985) Kam. 3983.

The owner of a country craft sued the hirer for compensation for the loss of the craft alleging the same was caused by the negligence of the hirer C. The suit was dismissed by the trial and appellate Courts. On revision, *held*, the burden of proof lies on the bailee to show that such care as a man of ordinary prudence would have exercised was duly exercised by him when negligence is alleged against him. The standard of care required of the bailee in the case of bailment of goods left with the bailee to be used by him on hire (*'locatio rei'*) is that of an average prudent man in respect of his own goods of the same kind and value. Though the onus of proving negligence on the part of the defendant is on the plaintiff, where a thing is solely under the management and control of the defendant or and his servants and the accident is such, that in the ordinary course of events it does not happen to those in management using proper care, the accident itself is *prima facie* evidence of negligence: A.I.R. 1962 Kutch 50.

The burden of proof in an action for damages for collision of vessels in back-waters and canals, usually rests first on the plaintiff even if the defendant has committed a breach of the regulation or even if he alleges inevitable accident or admits that he is partly in fault. Where the evidence on both sides is nicely balanced and conflicting, the Court will be guided by the probabilities of the cases set up, and the reasonable way is to analyse the facts so to ascertain what the principal subject of inquiry on which the case hinges and endeavour to arrive at a satisfactory conclusion as to the testimony upon that. The plaintiff cannot, however, succeed, if the case is left in doubt; it is for him to give preponderating evidence. The plaintiff may by proving certain circumstance, shift the burden on to the defendant. The defendant is generally bound to prove such facts as are peculiarly or exclusively within his knowledge: A.I.R. 1952 Trav.-Co. 143.

Tort—Negligence—Collision—Damage to launch waiting for repairs in dock—Suit for damages—Pre-collision value of launch—Onus to prove—Factors to be considered—Opinion of the expert—When accepted: A.I.R. 1967 Cal. 191.

In an action against the ship owners for short delivery, the burden rests squarely on the plaintiff-shippers to place acceptable and convincing evidence of the actual weight of the goods shipped: A.I.R. 1987 Mad. 12: (1986) 99 Mad.L.W. 366: (1986) 2 M.L.J. 45. *See* also Note 16, *supra*.

Board taking charge of goods under Ss. 39 and 40, Madras Port Trust Act (II of 1905)—Its responsibility is that of a bailee under Ss. 151, 152 and 161, Contract Act—Damage to goods, *prima facie* evidence of bailee's negligence—Bailee to disprove it: A.I.R. 1970 Mad. 48: (1968) 2 M.L.J. 497: (1968) 81 Mad.L.W. 594 (D.B.).

Carrier—Carriage by railway—Suit for damages—Onus of proof: A.I.R. 1969 Andh. Pra. 386.

S. 73 of the Railways Act, 1890 provides statutory immunity to the Railways from damages arising out of causes stated therein subject to its proviso which makes it incumbent on the Railways to plead and prove that the damage was caused despite use of reasonable foresight and care; the burden therefor clearly lies on the Railways: A.I.R. 1979 Ori. 165 (D.B.).

Defective packing—Liability of Railways—In absence of proof that Railways had no notice of defective packing, Railways is liable for damage: I.L.R. (1957) 45 Pat. 607.

Goods sent at Railways risk in defective packing—Shortage of delivery—Burden of proof is on consignor: A.I.R. 1968 Madh. Pra. 199.

In case of pilferage—stealing in small quantities—even if the goods are proved to

have been defectively packed, the Railway Administration is not relieved of its liability of the loss unless it further proves that it had used reasonable foresight and care in their carriage. [A.I.R. 1959 Mys. 90 and A.I.R. 1949 Cal. 679, Disting.]: A.I.R. 1972 Mys. 164: (1972) 1 Mys.L.J. 96.

Negligence—Onus—Loss or damage whether *prima facie* proof of negligence—Burden of proof: A.I.R. 1959 Pat. 473.

Carrier—Negligence—Proof of—Duty of Railway Administration to disclose how consignment was dealt with—When burden shifts to consignor: A.I.R. 1969 S.C. 817.

Negligence—Fire—Onus of proof: A.I.R. 1959 Pat. 348; A.I.R. 1927 All. 349.

Goods accepted for carriage—Nature of duty of the Railways—Proof of care taken by it—Mere fact that rain water entered the wagon and caused damage, *held*, would not fix liability on Railways: A.I.R. 1970 Madh. Pra. 55: 1969 M.P.L.J. 737 (D.B.).

Risk-note *A*—Loss due to bad condition of packing—Proof of misconduct—Burden is on consignor: A.I.R. 1957 All. 21.

Risk-note Z—Proviso, Cl. (*b*)—Applicability—Necessary conditions—Consignment under Risk-note *A*—Effect on burden of proof on Railways: A.I.R. 1957 All. 21.

Goods sent at owner's risk—Destruction by fire—Burden is on consignor to prove negligence or misconduct on part of Railway Administration—Evidence adduced by both parties—Onus of proof not material: A.I.R. 1964 Andh. Pra. 172.

Negligence—Burden of proof—Responsibility of Railways—Goods sent at owner's risk—Damage—Onus of proof of negligence or misconduct: (1959) 2 M.L.J. 365: A.I.R. 1960 Mad. 149.

Goods carried at owner's risk—Negligence or misconduct—Onus is on consignor: A.I.R. 1967 Del. 153.

Loss of goods in transmission—Liability of Railway Administration—Measure and extent of—Onus to disprove negligence—Railway Authorities taking all reasonable care—Consignments looted by unruly mob under circumstances beyond control—*Held* that, in the circumstances, Railway Administration had exonerated itself from liability—R. 237 of the Rules framed under S. 47(1)(*f*), Railways Act, had no application: (1964) 2 An.W.R. 171: A.I.R. 1964 Andh. Pra. 477.

Burden of proof for damage to goods by fire: (1963-64) 68 Cal.W.N. 554: A.I.R. 1964 Cal. 374.

Damages—Burden of proof: A.I.R. 1964 Mys. 80; A.I.R. 1972 Del. 189.

Bailment—Negligence—Burden of proof: (1963) 2 An. L.T. 59.

Suit for damages and cost for non-delivery of consignment—Non-delivery due to fire—No election in writing by plaintiff to pay Railways risk rate—No certificate under S. 74(2) taken or produced—*Held*, goods should be deemed to be carried at owner's risk and sub-S. (3) of S. 74 applied—Hence, burden of proof shifted to plaintiff to prove that loss was due to negligence or misconduct on part of Railway Administration or its servants: A.I.R. 1968 Andh. Pra. 327.

In order to claim protection under S. 77(2) of the Railways Act, 1890, the onus is on the Railways to show that no loss, destruction, deterioration or damage had taken place not only during the period of transit, but also during the subsequent period of transit—seven days after the termination of transit: A.I.R. 1985 Mad. 37: (1984) 97 Mad.L.W. 320: 1984 T.N.L.J. 307.

In a suit against a Railway Company for non-delivery of goods, the Railways must first prove loss of goods and on such proof the onus will shift to the plaintiff to prove wilful neglect on the part of the Railways or its servants, etc., according to the terms of the risk-note: A.I.R. 1928 Lah. 774. Wrong view as to burden of proof—Interference in second appeal: 152 I.C. 441: A.I.R. 1934 Nag. 253.

Liability of Railway Administration—Suit for damages for deterioration of goods due to unusual delay in transhipment—Goods carried at owner's risk—Negligence or misconduct on part of Railway Administration—Burden is on plaintiff—Station Master's certificate obtained when taking delivery is not conclusive on point of period of transit: (1961) 3 Ori. J.D. 264.

Negligence—Burden of proof: (1956) 2 All E.R. 555; (1959) 2 W.L.R. 241; A.I.R. 1958 Madh. Pra. 351; A.I.R. 1954 Cal. 479.

Under S. 80 of the Railways Act, 1890, it is for the consignor claiming compensation from a Railways other than the one on which the goods were booked that the damage had occurred on its system; but if the goods were

delivered in damaged condition, the burden would lie on that Railways that the damage did not occur on its system but the goods were already damaged before it received them from the preceding Railway Administration; thus, where Railways other than the booking Railways were not impleaded and the latter did not adduce any evidence that the goods were already damaged when received by it, no presumption would arise in its favour: the booking Railways would be liable for the loss. [A.I.R. 1962 S.C. 1879, Expl.]: A.I.R. 1982 Raj. 253: 1982 Raj.L.W. 213: 1982 W.L.N. 88: 1982 Raj.L.R. 533. *See* also A.I.R. 1968 Madh. Pra. 185.

Suit for compensation for loss of goods under S. 80, Railways Act—Limitation—Burden of proof on Railway Administration: A.I.R. 1967 Ori. 148.

Suit for damage for loss of part of goods consigned by Railways—Burden of proof on plaintiff. *See* A.I.R. 1957 Pat. 147. Loss of goods by accidental fire—Negligence of Railways—Burden of proof. *See* A.I.R. 1957 Pat. 325.

Where a consignment of goods despatched by rail is damaged by fire and a suit is brought against the Railways for damages, the onus of proving the value of the goods booked and the extent of damage caused to the goods is on the plaintiff. The short certificate issued by the Railway Company showing that some of the goods had been damaged does not prove the exact amount of damage suffered: A.I.R. 1957 Cal. 190: 98 Cal.L.J. 106. *See* also A.I.R. 1957 Nag. 59.

Suit for damages against Railways—Burden of proving damage is on plaintiff: (1963) 29 Cut.L.T. 193; A.I.R. 1961 Pat. 473.

Where plaintiff asserted that there was short delivery of 112 maunds and odd of ground nut oil due to the fact that Railway tank wagon was leaking badly, *held*, the burden of proof of negligence on the part of the Railway Administration was on the plaintiff: [A.I.R. 1970 S.C. 843, Foll.]: A.I.R. 1973 Pat. 244 (D.B.).

Consignment of groundnut oil by Railways—Deviation from agreed route—Loss—Negligence and misconduct by Railway Administration—Mere proof of loss not sufficient—Burden to prove negligence and misconduct lies on plaintiff: I.L.R. (1965) 2 All. 127: A.I.R. 1966 All. 333.

Suit for compensation for short delivery and deterioration of goods—Assessment and damage certificate by Railway Inspector marked without prejudice—How far admissible as admission of liability or proof of damages—Absence of evidence *aliunde*—Effect: A.I.R. 1965 Cal. 636.

In a suit for recovery of damages from the Railways for the consignment damaged during transit, *held*, the onus of proving the value of the consigned goods and the actual loss and extent of damages lies on the plaintiff; the damage certificate issued by the Railways "without prejudice to the Railways' right to repudiate the claim under law" is no acknowledgment of the damage having been occasioned by the Railways' negligence or misconduct; but once the Railways' liability is proved, the certificate can be used to assess the measure of the loss. [(1963) 29 Cut.L.T. 193 (D.B.) and (1966) 32 Cut.L.T. 855, Foll.]: A.I.R. 1981 Ori. 9: (1980) 50 Cut.L.T. 29 (D.B.).

Where in a suit by plaintiff for damages for wrongful search of the plaintiffs premises and seizure of his property, the defendants contend that the action taken by them was justified under Cr.P.Code, burden is on the defendants to show the law by which their action was warranted: 1957 Jab.L.J. 869: 1957 M.P.C. 429.

It is no doubt true that in a suit for damages for wrongful attachment of property or goods of one person as being the property or goods of another, the onus of proving that the property or goods attached belong to the plaintiff lies on the latter who claims damages for such wrongful attachment. But the quantum of evidence which a Court would consider sufficient to discharge that burden would obviously depend upon and vary according to the circumstances of each case. Where the defendant lets in absolutely no evidence to prove that the property belongs to the person whom he alleges to be the owner thereof and as whose property he attaches the same and the alleged owner comes to Court and deposes that the property does not belong to him but to the plaintiff, it must be held that the plaintiff has discharged the burden that lay on him and that the plaintiff has proved his case and is entitled to succeed: A.I.R. 1952 Mys. 90: I.L.R. (1952) Mys. 176.

Damages—Suit for, by bus-passenger for an injury on account of a collision between

bus and lorry—Burden of proof: A.I.R. 1956 Mad. 464; A.I.R. 1939 Mad. 261.

Suit for compensation for extracting coal from underground plaintiff's land—Onus—What plaintiff has to prove. *See* 1960 B.L.J.R. 94: A.I.R. 1960 Pat. 266.

Loss of subject-matter of bailment—Presumption—Loss by private stealth by person other than bailee—Bailee cannot escape liability: A.I.R. 1962 Mad. 244.

Burden of proving damages due to unauthorised construction by the tenant, is on the landlord: A.I.R. 1993 Cal. 144: (1993) 1 Cal.H.N. 307: (1992-93) 97 Cal.W.N. 227.

Collapse of wall due to rain, killing son and daughter of plaintiff, who were looking after thela of plaintiff on adjoining road—Wall in dilapidated condition and not under repairs for thirty years: 1957 M.P.L.J. 532.

Appeal—Burden of proof—Personal injury—Award of damages—Interference by appellate Court—Burden of proof: (1957) 3 All E.R. 525.

37. Death.—(*See* also Notes under Ss. 107-108, *infra*). S. 108 does not warrant that the exact date of death not being proved, the earliest date of which the death could be presumed is the date of institution of the suit; the time of death is a matter for evidence, not presumption. The onus of proof is cast not under S. 108 but under the general principle of the burden of proof: (1993) 2 M.L.J. 283 (D.B.).

Presumption of death—Time of death—Onus: 1956 All E.R. 603.

Survival—Onus—Party asserting survival has to prove it like any other fact—There is no presumption of it founded on age, sex or any other factor—There is also no presumption of death at the same time: 1959 Ker.L.T. 1302: I.L.R. (1960) Ker. 106: A.I.R. 1960 Ker. 195.

38. Debt Relief Acts.—As S. 7 of the Karnataka Debt Relief Act, 1976 lays down that the burden of proving that the debtor is not entitled to protection of that Act shall lie on the creditor, *held*, the burden of proving that the judgment-debtor is a "debtor" under that Act lies on him; it is only after that burden is discharged that the creditor is required to show that the judgment-debtor is nevertheless not entitled to protection under that Act: A.I.R. 1982 Karn. 73: (1981) 2 Karn.L.J. 409: I.L.R. (1981) 2 Karn. 1363: (1982) 2 D.M.C. 73.

The burden of establishing that a person is a "debtor" is initially on the claimant under S. 7 of the Karnataka Debt Relief Act, 1976: A.I.R. 1985 Karn. 265.

Once the initial burden of being "debtor" within the meaning of the Kerala Debt Relief Act, 1977, is discharged by the judgment-debtor, the burden shifts on to the creditor to prove under S. 9 of that Act that the debtor is not entitled to the benefits of that Act: 1984 Ker.L.J. 516: A.I.R. 1985 N.O.C. 192: 1984 Ker.L.T. 702: I.L.R. (1984) 2 Ker. 600 (D.B.).

A debtor seeking protection under S. 9 of the Kerala Debt Relief Act, 1977 must first discharge his initial burden by either examining himself on oath or filing his own affidavit; the burden to show that the debtor was not entitled to the protection would shift on to the creditor after the debtor has discharged the initial burden. [1978 Ker.L.T. 587, Rel. on]: A.I.R. 1984 N.O.C. 34: 1983 Ker.L.T. 867: 1983 Ker.L.J. 561: I.L.R. (1984) 1 Ker. 339 (D.B.).

Under S. 9 of the Kerala Debt Relief Act, 1977 it is for the creditor to prove that the debtor has not established *prima facie* his entitlement for the benefits of the Act. [There was no conflict between decisions in A.I.R. 1984 N.O.C. 34 (Ker.) and A.I.R. 1985 N.O.C. 192 (Ker.)]: A.I.R. 1987 Ker. 170: (1987) 1 Ker.L.T. 184: 1987 Ker.L.J. 280: I.L.R. (1987) 2 Ker. 228 (D.B.).

39. Decree.—Execution of decree under S. 51, C.P.Code—Onus to bring case within one or more classes of proviso to S. 51 is on decree-holder: A.I.R. 1968 Pat. 218.

Court-sale in execution of decree against debtor subsequently adjudged insolvent—Not a judicial proceeding suffered by debtor—Burden is heavy on Official receiver who seeks to impeach it to prove that it was suffered by the debtor with a view to give preference to a creditor: A.I.R. 1968 Ker. 182.

Objection as to step-in-aid of execution—Requisites of O. 21, R. 11(2)(*f*) satisfied—Onus to establish that execution was within limitation, *held*, was discharged: I.L.R. (1964) Cut. 556: A.I.R. 1964 Ori. 170.

Where a compromise was recorded by the Court in the manner provided in O. 23, R. 3 of the Code of Civil Procedure, carrying the Court's endorsement that it was read and

recorded and the parties, having accepted it, put their signatures; the compromise stands on the same footing as a contract; if impugned by any party thereto, heavy burden would lie on that party to prove that the compromise was not explained to her and its admission in the compromise was procured by fraud; the Court's endorsement is a judicial record made in discharge of judicial duties and is to be taken as authentic and in itself is a true evidence; the presumption under S. 114 would also arise in its favour: (1986) 1 Bom.C.R. 81.

Burden of proving consent to compromise is on the person setting it up: A.I.R. 1923 P.C. 13.

In case of a consent-decree against a minor, onus is on the person relying upon such a decree to show that the person consenting had authority to bind the minor by such consent: I.L.R. 23 Cal. 934 (P.C.).

The onus of proving that the compromise is illegal or void is on the party asserting it: A.I.R. 1919 Mad. 1110 (D.B.); A.I.R. 1965 Pat. 345.

Where the decree-holder seeks execution by attachment of movable property, he should specify in the application or indicate in any other manner before attachment whether or not, the property sought to be attached is in possession of the judgment-debtor. If the goods are not attached from the possession of the judgment-debtor, the presumption is that the judgment-debtor was not the owner of the attached goods and onus to prove that the goods belonged to the judgment-debtor is upon the decree-holder. If the goods are attached from the possession of the judgment-debtor, *prima facie* it can be held that the attached property belonged to him: A.I.R. 1984 Del. 90: (1984) 25 Del.L.T. 259.

Reopening of decree on ground of contravention of Statute—Onus of proof: (1956-57) 61 Cal.W.N. 67.

40. Defamation.—(*See* also S. 105, Note 6, *infra*). Publication of defamatory matter—Privilege—Onus: A.I.R. 1957 Madh. Bh. 162: 1957 Cr.L.J. 1143.

The aggrieved party must lead evidence to prove that the incriminating article is *per se* defamatory: A.I.R. 1935 P.C. 34. In a suit for damages for defamation of character in respect of evidence given by witnesses in a judicial proceeding can be viewed as a suit for damages for malicious prosecution. In such a suit, the plaintiff has to prove that (*i*) the defendant prosecuted the plaintiff, (*ii*) the prosecution was actuated by malice, and (*iii*) the proceedings were without any reasonable and probable cause: (1873) 11 Beng.L.R. 321 (P.C.).

Defamation—Defamatory words are presumed to be false—Rebuttal of such presumption—Onus is on defendant: 1969 M.P.L.J. 510: 1969 Jab.L.J. 544; A.I.R. 1953 All. 302 (D.B.); A.I.R. 1923 All. 167.

41. Desertion.—It is well settled that the burden of proving desertion, both the *factum* and the *animus deserendi*, lies on the spouse asserting it; such spouse has to establish beyond reasonable doubt to the Court's satisfaction the desertion throughout the period of two years before the petition as also the absence of the just cause; that is, even if the deserting wife fails to prove the just cause, the other spouse has still to "satisfy" the Court that it was without just cause; and the Court's satisfaction has to be on "preponderance of probabilities". [A.I.R. 1964 S.C. 40; A.I.R. 1975 S.C. 1534, Foll.]: A.I.R. 1984 Del. 389: (1984) 2 D.M.C. 20; A.I.R. 1986 Pat. 308: (1986) 34 B.L.J.R. 599.

It is settled law that burden is on the plaintiff to prove desertion without cause for the statutory period. He must prove the factum as well as the *animus deserendi*. Hence, even if the other party fails to prove just cause for her living apart, the plaintiff-husband has still to satisfy the Court that desertion was without just cause: 1984 Hindu L.R. 185 (Del.) (D.B.); 1980 Hindu L.R. 61 (P.&H.).

Petition for judicial separation on ground of desertion—Onus of proving that desertion was without reasonable cause is on petitioner: (1965) 1 M.L.J. 149.

Under S. 13 of the Hindu Marriage Act, the burden is on the petitioner to show that the respondent had deserted him without reasonable cause and without his consent or against his wishes; that burden is discharged by showing (1) the factum of separation, (2) the intention to bring cohabitation to an end, (3) absence of the husband's consent and (4) the absence of the husband's conduct which may provide the reasonable cause to quit the matrimonial home. [A.I.R. 1957 S.C. 176; A.I.R. 1964 S.C. 40, Foll.]: A.I.R. 1980 Raj. 48: 1979 Raj.L.W. 339: 1979 W.L.N. 331.

The matrimonial offence of desertion commences when the factum of separation and the *animus deserendi* co-exist though they need not commence at the same time. Where, however, the intention to desert is formed subsequent to the factum of separation, that would be specially within the knowledge of the deserting spouse upon whom would the burden to prove the commencement of such intention would lie: (1988) 1 Hindu L.R. 131 (Mad.).

Desertion—Essentials of—Inference from facts and circumstances—Burden of proof: A.I.R. 1957 S.C. 176.

Refusal to live with husband—Absence of sufficient cause—Burden of proof is on husband—Case of divorce—Divorce found not valid—There was refusal and neglect to maintain wife: (1965) 1 Cr.L.J. 387 (1) (Guj.).

Where husband claims divorce under the Hindu Marriage Act, 1955, on the basis of desertion by the wife for a period of more than two years, *held*, burden is on him to prove the attempts made by him to request the wife to return to the matrimonial home. However, the burden shifts to the wife if she pleads reasonable cause or justification for withdrawing from the company of the husband: (1986) 2 Hindu L.R. 306 (P.&H.); A.I.R. 1985 Del. 491. *See* also (1988) 2 Hindu L.R. 682 (Del.) (D.B.).

42. Easement.—It is for the plaintiff who comes to the Court to establish that the portion of the house occupied by him had any right of easement over the open space of the defendant. In law the owner of every open space is entitled to build over it unless his action in building interferes with an easementary right already acquired: A.I.R. 1965 Mys. 292.

Easement—Right of way—User must be as of right—Burden of proof: A.I.R. 1958 Ori. 248; A.I.R. 1967 Mad. 164.

Right of way—Expression "as of right"—Meaning—Long continued user—Presumption that exercise was "as of right"—Pleadings and proof: (1963) 76 Mad.L.W. 657: (1964) 1 M.L.J. 293: I.L.R. (1964) 1 Mad. 409: A.I.R. 1964 Mad. 209.

Customary easements—User of—Presumption and burden of proof: (1964) 2 An.W.R. 39.

In a suit to restrain the defendants from burdening the plaintiff's land with passage to the defendant's fields, *held*, the trial Court erred in placing the burden on the plaintiff to prove that the defendant's had no right of easement on the plaintiff's land; the trial Court was directed to reframe the issue so as to throw the burden on the defendants to show that they had the right of easement on the plaintiff's lands: A.I.R. 1981 Guj. 141: (1981) 22 Guj.L.R. 74.

Easements — Customary supply of water — Diminution — Proof: A.I.R. 1966 Andh. Pra. 329.

Easement—Ejectment suit—Onus. *See* 105 I.C. 560: A.I.R. 1927 Lah. 885.

Suit for injunction restraining adjoining owner from using open space in front of his (defendant's) house—Burden of proof: A.I.R. 1968 Guj. 287.

43. Ejectment.—(*See* also S. 106, Note 12, *infra*). In a suit for ejectment, even though the defendant has no title, he can still put the plaintiff to the proof of his title and the plaintiff has still to show that the title deed on which he relies as having given him a title superior to that of the defendant is a valid one: A.I.R. 1928 Mad. 840: 56 M.L.J. 52.

It is well settled that the plaintiff in an eviction case must establish his own title to the demised property by adduction of sufficient evidence to discharge his onus; it is of no importance whether or not the tenant proves his defence or not; even if the title set up by the tenant is not proved, the plaintiff has to prove his title but for which he has to be non-suited: A.I.R. 1973 Andh. Pra. 149 : (1972) 2 An.W.R. 346 (D.B.).

If a suit is one for ejectment it is for the plaintiff to prove his title and the Court is not concerned with the weakness of the title of the defendant. The defendant may be a trespasser, but as a defendant in possession, he is entitled to ask the plaintiff to prove strictly his title: (1957) 59 Bom.L.R. 633: A.I.R. 1957 Bom. 280.

The plaintiff in ejectment suit must succeed on the strength of his own title. This can be done by adducing sufficient evidence to discharge the onus that is on him irrespective of whether the defendant has proved his case or not. A mere destruction of the defendant's title, in the absence of establishment of his own title carries the plaintiff no where: I.L.R. (1954) Trav.-Co. 867: A.I.R. 1954 S.C. 526: (1955) 1 S.C.R. 520.

Where in a case for ejectment of trespasser from suit premises, the defendant claimed to be a tenant and there was no dispute in regard to the plaintiff's title to the said land, *held*, the burden was on the defendant to displace plaintiff's prime right to possession and establish his right to continue in possession of the said land as a tenant. [(1873) 20

Suth.W.R. 374, Foll.]: A.I.R. 1971 Bom. 115: 1970 Mah.L.J. 748.

In a suit for ejectment the plaintiff is not entitled to succeed unless he shows, in addition to title, that he has been in possession of the property within 12 years of the suit. The burden lies upon the plaintiff to prove that he was in possession within 12 years of the suit; the onus is not upon the defendant to prove adverse possession for a period of 12 years. The position doubtless would have differed if the evidence on the question of possession led by both parties, though not unworthy of credit, was evenly balanced and the Court finds it difficult to prefer one and reject the other. In such instances the presumption that possession follows title may be applied as a presumption of fact: I.L.R. (1958) Cut. 186.

In a suit for ejectment on the ground that the defendant who had taken on rent the premises in question from the plaintiff has sublet the premises, if the sub-tenancy alleged rests on the allegation that a portion of the premises which the defendant had tenanted is now in possession of the sub-tenant and that sub-tenant has opened the stores therein, this allegation has to be proved by the plaintiff; and when proved it would be presumptive evidence of the sub-tenancy and the burden would then shift on the defendant to establish the capacity in which the sub-tenant was occupying the premises in question: A.I.R. 1956 Madh. Bh. 121: Madh.B.L.J. 1955 H.C.R. 2100.

Ordinarily, the exact terms on which a tenant inducts a sub-tenant in the premises would not be within the knowledge of the landlord. Once it is proved that in relation to a business premises, the tenant has walked out of the premises leaving the premises to another person (may be, that another person may be his brother) and that another person is in exclusive possession of the business premises, it would not be out of place to raise an inference that parting of possession by the tenant in favour of that another person must be for valid consideration and the burden would be upon the tenant or the sub-tenant as the case may be, to prove that parting of possession—both legal and physical—by the tenant in favour of that other person was without any valid consideration: A.I.R. 1995 Guj. 68.

Initial onus is always on the landlord to prove that the tenant had sub-let, assigned or otherwise transferred his leasehold rights to the sub-tenant; considering nature of the onus, the Courts must remember that it is by no means easy since direct evidence of subletting is seldom available; the landlord for obvious reasons would be a complete stranger to the subtenancy agreement as it is in the common interest of the tenant and the sub-tenant to keep the transaction as a closely guarded secret; placed in such a situation the landlord can only prove the attending circumstances indicating sub-letting or assignment; the landlord's initial burden would stand discharged by showing that the tenant had parted with, and handed over, exclusive possession and control of the premises to the sub-tenant; it is then for the tenant to prove and explain the circumstances of such transfer of possession, which are within the tenant's special knowledge; if the tenant fails to satisfy the Court, the landlord must be deemed to have established his plea: A.I.R. 1987 Him. Pra. 9.

Though the initial onus is on the landlord to prove the sub-letting, once the Court finds that there has been a transfer of possession by the tenant, the burden shifts on the tenant to show that the alleged sub-tenant is in occupation not as a sub-tenant but as a licencee or as a person in permissive occupation; in absence of any evidence to show this, an adverse inference can be drawn against the tenant: A.I.R. 1993 All. 90: 1993 All.L.J. 181: (1992) 20 All.L.R. 1138.

It is well established that for seeking eviction of a tenant on the ground of sub-letting, the onus to prove the ground lies on the landlord; if the landlord *prima facie* shows that a third person was in exclusive possession on payment of consideration, the onus would shift to the tenant to rebut the landlord's evidence; the real test is whether the tenant has walked out of the demised premises after handing over its exclusive possession and control to the third person; the tenant can use the premises for any business he likes; if he takes a partner therein, the partner get no right of tenancy or sub-tenancy. [A.I.R. 1974 S.C. 280, Rel. on]: A.I.R. 1983 P.&H. 205: (1982) 1 Ren.C.R. 726: (1982) 2 Ren.L.R. 486.

Suit for arrears of rent and recovery of possession of house on basis of alleged oral lease. Defendant setting up an independent arrangement with the lessor of the plaintiff under which he had constructed the houses on the vacant site with an undertaking to pay rent to the lessor of the plaintiff and denying lease from plaintiff. Possession admitted with defendant—Plaintiff to be entitled to

relief must succeed in establishing that he put up building—To hold that onus is on defendant to prove his case and that if he failed to succeed plaintiff would be entitled to the relief is a wrong approach to the question: 1953 Ker.L.T. 587: A.I.R. 1954 Trav.-Co. 152.

In cases where the tenant and alleged sub-tenant happens to be close relation or brother *inter se*, it is very difficult for the landlord to prove the secretive arrangement between the brothers regarding the valuable consideration. Thus, once the landlord establishes the parting of exclusive possession of the premises by the tenant, the onus shifts upon the tenant to prove the arrangement between the tenant and alleged sub-tenant as to in which capacity the sub-tenants were occupying the premises, *i.e.*, whether they were occupying as licensees under the tenant or in the capacity of a member of the partnership concern formed by them with the tenants or simply helping their relation, *i.e.*, the tenant in running the business etc.: A.I.R. 1990 P.&H. 160: (1989) 2 Ren.L.R. 613.

Initially the onus of proving that the tenant has assigned, sub-let or otherwise parted with possession of the lease-hold lies on the landlord and not on the tenant. Once it is established that there has been transfer of possession of the lease-hold property without the permission of the landlord, the onus shifts upon the tenant to make out that transfer of possession cannot be attributed to subletting or assigning, as the tenant even after transfer of possession, retained the right to claim the possession. In such a case, it is for the tenant to prove under what arrangement, he transferred the possession to another person: A.I.R. 1977 Raj. 38: 1976 W.L.N. 416: 1976 Raj.L.W. 437.

Where a recorded tenant files a suit to eject a recorded sub-tenant, the onus of proof lies on the latter to prove that the relationship of landholder and tenant did not exist between the parties: I.L.R. 2 All. 39 (Rev.).

Where certain rent receipts nearly 30 years old and their carbon copies issued by the tenant were proved by the sub-tenant's defence witnesses in a case for eviction under S. 14(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 but they were not cross-examined on the point of being fabricated, *held*, they could not be left out of consideration by the trial Court as proof of the sub-tenancy sought to be established thereby: (1984) 2 Bom.C.R. 738.

The exact date of sub-tenancy is a fact which can be within the exclusive knowledge of the sub-tenant only. Thus, the onus of proving the date of the sub-tenancy must be upon sub-tenant only: A.I.R. 1981 Bom. 446.

Where eviction was sought on the ground of sub-letting by the tenant to his son living with the father as a member of the family from the inception of tenancy and it was alleged that the son was running a watch company and contributing rent as lease money, *held*, merely because the tenant had adduced evidence contrary to his defence plea about the watch company is no ground to absolve the landlord of his burden to prove the ground of eviction; eviction order set aside: A.I.R. 1984 Del. 14: (1983) 24 Del.L.T. 316: (1984) 86 Punj.L.R. (Del.) 39.

Where the plaintiff-landlord succeeded in proving transfer of possession and the defendant tenant failed to discharge the burden to prove the manner in which the transfer took place, *held*, an inference of sub-letting could be drawn: A.I.R. 1977 Raj. 38: 1976 W.L.N. 416: 1976 Raj.L.W. 437.

Where in a suit by the tenant for recovery of rent from the sub-lessee, sub-lessee relied on the fact that the premises had been sub-let to her without obtaining the consent in writing of the landlord but plaintiff pleaded that the sub-letting in favour of the defendant took place with the consent of the landlord, *held*, it was duty of the defendant to have led evidence either by summoning the rent note from the owner or by producing him in the witness box to prove the non-existence of written consent of the landlord: A.I.R. 1989 Del. 184: 1989 Rajdhani L.R. 83 (D.B.).

Where in a case for eviction of a tenant and sub-tenant, the tenant pleaded that the sub-tenant was inducted as a licensee with the consent of the landlord's father but the sub-tenant set up an independent tenancy directly under the landlord, *held*, the burden of establishing the agreement of tenancy was on the sub-tenant to be discharged by cogent and convincing evidence; merely because his name appeared in the electorals of the years preceding, his induction as "licensee" was no such evidence: A.I.R. 1973 All. 229.

Creation of new tenancy subsequent to decree for ejectment obtained by landlord—Onus. *See* (1953-54) 58 Cal.W.N. 602: A.I.R. 1955 Cal. 229.

Where the plaintiff, an under-raiyat, claims permanent tenancy under the defendant, it is not for the defendant to support the correctness of the cadastral survey records recording lands as his "khas dakhi" lands,

but for the plaintiff to rebut the same and prove his case of permanent tenancy: I.L.R. 32 Pat. 124: A.I.R. 1953 Pat. 190.

When a tenant of lands in India in a suit by his landlord to eject him from them sets up a defence that he has right of permanent tenancy in the lands, the onus of proving that he has such a right is upon the tenant, and proof of long occupation at a fixed rent does not satisfy that onus: A.I.R. 1924 P.C. 65: 46 M.L.J. 546: 51 I.C. 83: I.L.R. 47 Mad. 317 (P.C.); A.I.R. 1957 All. 346; 1955 B.L.J.R. 506: A.I.R. 1955 Pat. 499. *See* also 1930 Mad.W.N. 874: A.I.R. 1931 Mad. 577; 146 I.C. 1002: A.I.R. 1933 All. 825.

In a case where admittedly the plaintiffs are landlord of the lands in dispute, and, the lands in suit are their *bakasht* and the dispute only is whether the lands are still *bakasht* of the plaintiffs, or now the *raiyati* lands of the defendants, it is for the defendants to establish affirmatively their tenancy right, and, if they fail to prove their settlement, or, their possession, the plaintiff's suit must be decreed on the failure of the defendants to prove their tenancy right and right of occupancy to hold the lands and to continue in possession thereof: 1959 B.L.J.R. 107.

Burden of proof—Landlord and tenant: A.I.R. 1962 Cal. 263.

Tenant holding over after expiration of lease—Suit for eviction—Allegation by tenant that there was verbal extension of lease—Burden of proof is on tenant to prove extension—Particulars as to time and place of agreement not given by tenant in his written statement—Witnesses said to be present at the time of agreement not examined—In their place other witnesses examined but their evidence found to be unsatisfactory, unreliable and unworthy of any credit—Defendant himself not appearing as witness—Burden of proof held not discharged: 1964 M.P.L.J. 502: 1964 Jab.L.J. 736: A.I.R. 1964 Madh. Pra. 288.

Landlord and tenant—Expiry of tenancy—Tenant claiming holding over with landlord's consent must prove such agreement—Acceptance of rent after notice to quit—Effect, in absence of evidence of such agreement, is not to amount to waiver of notice to quit or a renewal of tenancy by landlord. *See* A.I.R. 1957 Pat. 206.

Mere acceptance of amounts equivalent to rent by a landlord from a tenant in possession after a lease had been determined by a notice to quit and who enjoys statutory immunity from eviction because of the Rent Act cannot be regarded as evidence of a new agreement of tenancy. If the tenant asserts that the landlord accepted the rent not as statutory tenant but only as legal rent indicating his assent to the tenant's continuing in possession, it is for the tenant to establish it: A.I.R. 1978 Del. 92: 1978 Rajdhani L.R. 300: (1977) 2 Ren.L.R. 885: (1977) 2 Ren.C.R. 697. *See* also A.I.R. 1972 S.C. 819.

Where in a suit for eviction, the tenant contended that the increase in the rate of rent amounted to surrender and that it created a new relationship, *held*, it was for the defendant to prove the positive fact of creation of a new tenancy (particularly when the registered lease was subsisting) and not for the plaintiff to prove the negative: A.I.R. 1987 Cal. 221: (1986) 2 Cal.H.N. 195 (D.B.).

Ejectment suit—Eviction for violating purpose of letting—Onus is on landlord to prove purpose of letting and its violation: (1968) 70 Punj.L.R. 973.

The burden of proof as to whether the lease was for manufacturing purpose is on the tenant: A.I.R. 1982 S.C. 127: (1982) 2 Bom.C.R. 270: (1982) 1 S.C.C. 27: 1982 U.J. (S.C.) 23: (1982) 1 S.C.R. 1197.

Suit for ejectment on ground of dispossession—Onus of proof: 29 Cut.L.T. 90.

Bona fide need—Onus of proving *bona fide* need is on landlord and not on claimant for tenancy: I.L.R. (1965) 1 All. 247: A.I.R. 1965 All. 366.

Eviction of tenant on ground of *bona fide* requirement for his own occupation or of members of his family—Onus of proof as to *bona fide* requirement is on the landlord: A.I.R. 1968 Ori. 113.

The presumption under S. 23-D(3) of the M.P. Accommodation Control Act, 1961 is only partial and is confined to the *bona fide* nature of requirement and does not extend to the other ingredients involved in the ground for grant of relief of eviction. The law does not by the said presumption seek to relieve the landlords of the special category of the burden of proving by adducing evidence the ingredients except that of *bona fide* nature of the requirement. There is no question of

shifting of onus in respect thereof merely on the pleadings as distinct from proof: A.I.R. 1990 Madh. Pra. 106.

Since eviction from a non-residential accommodation under S. 12(1)(*f*) of the M.P. Accommodation Control Act, 1961 depends upon non-availability of non-residential alternative accommodation to the landlord, *held*, the burden lies on the landlord to prove such non-availability: A.I.R. 1986 Madh. Pra. 53.

Where a clause of lease deed prevented the defendant-tenant from making any additions or alterations to the demised property without previous consent in writing of the lessor and the lessor determined the tenancy on the ground of breach of said clause, *held*, the onus was upon the plaintiff-lessor to prove that the defendant constructed the said structures on the demised land without the consent in writing of the plaintiffs: A.I.R. 1976 Cal. 182 (D.B.).

It is not every construction or alteration which would result in material impairment to the value or the utility of the building so as to violate Cls. (*m*), (*o*) and (*p*) of S. 108 of the Transfer of Property Act, 1882. The impairment must be of material nature as to substantially diminish the value of the building either from commercial or monetary point of view or from the utilitarian aspect of the building and the burden of proof of such material impairment is on the landlord: A.I.R. 1993 Cal. 144: (1993) 1 Cal.H.N. 307: (1993) 1 Cal.L.J. 193: (1992-93) 97 Cal.W.N. 227 (F.B.).

Where eviction is sought on the ground of non-payment of rent, *held*, the onus to show payment lies on the tenant but mere oral testimony is not sufficient for discharging this heavy onus; a tenant alleging that the rent was paid but no receipt was issued by the landlord, in the absence of any explanation whatsoever for not sending the rent by postal money order, cannot be deemed to have discharged the heavy burden cast upon him: A.I.R. 1993 All. 326: (1993) 22 All.L.R. 281.

Protection against eviction under the Rent Act—Burden of proving annual income of tenant lies on the plaintiff: A.I.R. 1968 J.&K. 59.

Where the title of the plaintiff-landlord was not in dispute at all and the defendant-tenant averred that she had been paying rent to the plaintiff-landlord, *held*, the burden of proving said positive fact was upon the defendant-tenant and if she failed to prove it, it was she who had to lose: (1984) 2 Bom.C.R. 423.

The initial burden of proof on the landlord when he makes a petition for permission to file a proceeding against the tenant for eviction, is to aver and to prove that the relationship of landlord and tenant exists between the parties and that the tenant is in occupation of the premises of the landlord, and also that the tenant is in possession of means to find alternative accommodation. He may make such averment according to such knowledge and belief as he may have entertained in this respect. But there may be honest cases in which landlords would not really know anything about the means of the tenant. In such cases, the landlords may truthfully say that they do not know if the tenant is in possession of the means to find alternative accommodation. The income of the tenant is a fact which is especially within his knowledge. The burden of proving the same is, therefore, on him. If, therefore, neither the landlord nor the tenant adduced any evidence as to the income of the tenant, it is the tenant whose defence will fail and the landlord would obtain a permission for filing an eviction petition against him in view of S. 102 of the Evidence Act. [A.I.R. 1974 Del. 219, Rel. on]: A.I.R. 1974 Del. 221: 1974 Ren.C.R. 288.

Notice to quit—Onus to plead and prove it is on the landlord: A.I.R. 1968 Ori. 113; 1979 Jab.L.J. (Notes) 50.

Where a notice to quit was sent by registered post and which was duly received by treasurer and secretary of tenant-company but the tenant-company denied having received any notice, *held*, though the onus of proof of producing its register of letters received and issued did not lie on the tenant-company, an adverse inference could be drawn against the tenant-company for not producing the same. [A.I.R. 1917 P.C. 6; A.I.R. 1968 S.C. 1413, Rel. on]: A.I.R. 1982 Cal. 127: (1981-82) 86 Cal.W.N. 456 (D.B.).

Where the tenant admitted the receipt of notice to quit but challenged its validity on the ground that the landlord had only filed a copy prepared not from the original but from another copy of the notice, *held*, it was for the tenant to file the original notice received by him to substantiate his plea: A.I.R. 1978 All. 144.

Where it was stated in the plaint that a registered notice for vacation of the shop had been given to the tenant and that the period of notice had elapsed and relationship of the defendant as tenant came to an end and nothing was stated about contents of the notice either in the plaint or in the witness box by the plaintiff, *held*, the defendant, in discharging the onus that the notice given was not a notice terminating the tenancy but was only a notice for vacation of the shop and thus, not fulfilling the requirements of S. 106 of the Transfer of Property Act, 1882, could certainly rely upon the contents of the plaint which indicated that the notice given was one for vacation of the shop. [A.I.R. 1968 All. 321, Foll.]: A.I.R. 1972 All. 155: 1972 All.L.J. 799.

Where the landlord in an eviction case denied on oath that he had not refused to accept the money order, *held*, the postal endorsement of "refusal" could not by itself and without the postman's evidence lead to a presumption that the money was tendered to the landlord and he refused to accept it: A.I.R. 1984 Sikkim 1.

Where a tenant of a large property had purchased half of that property, *held*, the presumption is that he intended to keep his tenancy rights in the unpurchased property as alive and distinct from his ownership of the purchased property; a person is presumed to intend that which is to his benefit; the burden to prove that the tenant intended to merge the two rights would, therefore, lie on the party which asserts it: A.I.R. 1973 P.&H. 204: 1972 Punj.L.J. 703.

Where appellant sought a declaration that he was a tenant of the impugned land and in its support he produced a certified copy of the statement of the landlord given in an earlier suit wherein he had admitted that the appellant was a cultivating tenant, *held*, the appellant having filed certified copy of the statement, it was for the landlord to explain it and no adverse inference could be drawn against the appellant on account of his failure of filing any application for summoning the deponent, *i.e.*, landlord; it was for the landlord to explain the deposition either by examining himself or producing any material to nullify the effect of said statement: A.I.R. 1994 S.C. 1303.

Onus of proof—Landlord's application for eviction of Mundcar after demolition of house of Mundcar under Art. 7 of Legislative Diploma of 26th November, 1959—Burden of proving that existence of Mundcar's house is incompatible with new construction proposed by landlord as contemplated by Art. 7(*b*) is on landlord and not on Mundcar: A.I.R. 1968 Goa 41.

Fixation of fair rent—Application by tenants—Burden is on them to show what fair rent is and that it is lesser than contract rent—There is no presumption that contract rent is not fair rent: (1966) 79 Mad.L.W. 411: A.I.R. 1967 Mad. 306.

Contractual tenancy evidenced by registered deed—Proceedings for fixation of standard rent—Tenant contending that proceedings are not suit with reference to deed to apply S. 92 and, hence, subsequent oral agreement can be admitted in evidence to prove variation which would make Madras Act (XVIII of 1960) inapplicable to tenancy—*Held*, to make Madras Act inapplicable contractual or agreed rent had to be found and it was for tenant to prove that same was different from the one stipulated in lease—This he could not do except by proof of another registered instrument: (1969) 2 M.L.J. 8: (1969) 82 Mad.L.W. 476.

Where though the claim of the landlord was that the monthly rent of the premises was Rs. 125, the tenant stated that monthly rent was Rs. 75 and Rs. 50 were charged for additional amenities, *held*, the burden was on the tenant to so prove: A.I.R. 1976 All. 362.

Where in a case for eviction under S. 14 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 both parties had adduced evidence on the point of comparative hardness to the parties by granting or refusing eviction, *held*, the question of onus of proof becomes irrelevant and immaterial: A.I.R. 1979 N.O.C. 97 (Raj.).

Where the landlord's submission that the premises was lying vacant when it was given to the tenant after taking permission of the Rent Controller under S. 21 of the Delhi Rent Control Act, 1958, was corroborated by the statement of the tenant himself made before the Rent Controller, *held*, the onus was upon the tenant to prove that much before the filing of said application he was occupying the premises and never vacated it and, thus, it was not lying vacant when said application was filed: A.I.R. 1994 Del. 189.

Where the landlord's assertion that the shop was constructed in 1976 was admitted by the tenant in the rent deed and supported by the landlord's deposition, *held*, the landlord's initial burden to prove that the eviction suit was exempted from the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 stood discharged; the burden had shifted on to the tenant to prove that the suit was incompetent; the tenant having adduced no evidence to rebut, the Courts below had correctly found the issue against him: (1993) 21 All.L.R. 354.

Where a tenant challenged execution of the eviction order under S. 22(1)(*b*) of the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971, *held*, it was incumbent upon him to prove that the premises wherefrom he was sought to be evicted had been declared as a slum area; no burden lies on the landlord to prove otherwise: (1986) 1 Bom.C.R. 637.

Suit for eviction—Application for stay of suit under S. 8 of Kerala Prevention of Eviction Act—*Prima facie* case—Onus of proof—Burden is on tenant to make out *prima facie* case of tenancy: 1969 Ker.L.T. 664.

Suit for ejectment—Permission—Order granting permission attacked on the ground that Officer granting permission had no authority from District Magistrate—Burden of proof: 1963 All.W.R. (H.C.) 421.

Ejectment of tenant without permission of District Magistrate—Onus to prove that land was "accommodation": A.I.R. 1966 All. 39.

Village forming part of Tanjore Palace Estate—Lands in, treated by Raja as separate property—Effect of seizure by Government and subsequent regrant—Eviction of tenants in long possession by alienee from purchaser in execution—Burden of proof. *See* (1957) 1 M.L.J. 72.

44. Election.—In an election petition, the general onus of proof is always on the election petitioner: A.I.R. 1975 Ori. 184.

Election petition—Quantum of proof for setting aside election—Burden of proof: A.I.R. 1968 Ori. 200.

Election petition—Onus—Tribunal bound to scrutinise even if evidence in election petition is *ex parte*—Onus is entirely on the petitioner: 1969 Pat.L.J.R. 308.

Burden of proof—Burden of proof on grounds for setting aside election lies upon petitioner and specially in a case of corrupt practice burden lies heavier and has to be strictly discharged: I.L.R. (1960) 10 Raj. 1540: A.I.R. 1961 Raj. 122.

As the charge of a corrupt practice in an election petition is in the nature of a criminal charge, it is for the party who sets up the plea of undue influence to prove it to the hilt beyond reasonable doubt and the manner of proof should be the same as for an offence in a criminal case: A.I.R. 1985 S.C. 24: (1984) 4 S.C.C. 649: (1985) 1 S.C.R. 1089.

Election—Corrupt practice—Burden of proof: A.I.R. 1965 S.C. 183. *See* also A.I.R. 1960 Punj. 45; A.I.R. 1964 Madh. Pra. 92: 1964 M.P.L.J. 160; A.I.R. 1968 Mys. 18; A.I.R. 1968 Ori. 99.

Allegation of corrupt practice—Nature of proof required—Burden of proof: A.I.R. 1964 Ori. 8.

Representation of the People Act, 1951 (as amended in 1956), Ss. 123(4), 83(1), 100(1)(*b*)—Charge under S. 123(4)—Charge is *quasi* criminal in character—Allegations in petition must constitute corrupt practice—Evidence cannot be accepted where there is want of necessary pleadings: A.I.R. 1965 Mys. 102; A.I.R. 1964 Raj. 184; A.I.R. 1967 S.C. 808: 1967 Cr.L.J. 823.

The onus of proving the essential ingredients of a corrupt practice set out in S. 123(4) of the Representation of the People Act, 1951, lies on the election petitioner that the impugned false statement was published by the candidate or his agent, and with their consent if it was published by some one else, either believing it to be false or not believing it to be true, and in relation with the personal character or conduct or candidature of the election petitioner. [A.I.R. 1967 S.C. 808, Rel. on]: A.I.R. 1973 Gau. 145.

Election petitions on the ground of corrupt practices are *quasi* criminal proceedings; the onus lies on the petitioner to prove his allegations beyond reasonable doubt: A.I.R. 1977 S.C. 813: 1976 U.J. (S.C.) 1005: (1977) 3 S.C.C. 566; A.I.R. 1971 S.C. 2025.

Burden of proof—Charges of corrupt practices in election—Charges are *quasi* criminal and require strict proof: A.I.R. 1966 Madh. Pra. 255.

Corrupt practice—Corrupt practice of bribery—Standard of proof is same as in criminal cases—Accomplice evidence—

Value of: I.L.R. (1962) Cut. 835: A.I.R. 1963 Ori. 83.

Deliberate impersonation of dead or absent voters alleged—Corrupt practice not averred against returned candidate or his agent—Evidence and proof: I.L.R. (1966) 1 Mad. 580.

Corrupt practice—Burden of proof—Interference by High Court—Principles: 1963 M.P.L.J. 570: A.I.R. 1963 Madh. Pra. 306.

Allegation of corrupt practice of making appeal on the ground of caste—Election petitioner's witness stating that he received a letter written by one *'S'* appealing for casting vote in favour of returned candidate as he belongs to their caste—*Held*, burden of proving that such letter was either not written by *'S'* or there was collusion between election petitioner's witness and *'S'*, was on the returned candidate: A.I.R. 1971 S.C. 1949: 1971 U.J. (S.C.) 726.

Allegation as to personal character of election petitioner—Initial burden—Nature of—Discharge of onus: I.L.R. (1965) 15 Raj. 322.

Though an election petition may not be akin in all respects to a criminal trial, but the burden of proof nevertheless lies on the election petitioner to prove each and every ingredient of the electoral misconduct; even if such an ingredient is permanently within the knowledge of the returned candidate, it will not relieve the election petitioner of his primary burden though the quantum of proof may be affected; the petitioner has to adduce at least *prima facie* evidence: A.I.R. 1975 S.C. 667; A.I.R. 1985 N.O.C. 44 (Del.).

Burden of proof—Election challenged by some voters as they were not allowed to vote—Respondents contending that they had participated in election—Petitioners stating in affidavit that they had not participated in any way in election—Counter-affidavit by respondents alleging that petitioners had exercised their franchise—*Held*, evidence was not sufficient to prove that petitioners had participated in election: 1964 B.L.J.R. 855.

Proportion of wasted votes to margin of votes secured by returned candidate at election—Its effect on election—Burden of proof of result having been materially affected. *See* A.I.R. 1957 Assam 118.

Where objection as to the candidate being under-age and unqualified to contest the State Assembly election was overruled by the Returning Officer and his election was impugned in an election petition, *held*, the burden lay on the petitioner to prove the age of the returned candidate on the relevant date; the burden to prove his age would shift to the member only if *prima facie* evidence of his being under-age is placed on the record by the petitioner: A.I.R. 1982 Ori. 221: (1982) 54 Cut.L.T. 265.

Election challenged on ground that the elected candidate was below 25 years of age on date of filing nomination paper and, thus, disqualified under Art. 137 of the Constitution—Burden to prove that age was below 25 years on relevant date is on election petitioner: A.I.R. 1965 S.C. 282.

Where in an election petition, the issue involved was regarding the age of the elected candidate on the date of the scrutiny of his nomination and there were a number of clear admissions in prior declaration precisely and deliberately made in solemn documents by him which admissions were made *ante litem motam* during the decade preceding the election in question, *held*, these admissions were entitled to great weight and had shifted the burden on to the candidate to show that they were incorrect: A.I.R. 1977 S.C. 1724: (1977) 3 S.C.C. 540: (1977) 3 S.C.R. 538.

In an election petition seeking scrutiny and recount on the ground of miscount, *held*, the petitioner has to offer *prima facie* evidence of counting errors; if the proof offered by him is in respect of some ballot papers, the scrutiny or recount would not be confined only to those ballots; that would be contrary to the requirements of the Representation of the People Act, 1951 and the Rules framed thereunder; and might play havoc with Parliamentary election: A.I.R. 1982 S.C. 1569.

Two candidates obtaining equal number of votes—Casting of lots is not the result of election—Casting of improper vote in favour of successful candidate—Onus lies on person who challenges the election—*Held*, that there was no proof that election result had been materially affected by reception of improper vote: (1962) 2 M.L.J. 358.

Election for reserved seat for Scheduled Tribe—Question of caste of a candidate is one of fact — Both sides not leading

evidence—Matter has to be decided on the basis of original onus which lies on the election petitioner—High Court has no power to contradict Presidential order: A.I.R. 1968 S.C. 929.

Improper rejection of nomination paper—It is for the petitioner to prove that it was improper: A.I.R. 1968 Ori. 84.

Objection as to validity of nomination paper—Onus to prove disqualification or defect is on party who raises the objection: A.I.R. 1969 J.&K. 12.

Gujarat Municipalities—Election Rules, 1964, Rr. 12 and 14—Exclusion of candidate from election on account of improper rejection of his nomination paper or wrong decision that he had withdrawn his candidature —Presumption—Pleading: I.L.R. (1967) Guj. 76.

"Result has been materially affected"—Burden of proof: A.I.R. 1968 Ori. 75.

45. Essential supplies.—(*See* also S. 106, Note 5, *infra*). Where in a prosecution under the Essential Commodities Act, 1955 for alleged contravention of a Control Order by the Managing Director and President of a company, the holding of those posts was not categorically denied by the accused, *held*, still the prosecution was required to prove that the accused were, in fact, holding those posts at the relevant time: 1983 Cr.L.J. 1268: (1983) 24 Guj.L.R. 594. *See* also Notes under S. 10 of the Essential Commodities Act.

Prosecution for offence under Cl. 11, Assam Food Stuff (Foodgrains) Control Order—*Mens rea*—Burden of proof. *See* A.I.R. 1955 Assam 54: 56 Cr.L.J. 444.

Orissa Foodgrains Dealers Licensing Order, 1964, Cls. 3(2) and 2(*a*)—Storage of foodgrains without licence of more than prescribed quantity on single occasion—Burden to prove that storage is not for sale lies on person who stores foodgrains—"Business"—Requirement of—Single transaction of storage for sale does not constitute business—Person storing foodgrains on single occasion is not dealer: 1967 Cr.L.J. 235: A.I.R. 1967 Ori. 29.

Where the accused charged with the offence of storing more than the permissible quantity of rice and/or paddy under the Orissa Rice and Paddy Control Order contended that at no time did he store the requisite quantity in excess of the permissible limit and produced way bills, receipts and vouchers long after the raid which not only made their genuineness suspect but they were also not prepared contemporaneously with the alleged disposals, *held*, the accused had not been able to establish his innocence; the presumption of his being a dealer under the Order was not rebutted for he had to prove his defence beyond reasonable doubt, and not merely by balance of probabilities: 1990 Cr.L.J. 1193 (Ori.).

Where under the Orissa Rice and Paddy Control Order, any person storing rice and/or paddy exceeding the prescribed limit is deemed to be a "dealer", the burden lies on the accused to prove, after his storing the excess quantity is established, to rebut the presumption. Though ordinarily, the burden to rebut the presumption in criminal cases is not so heavy on the accused and he may be let off if his explanation is reasonable or creates doubt in the prosecution case, but under S. 10-C of the Essential Commodities Act, the accused is required to prove the absence of culpable mental state *qua* the offence charged beyond "reasonable doubt" and not by preponderance of probability. There is, thus, a clear departure from the ordinary rules of criminal jurisprudence: 1990 Cr.L.J. 1193 (Ori.).

When a person is prosecuted for contravention of Cl. 4 of the Iron and Steel (Control) Order, 1956, S. 14 of Essential Commodities Act, casts a burden on the accused of proving possession of a lawful authority, permit or licence to acquire, and the burden of proving the doing of the prohibited act of acquiring and acquiring from any of the three sources specified in Cl. 4, remains on the prosecution. Unless these two ingredients are established by the prosecution, burden under S. 14 would not shift on the accused.

Difficulty on the part of the prosecution to obtain evidence to establish the necessary ingredients of an offence can be no criteria to determine the question of burden of proof. Under Cl. 28, the Controller is empowered to get into possession of knowledge of the source from which the iron and steel was acquired before taking any steps for breach of Cl. 4. If the authorities do not utilize provisions of law enabling them to get information, they cannot urge that the burden of proof does not lie on the prosecution.

S. 106, Evidence Act, cannot have any application to such a case. It cannot come into play where the fact concerned is such as is capable of being known not only by the accused but also by others: 1968 Cr.L.J. 1065: A.I.R. 1968 Guj. 163.

Where prosecution case was that the petitioner acquired a quantity of iron joist, etc. for the purpose of repairing his factory but instead of doing so, he otherwise dealt with it which constituted a contravention of Cl. 7 of the Iron and Steel (Control) Order, 1956, but it failed to produce any evidence to show that the goods were used for a purpose other than for repairing the impugned factory, *held*, the petitioner could not be convicted under the said Order merely because he disposed of the impugned factory even before acquiring the goods and, thus, there was probability that the goods might have been used otherwise: 1989 Cr.L.J. 1238 (Cal.) (D.B.).

46. Estate.—Plaintiff asking for declaration that area covered by inam title deed is not estate—Plaintiff must prove that it is not estate: 30 Cut.L.T. 336.

Explanation to S. 3(2)(*d*) of the Madras Estates Land Act, 1908 (as amended in 1956) raises a presumption that where a grant is expressed to be of a named village, it should be deemed to be an estate; the burden to prove that it was not an estate would lie on the party contending so to show the minor inams comprised in the grant were created contemporaneously with or subsequent to the grant of village by the original grantor. [A.I.R. 1966 S.C. 681, Rel. on]: A.I.R. 1983 S.C. 608: (1983) 3 S.C.C. 21: 1983 U.J. (S.C.) 425.

Suit for declaration that certain lands do not form "estate" within the meaning of Madras Estates Land Act—Onus of proof is on the plaintiff: (1967) 2 An.L.T. 116.

47. Execution of documents.—(*See* also Ss. 67, 68, 70 and 71 and Note 31, *supra* and Note 77, *infra*). Proof of execution of a document is no proof of the truth of its contents; the truth of the facts stated in the document, if denied, has to be proved by admissible evidence; under S. 61, the contents of documents are to be proved either by primary or secondary evidence and under S. 62 "primary evidence" means the document itself produced for the inspection of the Court". Even on such proof the Court is not bound to accept the contents, unless it is satisfied about their truth. [A.I.R. 1981 S.C. 2085; A.I.R. 1950 Pat. 370, Rel. on]: A.I.R. 1983 Ker. 81 (D.B.).

A mere acknowledgment of execution of a document need not necessarily mean an acknowledgment of liability thereunder. The burden is undoubtedly on the party who relies on such document to establish that statement of the defendant in document constitutes an acknowledgment of liability: A.I.R. 1971 Mad. 425: (1971) 84 Mad.L.W. 167.

Where the defendant denies that he ever executed the document in question, the plaintiff has only to prove the execution of the document and once the execution is proved, the contents follow: A.I.R. 1959 Andh. Pra. 653.

Mere proof of the signature does not operate to discharge the onus to prove execution of the document: (1976) 2 Cut.W.R. 780.

Deed—Execution—Appending signature to blank paper—Burden of proof. *See* A.I.R. 1957 Pat. 64.

When a signature or thumb-impression in a document is admitted by a person to be his and it purports to be in token of the execution of the document by him then a presumption arises that he must have executed it. It is for him to prove that the signature or thumb-impression was affixed for some other purpose as in token of attestation or that it was affixed on a blank piece of paper. If he fails to do so the presumption is against him. But at the same time before such a presumption is raised he must have unequivocally admitted that the signature on the document is his. It is not sufficient if he simply stated that he signed a blank paper and the document in question might have been got up with the help of that document. It may not be necessary for him to say specifically that his signature had been taken to the document in question. The admission must certainly amount to his saying so: A.I.R. 1952 Mys. 114.

Presumption under—To raise such presumption due execution of pronote must be established—Initial burden lies on plaintiff—Mere admission of signature and thumb-marks on blank sheet is not admission of execution: 1968 All.L.J. 480.

Execution of pronote when needs be established despite admission of signatures by executor. *See* 1981 Jab.L.J. (Note) 58.

Negotiable Instruments Act (1881), Ss. 4, 118(*a*)—Promissory note by illiterate person—Defendant admitting his thumb-impression on note as well as receipt—Burden of proving consideration for the same does not shift on the defendant: 1979 All.L.J. 231: 1979 All.L.R. 245: 1979 All.W.C. 162.

Denial of execution of document by the defendant—Plea that blank paper signed by him was handed over to plaintiff—Onus is on plaintiff to prove execution of document and payment of consideration: (1965) 35 Cut.L.T. 794.

Where in a suit for possession of property belonging to a Hindu, the defence is that the defendant was in possession of the property under a sale deed purported to be executed by the widow, and the execution of the sale deed was denied by the plaintiffs, the burden is upon the defendant to show that the widow had executed the agreement for sale. Where the widow could sign and the document bears her thumb-impression and it is alleged by the defendant that she was conscious at the time the widow gave her thumb-impression, the burden does not shift on to the plaintiffs until it is explained by the defence why her thumb-impression was taken to the document. Where the document purports to show itself that the executant's thumb-impression was taken to the document because she was not then in a position to sign, if subsequently the executant was in a position to sign, then failure to take her signature later to the same document makes the defence case still worse: A.I.R. 1956 Bom. 566.

Execution of document admitted—Onus on executant to prove that he did not understand its terms even if he is illiterate: (1925) 27 Punj.L.R. 641: A.I.R. 1926 Lah. 692. *See* also 147 I.C. 591: A.I.R. 1934 All. 226.

Where a person not knowing English has affixed his mark to a document written in English language, the onus to prove that the document was properly explained and interpreted to the perosn affixing his mark so as to make him understand its true import is on the party relying on the document: A.I.R. 1937 P.C. 274.

Where there was no endorsement on the document to the effect that it was read over and explained to the executant or that she appended her signature after understanding the contents of the same, *held*, it could not be said that the claimant had discharged the burden that lay on him: (1977) 2 Cut.W.R. 800.

The execution of a document implies intelligent and conscious appreciation of the contents thereof and the facts connected therewith; and where the defendant admitted only that he had put his signature in a blank piece of paper, which, he alleged, had possibly been utilised for fabricating the document in question, it cannot be regarded as his having admitted the execution of the document. The onus of proving that a particular paper, which is the basis of a suit was duly executed by the defendant, must, therefore, have been thrown upon the shoulders of the plaintiff: A.I.R. 1975 Mad. 333: (1975) 88 Mad.L.W. 265: (1975) 1 M.L.J. 5 (D.B.).

When once the execution of a document is proved if a party alleges circumstances that would make the document not binding on him, it is for him to prove such circumstances: 116 I.C. 143; 39 P.L.R. 42.

Where the defendants admitted receiving of the sums mentioned in a voucher and signature thereon, *held*, when that voucher mentioned that the amount was advanced by way of loan, it was for the defendants to prove that the voucher was signed in blank and/or that amount was towards profits: A.I.R. 1992 Bom. 434.

When the plaintiff admits execution of receipt, the burden is on him to prove that such receipt does not pertain to the suit amount: (1981) 1 M.P.W.N. 121.

Though, normally the law will not be favourably inclined towards and protect "literate persons of full capacity", if they raise the plea of *non est factum*, the law would protect even such persons if they prove that they are "persons who have been tricked into signing the document". Further, it is for the defendant to prove that the document which he purported to execute by signing blank papers was of fundamentally different nature from the document which he believed he was signing: A.I.R. 1987 Bom. 60: I.L.R. (1987) Bom. 370.

Execution of handnote—Proof of—Contention that document was not genuine—Decree on weighing oral evidence in absence of expert evidence, *held*, was valid: A.I.R. 1965 Pat. 295.

Where execution of a handnote was admitted, *held*, the burden of proving that it was obtained from the defendant under threat and coercion; if the defendant failed to establish that plea, the plaintiff was not required to prove passing of consideration; in view of S. 118 of the Negotiable Instruments Act, 1872, the Court was bound to draw the initial presumption that the note was for consideration; it was for the defendant to prove want of consideration: A.I.R. 1982 Ori. 264: (1982) 53 Cut.L.T. 537.

Where the defendant admits only that he had put a thumb-mark or signature on a document which was not handnote sued upon, the admission does not amount to admission of the execution of the handnote and, consequently, the burden of proving that the particular handnote sued upon was duly executed by the defendants is upon the person suing upon the same: 1968 B.L.J.R. 409. *See* also A.I.R. 1976 Pat. 92; A.I.R. 1975 Mad. 333.

The burden of proof is heavy on a plaintiff who sues for a declaration of a document solemnly executed and registered, as a fictitious transaction. The burden becomes doubly heavy when the plaintiff seeks to set aside the order of the civil Court passed in execution proceedings upholding the claim of a third party to a property sought to be proceeded against in execution. The plaintiff who seeks to get rid of the effect of the adverse order against him, has to show affirmatively that the order passed on due inquiry by the executing Court, was erroneous: A.I.R. 1959 S.C. 1204.

Where a document is registered by a registering authority, the certificate granted to that effect, *held*, is admissible to prove due registration of the document in statutory prescribed manner and the facts set out in the endorsements made by the authority; the provision is rebuttable but all the same, it places the burden of proof squarely and unmistakably on the party denying the document's registration or its validity: (1978) 91 Mad.L.W. 421. *See* also 1984 All.W.C. (Rev.) 52.

The Registrar's endorsement that the document was signed by the executant after fully understanding it, *held*, cannot be a conclusive proof of its execution if circumstances of its execution are suspicious, *i.e.*, when the executant was an illiterate widow and was ignorant, inexperienced and had to depend on others: A.I.R. 1985 All. 160: 1985 All.C.J. 345.

In a suit for specific performance of a contract of sale said to have been executed by an old, illiterate tribal woman, *held*, the burden lies on the plaintiff to establish that the contract was duly executed by her: A.I.R. 1981 N.O.C. 17: (1980) 50 Cut.L.T. 77 (D.B.).

In a suit for specific performance on the basis of an agreement to sell, executant of which was an illiterate lady, *held*, the onus of proving intelligent and conscious execution of the document by her in favour of the plaintiff, was on the plaintiff: A.I.R. 1977 All. 36.

When an illiterate person raises the plea that he/she signed the document under a mistaken impression of its character, the burden is on the person who procured the document to show that the executant had the knowledge of the contents of the deed. Such burden can be discharged by proving that the document was read over and explained to the executant before the execution. If the evidence discloses that the execution took place after the document was read over and explained, the executant must prove that he is not guilty of negligence or carelessness.

The plea of *non-est factum* is independent of other vitiating grounds such as fraud or misrepresentation in procuring the document which make the deed voidable. In order to invoke this doctrine, it must be shown that the document was radically different in character from that which signer thought it was. The mistake must not be as to the legal effect of the document but only its character. The Court may not extend the applicability of the doctrine where the interests of the parties are involved or in the case of negotiable instruments.

While examining the evidence the plea of fraud, misrepresentation and coercion are not relevant and must be excluded. The plea regarding non-understanding of the nature of the document must be judged independently apart from those vitiating grounds: (1988) 2 An.L.T. 9 (N.R.C.).

Where plea of a person, who had allegedly executed a document, was that he was illiterate and apart from putting his signature he did not know how to read or write and that he was not informed of the contents

of the document as the document was not read over or explained to him, *held*, the burden is on the opposite party who was relying upon the said document to prove that the document was properly explained and interpreted to the person executing it. [A.I.R. 1937 P.C. 274, Rel. on]: A.I.R. 1972 Mad. 336: (1972) 85 Mad.L.W. 164.

Since an illiterate person is unable to read the contents of a document, *held*, the burden lies on the party relying upon it to establish that the executant had known the contents and purport of the deed before he thumb-marked it; due execution must always mean that the executant's mind did concur with the contents of the deed and its signing or thumb-marking was a consequent act; it must be shown to have been thumb-marked after its contents have been read over to, and understood by, him. [(1968) 34 Cut.L.T. 874; (1975) 1 Cut.W.R. 512; (1974) 1 Cut.W.R. 630; A.I.R. 1937 P.C. 274, Rel. on]: (1977) 44 Cut.L.T. 26: A.I.R. 1977 N.O.C. 304: (1977) 1 Cut.W.R. 234.

Where the illiterate mother-in-law had challenged the sale deed on the ground that it was got executed from her by her son-in-law, who was living with her and managing her property for about twenty years, on the pretext that it was a power-of-attorney, *held*, the mother-in-law being his ward and the relationship being that of trust, the burden to prove that she had executed the deed after fully understanding its contents and receiving the consideration lay on the son-in-law; illiterate ladies are equated with *pardanashin* ladies. [A.I.R. 1963 S.C. 1203, Foll.]: A.I.R. 1982 Ori. 174.

If from the facts and circumstances appearing from the evidence on record it becomes evident that the illiterate executant of the deed understood the nature and the consequence of her said act and knew what she was doing, then, in the absence of other facts to invalidate that execution one can safely hold that the said deed was validly executed: (1977) 2 Cut.W.R. 730.

It is for the appellants to show that the reading and interpretation of the mortgage deed by the Courts below is not correct. But when the terms of the mortgage deed are more than clear enough to support the position that has been urged on behalf of the appellant, then onus can only be discharged by the force of argument and in no other way: (1959) 61 Punj.L.R. 213: A.I.R. 1959 Punj. 249: I.L.R. (1959) Punj. 254.

The appellant had brought a suit on the strength of a sale deed. The written statement of defendant showed that he did not dispute the fact that there was such a document of sale in the name of appellant. His contention was that though in form the document was a sale deed, in actual fact it was intended, by the parties to the document, only to be a mortgage. *Held*, that on the above pleadings, the Munsiff ought to have framed an issue and thrown the burden on the defendant to lead evidence in support of his contention that the deed was only a mortgage: A.I.R. 1960 Manipur 11. *See* also (1980) 2 M.P.W.N. 191.

The argument that while proof of the execution of a Khata by the debtor may throw the burden of proof about the incorrectness of the recitals on the debtor, the same should not be said when the suit was against an heir of the executant cannot be accepted as correct. An heir of the deceased executant is in no better position than the executant himself: A.I.R. 1958 Raj. 10: 1958 Raj.L.W. 169.

Comparison of signatures by Court itself—Permissibility—Execution of document—Denial—Burden of proof: A.I.R. 1957 All. 119.

Where a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority: A.I.R. 1928 P.C. 152: 55 M.L.J. 88 (P.C.).

In a money suit based on vouchers or coupons for petrol singed by the defendant's driver the defence set up is that the driver was not the defendant's employee at the relevant time, *held*, the burden lies on the plaintiff to prove that the driver was indeed the defendant's employee at the relevant time which can be discharged only by the driver's deposition; in the absence of such evidence, the defendant could not be held liable: A.I.R. 1981 N.O.C. 85 (Gau.) (D.B.).

Where there is no reason forthcoming why a different ink has been used for the purpose of the signatures of the attesting witnesses from the ink used for the body of the document and the thumb-impression on the deed, the execution of the document is suspicious: A.I.R. 1956 Bom. 566.

Where the due execution and due attestation of the waqf deed has been established and not challenged, the onus lies upon the party to prove by cogent and convincing evidence that the deed was a colourable or a fictitious transaction: I.L.R. (1954) 2 All. 556: A.I.R. 1957 All. 94.

A lunatic is not a person who is continuously in a state of unsoundness of mind and once it had been established that a person is a lunatic, the burden of proof is on the party who alleges that a document he relies on as having been executed by the alleged lunatic was executed by him during a lucid interval: nor does the fact that it was registered, shift the burden of proof in regard to the factum of execution in a sound state of mind. Under the Registration Act, the registering officer is only concerned to see whether the executant appears to be a lunatic and if he does not, he is bound to register it: A.I.R. 1958 Andh. Pra. 22.

Misrepresentation—*A* alleging that deed executed by him was vitiated by misrepresentation—Onus is upon *A* to establish plea of misrepresentation—*Held*, on facts, that *A* had failed to establish misrepresentation: (1967) 1 S.C.R. 275: A.I.R. 1967 S.C. 1395.

When execution of a bond was admitted, the burden to prove plea of coercion and threat is on the defendant who raises such plea: 1983 M.P.W.N. 156.

Where the plaintiff an illiterate and unaware of the contents of the document affixed her thumb-impression on it and later on alleged misrepresentation and fraud, *held*, the burden of proof was on the defendant to disprove the allegation of misrepresentation and fraud: (1993) 1 M.L.J. 259: (1992-2) 110 Mad.L.W. 209 (D.B.).

Where an illiterate woman sued that the sale deed had been got fraudulently executed from her and its contents were not read over to her, *held*, the burden to prove that the deed was read over to, and its contents were fully understood by her, would lie on the vendee: A.I.R. 1990 All. 75: 1989 All.C.J. 698.

When signing of bills is admitted by the defendant, it is for him to explain the circumstances under which he signed them: 1982 M.P.W.N. 126.

Where a letter purporting to be a licence written in Urdu and signed by an illiterate person in Mundi, *held*, the admission of his signature by the alleged licensee does not amount to his admission of the document's execution; it would not shift legal or evidentiary burden initially cast on the plaintiff to the defendant-licensee even before the trial starts. The proper issue in such a case would be—Whether the land is in possession of the defendant as a licensee under the plaintiff? : A.I.R. 1976 Del. 70 (*See* also Note 80, *infra*).

48. Fraud.—Suit challenging sale deed executed by plaintiff—Plaint assertions about fraud and plaintiff being *pardanashin* illiterate lady—Denial by defendant—Plaintiff must begin and not defendant: 30 Cut.L.T. 463.

Fraud in civil proceeding must be established beyond reasonable doubt as in a criminal proceeding: A.I.R. 1941 P.C. 93; (1972) 38 Cut.L.T. 325: (1972) 1 Cut.W.R. 513 (D.B.).

Transfer in good faith—Burden of proof—Fraud on part of transferor proved—Burden to show that transferee was transferee in good faith is on transferee: A.I.R. 1963 S.C. 1150.

Registered document—Plea of *non est factum*—Executant of deed misled by fraud or misrepresentation—Burden of proof—Illiterate executants other than *pardanashin* women—Burden is on executant—Rule of prosecution applicable to *pardanashin* women does not apply: (1961-62) 66 Cal.W.N. 254.

Compromise of suit alleged—Onus—Allegation of fraud onus: A.I.R. 1961 Pat. 310.

Fraud or misrepresentation by injured—Burden of proof—Revival of lapsed policy: I.L.R. (1961) 1 Punj. 553: A.I.R. 1961 Punj. 253.

Avoidance of marriage on the ground of fraud regarding concealment of wife's age at the time of marriage—*Held*, burden is on the wife to dispel the suspicion of any such concealment or misrepresentation: A.I.R. 1986 P. & H. 191: (1987) 1 Hindu L.R. 424: (1986-1) 89 Punj.L.R. 12.

Avoidance of policy on ground of fraud—Proof—High degree of probability required—Burden of proof lies on insurer alleging fraud: I.L.R. (1961) 1 Punj. 553: A.I.R. 1961 Punj. 253.

Avoidance of transfers as fraudulent—Burden of proof—Reliance on circumstantial

evidence—Duty of Court—Inference of fraudulent nature—When made: A.I.R. 1965 Ker. 156.

Onus is on party who advances plea of fraud to prove it by cogent evidence: 33 Cut.L.T. 621.

Onus is on the person alleging fraud or *mala fides*: A.I.R. 1970 Cal. 90; A.I.R. 1917 Pat. 417 (D.B.); A.I.R. 1926 Oudh 501; A.I.R. 1941 Pat. 88 (D.B.).

It is the Courts' duty to compel the party alleging fraud to produce details of it: A.I.R. 1937 P.C. 146.

Fraud between petitioning creditor and insolvent resulting in adjudication later as insolvent—Adjudication liable to be annulled—Burden of proof: (1965) 78 Mad.L.W. 715: A.I.R. 1966 Mad. 240.

Where students submitted revised marksheets purportedly issued as a result of re-evaluation and the affidavits and result of the enquiry instituted by the University established that the students had not even applied for re-evaluation of their answer books, *held*, it was a strong circumstance weighing against the students; though the general rule is that he who pleads fraud has to establish it but it is equally settled that inferences may be drawn from circumstances if direct evidence of fraud is not possible: A.I.R. 1981 All. 377 (D.B.); 1992 Mah.L.J. 1505 (D.B.).

Fraud—Burden of proof: I.L.R. 12 Pat. 359: A.I.R. 1933 Pat. 306. Fraudulent transfer, *see* I.L.R. (1953) Nag. 937: A.I.R. 1954 Nag. 129. As to burden of proving knowledge of party defrauded, *see* 143 I.C. 84: A.I.R. 1933 Cal. 339.

49. Gift.—Where the gift of property is admitted, the burden of proving fictitious nature of transaction is on the party alleging it and it is not discharged by proving that the donor continued in possession of the property: A.I.R. 1922 Oudh 178 (D.B.).

Where in respect of a gift deed, the plaintiff alleges that same was got executed from her by playing fraud, then she must establish the same, but if the plaintiff is an illiterate or *paradanashin* lady and alleges fraud and fails to establish fraud, yet the defendant must establish the fact that the plaintiff executed the document after the document was read over and explained to her and after she understood the contents thereof and in the absence of any thing to prove the same, the defendant could not succeed in his contention that the plaintiff could not revoke the gift-deed after having failed in proving fraud: A.I.R. 1994 Ori. 113.

Though an endowment can be created by the donor by executing a deed of dedication, yet its mere execution without the donor intending to act upon its terms does not create a valid endowment unless it is established that the donor intended to divest himself of his ownership of the property dedicated. In order to determine whether an endowment is real or nominal, a question of fact, the relevant and material factors to consider are: (*1*) whether or not the endowment was in fact created, and (2) the parties' conduct and surrounding circumstances; if the creation of the endowment is established as a fact, the second factor ceases to be very much material. However, the onus to prove that the endowment is nominal, and not real, lies on the party which asserts it to be nominal: A.I.R. 1974 Andh. Pra. 316 (D.B.).

Mohamedan Law—Gift—Delivery of possession—Onus—Recital in deed that possession was delivered—Effect of: (1958) 1 M.L.J. 14: A.I.R. 1958 Mad. 527; A.I.R. 1956 Trav.-Co. 268. *See* also I.L.R. 28 All. 439 (P.C.).

The initial burden to prove the requirements of *marz-ul-maut* is on the person who sets up such a plea as affecting the disposition of a dead person; that can be discharged by the proof of the facts and circumstances in which such person met his death and the attendant events preceding and succeeding the disposition itself. Once the possibility of a subjective apprehension of death in the mind of suffering person who made the gift is raised, clearly the burden shifts to that party who takes under the disposition or set up the title on its basis. Such party may prove the facts and circumstances which would enable the Court to hold that the disposition itself was not made while the suffering person was under the apprehension of death for there may be several answers to the problem and mere accident of death of the person making the disposition would not be enough. An old man meeting a natural death may be well disposed to see that the matters are settled in his lifetime and such dispositions would be perfectly valid and would not answer *marz-ul-maut*. It is, therefore, necessary for the

party setting up the disposition to rebut the proof that may be indicative that the disposition is within the mischief of *marz-ul-maut*. That cannot be done by merely relying on the abstract doctrine of onus of proof of insisting upon the evidence of medical experts not tendered by the opposite party. In a given case such evidence may not be at all available: A.I.R. 1975 Bom. 165: 1975 Mah.L.J. 122.

Property accepted under gift deed—Onus of proving that property does not belong to donor rests upon donee: A.I.R. 1968 Punj. 239.

Gift—Gift of immovable property—Acceptance—Onus: 1968 Ker.L.R. 327: A.I.R. 1969 Ker. 21.

Where the gift deed was executed 75 days before her death by an illiterate woman stated to be 85 years old in the deed, while the propounder and the attesting witness in their testimony gave her age at that time to be 50 and 72 years, respectively; though they also deposed that she had good and normal health but admitted in cross-examination that she was suffering from arthritis; and no independent witness was examined; *held*, apparently, due to her extreme old age, she could not have understood the nature and contents of the deed; there was also no mention in the deed of her having exercised her independent judgment without coercion or undue influence; the propounder had failed to discharge his burden to prove the deed which lay upon him: A.I.R. 1983 Ori. 172: (1983) 56 Cut.L.T. 241.

Where the donor had practically gifted all her landed property with an apple orchard, worth about two lakh rupees, to her lawyer, the donee, who was, due to fiduciary relationship, in a position to dominate her will, had no relation and belonged to a different caste, and his village was about 20 Kms. from her village, *held*, the transaction appears to be unconscionable; the burden, thus, shifts to the donee to prove that the gift deed in his favour was not executed under undue influence. [A.I.R. 1976 S.C. 163, Foll.]: A.I.R. 1984 Him. Pra. 11: I.L.R. (1983) Him. Pra. 277.

Where the plaintiff being an old man, with feeble health and weak eyesight alleged that the father of the defendants who was neither related to the plaintiff nor was he rendering any services to him taking advantage of his weaknesses fraudulently got executed the gift deeds in the name of his sons, *held*, it was for the defendants to prove that the plaintiff executed the gift deeds voluntarily after understanding the nature of the documents. [A.I.R. 1941 P.C. 90 and A.I.R. 1976 S.C. 712, Disting.]: A.I.R. 1985 P.&H. 315.

Where an old lady of 70 years, struck by paralysis, executed a gift deed, remained for four months as an inpatient under treatment and two months thereafter died, *held*, in the absence of any evidence showing that she had executed the deed with the knowledge of its contents and their implication except that of the donee who had, however, no direct knowledge, and evidence indicating that she had been complaining a few days after the deed that she had been coerced in executing a document unknown to her, the burden to prove that the deed was not procured by any improper means and was executed by her voluntarily shifted to the donee: A.I.R. 1985 N.O.C. 101: I.L.R. (1985) 1 Ker. 478.

Where a son impeaching the gift of a small portion of the joint family property made by his father, the *karta*, to the *karta's* helpless sister on the ground that it had not been acted upon, *held*, the burden lay upon the son to prove that the gift was not acted upon; it is not for the donee to prove otherwise; since the donor was the best person to prove or disprove the allegation and was not examined by the son, he clearly failed to discharge his burden. [A.I.R. 1964 S.C. 510 and A.I.R. 1954 Mad. 307, Rel. on]: A.I.R. 1980 Mad. 239: (1980) 93 Mad.L.W. 120: (1980) 2 M.L.J. 35.

The burden of proving that gift deeds of immovable property executed by an old illiterate *pardanashin* lady were not tainted with fraud, undue influence or misrepresentation lies on the party propounding the gift deeds; where no evidence was adduced by the propounder, *held*, the deeds were null and void: A.I.R. 1985 N.O.C. 33: 1984 Pat.L.J.R. 622: 1984 B.B.C.J. (H.C.) 822.

Gift of property by father to son-in-law—Burden of proof is on donee to show that property was self acquired property of former—Otherwise gift fails. *See* A.I.R. 1954 Manipur 22.

Gift by insolvent to his wife challenged as sham—Onus of proof is on receiver or assignee: I.L.R. (1964) Cut. 274.

A deposit made by a person of his money in the joint names of himself and his wife on

condition that it is payable to either or survivor or in the name of his wife alone, does not constitute a gift to his wife: A.I.R. 1985 Ker. 14: 1985 Ker.L.J. 34: I.L.R. (1985) 1 Ker. 281 (D.B.).

50. Government employees.—Classification of employees for appointment and promotion—Unless classification is *prima facie* unjust, onus lies on party attacking classification to show that it is unreasonable and violative of Art. 16: A.I.R. 1967 S.C. 839.

Public servant—Suspension of, whether by subordinate officer—Onus of proof: (1963) 6 Fac.L.R. 225.

Premature retirement from Government service—Writ petition—Burden of proof is on petitioner to establish premature retirement: 1968 Lab.I.C. 1024 (Assam).

Government servant on leave preparatory to retirement—Leave revoked by Government, Government servant suspended and departmental enquiry ordered, against him—*Held*, no breach of service rules—Petition under Art. 226 by such Government servant alleging *mala fides* on part of Minister in charge—No counter-affidavit by Minister concerned but affidavit filed by Secretary in the Department having no personal knowledge regarding allegations against Minister—*Mala fides* held proved—Orders set aside: A.I.R. 1964 S.C. 72.

Where a compulsorily retired peon, consequent upon a departmental enquiry, having lost in his departmental appeal, impugned the decision in a writ petition on the grounds of bias, wrong placement of the burden of proof upon him, and prejudice caused to him by refusal to allow the assistance of a lawyer, *held*, bias could not be assumed merely from the language used in the chargesheet; the entire facts and circumstances are to be considered in the context of the relevant disciplinary rules and the facts and circumstances of each particular case; when the department adduced its evidence in support of the charge-sheet, there could be no wrong placement of burden; and mere denial of the lawyer's assistance caused no prejudice. [A.I.R. 1983 S.C. 109 and A.I.R. 1983 S.C. 454, Disting.]: (1983-84) 88 Cal.W.N. 5.

Liberalised Pension Rules, 1950, R. 2 (2)—Grievance of *P* that R. 2(2) had no application to his case as he had not completed 30 years of service—When Accountant-General has given his certificate after scrutiny of service register that *P* has put in 30 years of service, it is for *P* to show that calculation arrived at by Accountant-General is wrong: (1967) 2 An.W.R. 276: 1968 Lab.I.C. 116: A.I.R. 1968 Andh. Pra. 50.

51. Guardianship.—Where the contest with regard to the custody of a child of tender age lies between its father and mother, *held*, the welfare of the minor in remaining in custody of the mother is so patent that the onus would really lie upon the father who wishes to take it away from the custody of the mother, especially where the father has married a second time: A.I.R. 1953 Him. Pra. 50.

Claim to custody of minor child of another—Person claiming custody must show by positive evidence that mother of minor is guilty of such conduct as to render it unsafe to give minor child to her: 1969 Cur.L.J. 872 (Punj.).

Where the guardian, a *de facto* guardian at that time, alienated the minor's property, the burden lies upon him to prove that it was a pressing necessity; thus, in the absence of any negotiations for contracting the minor's marriage, the alienation claimed to be necessitated for his marriage expenses, even if the recitals in the deed say so, is not for legal necessity; it is well settled that recitals in the deed by themselves constitute no proof of legal necessity; on facts, the burden not discharged. [A.I.R. 1971 S.C. 1028, Rel. on.]: A.I.R. 1972 Ori. 28: (1971) 37 Cut.L.T. 178.

Where the purchaser of a minor's property relied on a recital in the deed that the sale was necessitated to repay litigation expenses incurred in the partition suit with the co-sharers and the medical expenses incurred on the minor but adduced no independent evidence of necessity or his having enquired about the genuineness of the legal necessity for the sale, *held*, the purchaser did not discharge his burden; the sale was voidable at the minor's attainment of majority. [A.I.R. 1916 P.C. 110, Rel. on]: A.I.R. 1983 Cal. 76: (1982) 1 Cal.H.N. 445 (D.B.).

Transfer by guardian—Right of subsequent transferee from ward to resist suit—Burden of proof: A.I.R. 1957 Ker. 96.

52. Illegal imprisonment.—Order of detention can only be challenged on the ground

of malice—Detenu must establish *mala fides* on part of the Government to secure his release: 1967 Cr.L.J. 845: A.I.R. 1967 Andh. Pra. 202.

Order of detention challenged on the ground that it was actuated by malice—Burden of establishing malice is on detenu: 1967 Cr.L.J. 427: A.I.R. 1967 Bom. 96.

Detention whether *mala fide*—Burden is on petitioner to prove *mala fides*—Affidavit by detaining authority about his satisfaction regarding necessity of detention—Burden held not discharged: 1966 Cr.L.J. 1338: A.I.R. 1966 Raj. 247.

The defendant in an action for false imprisonment is entitled to succeed, if he pleads and proves that imprisonment was legally justifiable. The burden of proving that the arrest of plaintiff was legal is on the defendants: 1957 Jab.L.J. 869: 1957 M.P.C. 429.

53. Illiterate person.—*See* Note 47, *supra* and Note 80, *infra*.

54. Impotency.—Burden of proof of impotency lies on the petitioner: A.I.R. 1968 Del. 79.

The onus of proving the impotency of the defendant is on the petitioner who so alleges: (1988) 1 Hindu L.R. 243 (J.&K.).

Incapacity of husband to consummate the marriage—Burden is on wife to prove: A.I.R. 1968 Ker. 129.

Impotency must be proved beyond reasonable doubt and, thus, its strict and positive proof is necessary: A.I.R. 1973 Del. 200: (1973) 75 Punj.L.R. (Del.) 123 (D.B.).

Impotency of husband—Proof—Husband unable to consummate marriage and wife continuing to be virgin at the date of petition under S. 12(1)(*a*) of the Hindu Marriage Act—Burden shifts on husband to prove that he regained potency before filing of petition: A.I.R. 1966 J.&K. 68.

Where in a petition for divorce on the ground of the wife's impotency, the husband had adduced evidence that the marriage could not be consummated because of the wife's malformed uterus and under-developed vagina which prevented penetration and the medical witness in cross-examination deposed that intercourse might be possible after surgery, *held*, the husband had discharged his primary burden to prove the wife's impotency by sufficient evidence to shift the burden to the wife to show that she could be cured by operation; having chosen not to be operated upon, she failed to discharge the burden: 1984 Hindu L.R. 525 (P.&H.).

Where in the wife's petition for divorce on the ground of her husband's impotency, medical evidence showed the husband to have well developed external genitalia but no test was performed to find out if the erection was possible, *held*, it was then for the husband to prove, by rebuttal evidence, that he was able to penetrate his wife: (1981) 2 D.M.C. 43; A.I.R. 1986 Punj. 308.

55. Injunction.—Where the defendants make construction in violation of the Municipal Rules, *held*, the plaintiff has to establish the material injury by such violation, so as to enable him to be entitled to the relief of injunction. [(1974) 40 Cut.L.T. 1 (F.B.), Foll.]: (1981) 51 Cut.L.T. 126.

Where in a suit for mandatory injunction, possession was claimed after removing building standing on the suit land, *held*, burden lay on the plaintiff to prove his title over the suit land: (1978) 2 M.P.W.N. 60.

56. Insanity, mental disorder, etc.—(*See* also S. 105, Note 5, *infra*). Whenever the accused takes up the plea of insanity, it is for the accused to discharge the burden and prove, either by leading evidence or from the evidence led by the prosecution itself that on account of unsoundness of mind he was not knowing the nature of the act or that what he was doing was either wrong or contrary to law. This burden on the accused is certainly not as heavy as the burden on the prosecution to prove the guilt. But before this question arises, the prosecution is never relieved of its burden to prove the case against the accused: (1991-1) 11 Guj.L.H. 510 (D.B.).

The Court presumes absence of insanity in a criminal trial; this presumption, however, is rebuttable. The burden of proof of legal insanity is on the accused, though it is not as heavy as on the prosecution. The prosecution in discharging its burden in the face of the plea of legal insanity, has merely to prove the basic fact and rely upon the normal presumption of law that every one knows the law and the natural consequences of his act. To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the accused was

labouring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing or if he did not know it, that he did not know he was doing what was wrong or contrary to law: 1994 Cr.L.J. 1897 (Raj.) (D.B.). *See* also (1978) 2 M.P.W.N. 33; 1985 Cr.L.J. 452: (1984) 86 Bom.L.R. 462 (D.B.) [Where the accused did not adduce any evidence to prove his insanity, he can take advantage of the evidence adduced by prosecution and may raise a reasonable doubt in the mind of Court.]

Plea of insanity—Burden of proof: A.I.R. 1923 Pat. 187; A.I.R. 1957 Madh. Pra. 104: 1957 Cr.L.J. 370; A.I.R. 1957 Pat. 491; (1964) 5 Guj.L.R. 474; 1971 Ker.L.T. 57; A.I.R. 1971 Tripura 16.

Burden of proof—Presumption is in favour of sanity—Person pleading insanity must prove it: 1967 Kash. L.J. 44: A.I.R. 1967 J.&K. 85. (*See* also Notes under S. 105, *infra*).

It is well established that the burden of proving a sufficient degree of unsoundness of mind at the time of marriage is in all cases on the party impugning its validity; if permanent unsoundness of mind is proved, the burden to prove that the marriage took place during a lucid interval lies on the party upholding the marriage; subsequent recovery of the person of unsound mind does not affect the question of validity: A.I.R. 1973 Cal. 545 (D.B.).

The burden of proving the requisite degree of mental disorder sufficient under S. 13(1)(*iii*) of the Hindu Marriage Act, 1955, *held*, lies on the spouse seeking divorce on that ground; all mental abnormalities by themselves do not constitute such ground: (1988) 2 Hindu L.R. 633: (1988) 2 Hindu L.R. 557 (S.C.).

Where respondent an inmate of the mental hospital who was discharged on parole but there was no order of discharge under Lunacy Act, executed a power-of-attorney during that period in favour of the appellants, *held*, the burden was on the appellants to establish by sufficient evidence that executant was capable of understanding the meaning of power-of-attorney and of forming a rational judgment as to its effect upon his interest: A.I.R. 1985 Bom. 372 (D.B.).

There is ample authority that mere proof of idiocy at a point of time does not establish, congenital idiocy; it is a fact required to be proved like any other fact and cannot be presumed; rather it is the sanity which is to be presumed unless congenital idiocy is established; thus, a person born in 1941 cannot be presumed to be a congenital idiot on proof that he was an idiot 23 years thereafter or from some years after his birth. [A.I.R. 1965 S.C. 364 and A.I.R. 1974 Mys. 61, Disting.]: A.I.R. 1982 Andh. Pra. 163 (D.B.).

Where annulment of marriage is sought on the ground that the respondent was an idiot and lunatic at the time of marriage, *held*, it is for the petitioner to prove that his case was squarely covered by S. 5(*ii*)(*b*) of the Hindu Marriage Act, 1955: 1980 Hindu L.R. 134.

Petition for annulment of marriage with lunatic—Burden to prove lunacy is on the petitioner: A.I.R. 1969 Cal. 304; A.I.R. 1973 Cal. 545: (1971-72) 78 Cal.W.N. 36; A.I.R. 1975 Cal. 109 (D.B.).

57. Insurance.—(*See* also Note 16, *supra*). The general principle that burden lies on the insurer to prove the breach of conditions of insurance of postal parcel is not displaced by the provisions of S. 33 of the Post Office Act, 1898 and the Rules framed thereunder: A.I.R. 1971 S.C. 432.

The burden of proving the special defences available to the insurance company under S. 96(2) of the Motor Vehicle Act, 1939 is on the insurance company: 1980 Raj.L.W. 38: 1980 W.L.N. (U.C.) 244; (1975) 77 Bom.L.R. 38.

Where sea water had not entered the engine room and the failure of the vessel and boiler were possibly occasioned by non-repair, *held*, it did not amount to loss by perils of the sea under a marine insurance policy under the Marine Insurance Act, 1963; the burden of proof not discharged by the assured: (1993-1) 41 B.L.J.R. 773 (S.C.).

Where an insurance company undertook to pay the insurance money of the assured proving total loss of the ship carrying the goods and the company admitted the loss of ship but contended that it was due to risk of war and claimed exemption on that ground, *held*, that when the loss of ship was admitted by the company the onus on the assured was discharged and it was for the company to prove that though the loss was due to an event insured against, the event was caused under circumstances which brought the case

within the exception contained in the policy: A.I.R. 1954 Sau. 81.

Where insurer pleads general exception to avoid its liability under the policy, burden is on it to prove such exception: (1981) 2 M.P.W.N. 3. *See* also A.I.R. 1991 Ker. 380 [The burden of proving the fact which excludes the liability of the insurer, lies on the insurer alone.]

58. Intention.—It is not the duty of the prosecution to establish the intention for any act, if the act itself is proved: (1978) 45 Cut.L.T. 71.

Intention—Proof of—No presumption—Burden to prove intention—Extent of: A.I.R. 1970 Raj. 60: 1969 Raj.L.W. 612 (D.B.).

Intention—Proof—Onus: (1957) 23 Cut. L.T. 157.

59. Joint debt.—Burden of proof—Proof that plaintiffs and defendants had jointly come to an agreement of business—Defendants are to make out a case of non-participation in business to evade liability to joint debt: I.L.R. (1963) Andh. Pra. 931: A.I.R. 1965 Andh. Pra. 98.

60. Joint family—General.—Hindu undivided family—Presumption. *See* A.I.R. 1955 Pat. 366: 28 I.T.R. 167. Joint family—Presumption—Separation—Burden of proof. *See* A.I.R. 1954 All. 801 (D.B.); (1968) 34 Cut.L.T. 516; 1967 Cal.L.J. 781; A.I.R. 1962 Ori. 43; A.I.R. 1966 S.C. 405; (1957) 1 An.W.R. 31: A.I.R. 1957 Andh. Pra. 744; 1957 M.P.C. 397.

The burden of proving that a particular property belongs to the joint family, lies on the person who alleges it. But once the possession of an adequate nucleus is shown, the onus shifts on to the person who claims the property as self acquired to establish that the property was acquired without any aid from the family estate. [A.I.R. 1954 S.C. 379, Rel. on]: (1973) 89 I.T.R. 129 (Mad.).

Joint family property or self-acquired property—Burden of proof: (1963) 1 An.L.T. 312: A.I.R. 1963 Andh. Pra. 476.

Property held by member—Presumption—Burden of proof—Shifting of onus. *See* A.I.R. 1955 Madh. Bh. 28: I.L.R. (1955) Madh. Bh. 1.

Hindu law—Joint family—No presumption of joint property—Possession of nucleus essential—Burden of proof that any particular property is joint family property is, in the first instance, upon the person who claims it as coparcenery property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member is presumed to be joint family property. This is, however, subject to limitations that joint family property must be such as with its aid the property in question could have been acquired. It is only after possession of adequate nucleus is shown that the onus shifts on to person who claims property as self-acquired without any aid from the family estate: A.I.R. 1969 S.C. 1076.

Joint family—Joint property—Nucleus—Adequacy and existence of—Onus: A.I.R. 1959 Mys. 173. *See* also (1978) 2 M.P.W.N. 176.

There is no presumption that a Hindu joint family is possessed of joint funds and the onus lay on the one who claims that the business was started with the joint family funds, to prove so: A.I.R. 1989 All. 202: 1989 All.L.J. 823.

There is a presumption of a Hindu family being joint but not that property held by a member of a joint Hindu family is joint family property; the burden lies on the person to prove if he asserts that such property is joint family property; and that burden is discharged and shifts on proving that there was sufficient nucleus of joint family funds to acquire that property with, merely because it was purchased in his name would not render it to be the member's individual property. As *held* in A.I.R. 1931 Lah. 419 where a member of a joint Hindu family blends his separate property with the joint family property or the joint family property with his separate property, in either case the blend becomes joint family property belonging to the joint Hindu family. [A.I.R. 1960 S.C. 335 and A.I.R. 1969 S.C. 1076; A.I.R. 1931 Lah. 419, Foll.]: A.I.R. 1982 Del. 520 (D.B.).

Member of joint Hindu family setting up a case that a purchase of property by another member in his own name alone was made by him as *karta* with family funds. Onus of establishing that there was nucleus with the income of which the property could have been acquired is on him—Existence of joint family does not lead to presumption that the property held by any member is joint family: A.I.R. 1957 Assam 115.

It is not the law that the whole of the money required for purchasing the property in dispute must be proved to have actually come out from such nucleus, or that the nucleus was sufficient to have yielded all the necessary funds for acquiring the property in dispute. It is sufficient in law to find that there was a nucleus which could have been the source of the acquisition. It is not necessary to prove that the nucleus was in fact the source of the acquisition. Once the existence of such a nucleus is proved, it is for the person contending that the property is his self-acquired property to prove affirmatively that he acquired it from his own self-acquired funds. It is not sufficient for him to show or to suggest that it could have been acquired from his self acquisition. He must prove it positively as a fact that the source of the acquisition of the property in dispute was his self-acquired income or fund: A.I.R. 1983 All. 348.

Joint family property—Blending of separate property with joint family property—Person alleging that such property is joint property must show that owner has voluntarily thrown it into hotchpot abandoning his separate interest in it: A.I.R. 1968 Mys. 229.

Burden of proving item of property to be joint—Onus when shifts. *See* A.I.R. 1957 Pat. 398.

When in a suit for partition, a party claims that any particular item of property is joint family property, or when in a suit on a mortgage, a party contends that the property mortgaged is joint family property, the burden of proving that it is so rests on the party asserting it: (1988) 1 Hindu L.R. 79 (Karn.) (D.B.).

There is no onus in law on a Hindu family to show that certain items of deposits standing in the names of different members of the family do not belong to it: I.L.R. (1953) 5 Assam 173: A.I.R. 1954 Assam 49.

Hindu joint family—Acquisition of property by member of joint family—Burden of proof, as to when it becomes joint family property. *See* A.I.R. 1956 Andh. Pra. 255; A.I.R. 1957 Andh. Pra. 93.

Where the defendant's pleading was that Rs. 300 to purchase land and build the house in 1917 were obtained from the joint family business, but at the time of evidence they shifted their stand by asserting that it arose out of the income from the joint family land inherited from their father and the existence of the joint family land stood proved, *held*, the onus shifted on to the plaintiffs to prove that their father had separate income to purchase the land and build the house; on facts, onus not discharged: A.I.R. 1994 Him. Pra. 144.

Where properties standing in individual names were sought to be shown as belonging to the joint family and it was not shown as to what was the extent of the joint family's properties, what was the family's income, expenditure and the surplus available to acquire those properties, *held*, the burden of proving that the properties were purchased out of joint family funds was not discharged: A.I.R. 1986 Ori. 173 (D.B.).

Mortgage by manager to satisfy decrees obtained against him—Liability of other coparceners—Burden of proof. *See* A.I.R. 1956 Nag. 285.

Where evidence in a suit for partition showed that the Hindu joint family was not in affluent circumstances and did not possess adequate nucleus yielding requisite surplus to purchase the property even if in the name of one of its members who is shown to have obtained sufficient money from his brother-in-law to purchase it, *held*, there could be no presumption that the property belonged to the joint family: 1981 Hindu L.R. 384 (Mad.) (D.B.).

Where a plaintiff avers that an impartible estate has ceased to be a joint family property for succession purposes, *held*, the burden lies on the plaintiff to prove that the junior member of the family intended, expressly or impliedly, to give up their chance of succeeding to the estate; he has to adduce satisfactory evidence to the effect that the junior branch had given up its claim and the estate had become separate property of the last holder's branch; the test is to determine on facts proved whether there was a clear intention to renounce or surrender or relinquish the right of succession by the junior branch so as to render the estate a separate property: A.I.R. 1981 S.C. 1937.

The burden of proof lies heavily upon the member of the family, who sets up title by adverse possession in himself to the joint family property to the exclusion of another member. He should affirmatively prove that,

to the knowledge of the other member, he was asserting title in himself exclusively, that the other member was completely excluded from enjoying the property and that it continued for 12 years: A.I.R. 1973 Mad. 170: (1972) 2 M.L.J. 481: (1973) 86 Mad.L.W. 714 (D.B.).

When the plaintiff asserts that the primogeniture rule was inapplicable, that the family was joint and that there was absence of partition or family arrangement, the onus is on him to prove those contentions: A.I.R. 1970 Raj. 278.

(*a*). Burden to prove self-acquisition.— Once it is found that the family property which may be sufficient to form a nucleus for acquisition of fresh property, the burden to prove that the property was acquisitioned separately, would shift on the person who alleges separate acquisition: 1961 M.P.L.J. (Notes) 20; A.I.R. 1953 Ori. 315: I.L.R. (1953) Cut. 343; A.I.R. 1958 All. 42; 1983 M.P.W.N. 70.

Where in a suit for partition, a property was purchased in the joint names of two brothers living jointly and the family had property yielding some income even if it was not shown that the property was in fact purchased by joint family funds, *held*, the burden lay on the brother claiming it to be his self-acquired individual property and alleging that the other brother joined as a co-purchaser was a mere *benamidar* to prove the same. [A.I.R. 1954 S.C. 379, Foll.]: A.I.R. 1983 All. 348.

Once it is admitted or proved that a family is joint and possesses some joint property called nucleus, the presumption of law is that all property held by or in the hands of any individual member or members is joint family property. This being the presumption, if any member of the family claims any portion of the property as his separate property, the burden lies upon him to show that it was his separate property: A.I.R. 1985 Madh. Pra. 73 (D.B.).

Hindu law—Joint family—Self-acquisition—Shifting of onus. *See* A.I.R. 1954 All. 143: 1953 All.L.J. 611.

Where certain property was recorded as joint for a considerable length of time, *held*, burden of proof will lie on the party pleading self-acquisition to establish the same: 1976 All.W.C. (Rev.) 66.

Existence of family nucleus proved—Subsequent acquisition—Presumption—Proof—Self-acquired property of member impressed with character of joint family property cannot be disposed of by will. *See* (1967) 2 I.T.J. 315 (Andh. Pra.).

Joint family—Self-acquisitions—Acquisition in name of coparceners—Burden of proof: A.I.R. 1959 Pat. 246.

Where the land on which the house in dispute was constructed is coparcernary property of the two brothers, *held*, the burden is on the defendant, the brother asserting that the house was constructed from his self acquired funds to show that the house was his self acquired property: A.I.R. 1983 All. 348.

Hindu joint family—Self-acquisition—Blending—Intention—Onus: A.I.R. 1958 Andh. Pra. 147.

Hindu law—Joint family—Acquisition of separate property to member—Onus is on member claiming such acquisition as his separate property to prove that it is so: A.I.R. 1970 Pat. 13 (D.B.).

If any member of joint family claims any portion of the properties as his separate property, the burden would lie upon him to show that it was acquired by him in circumstances which would constitute it his separate property. Further, there is essential distinction as to the scope of the presumption in the case of acquisitions in the names of male members of a joint family and the female members of a joint family. In the case of male members of a joint family there is a presumption that if the joint family had sufficient ancestral nucleus, the properties standing or acquired in the name of individual members are joint family properties unless contrary is proved. In the case of female members there is no such presumption and it is for the party who claims properties as joint family properties to establish the same by adducing necessary evidence. If such party adduces no evidence or the evidence adduced by him is not satisfactory, the female member in whose name the property stands must be held to be the owner of the property in question: A.I.R. 1973 Ori. 85.

Where a property stood in the name of a female for well over 40 years, *held*, there is no presumption that the source of its acquisition was the Hindu joint family's funds or income; if a plaintiff contends so, he must

necessarily adduce evidence to show that his contention was plausible and maintainable; it is only if the ostensible title of the female is likely to be tilted thereby that the onus to prove her title would shift to her: 1981 Hindu L.R. 789 (Mad.) (D.B.).

Where land was purchased in the name of a married woman from her *stridhan* and no evidence was adduced to show that it was joint family property, *held*, the members not having discharged the burden of proof lying on them, the usual presumption would prevail that the ostensible is the real; the property does not belong to the joint family: A.I.R. 1985 N.O.C. 244: 1985 Pat.L.J.R. (H.C.) 430.

Suit for declaration of title—Plaintiffs title depending on suit property being self-acquired property of her husband—Defendant alleging it to be ancestral property of Hindu joint family—Burden is mainly on plaintiff to prove her case: A.I.R. 1962 Guj. 9: (1961) 2 Guj.L.R. 283.

Incorporation of self-acquired property with impartible estate. *See* A.I.R. 1955 Mad. 219: (1954) 67 Mad.L.W. 388.

(*b*). Partition.—There is no presumption that a joint family owns joint properties as well. In a suit for partition of alleged joint family properties, the onus is on the plaintiff to prove that the properties in question are joint family properties: A.I.R. 1990 Pat. 198. This onus may, however, be held to have been readily discharged, if there are appropriate circumstances appearing in the evidence in the case: (1972) 38 Cut.L.T. 827 (D.B.).

There is no presumption that a Hindu joint family is also possessed of joint property; thus, it is for the party which claims partition to plead and prove that the property sought to be partitioned belongs to the family; that can be shown by establishing an adequate nucleus of joint family property and funds wherefrom members had purchased the disputed properties in their individual names: A.I.R. 1985 N.O.C. 60 (Ori.) (D.B.).

The burden to prove that a property sought to be partitioned belonged to the joint family lies on the person who claims its partition as such: 1984 M.P.L.J. (N.O.C.) 54.

The burden of proving partition of the joint family property lies on the party which asserts partition; merely because a person is in exclusive possession of some joint family property is not determinative of partition because such exclusive possession may as well flow from an amicable settlement between members of the family; in the absence of satisfactory evidence of previous partition, the property held to be joint: (1993) 1 Hindu L.R. 83 (Cal.) (D.B.).

Partition admitted or proved—Person alleging family property to be joint—Burden of proving allegation: A.I.R. 1966 Pat. 179.

Partition suit—Question whether certain property belongs to joint family—Burden of proof—Discharge of: I.L.R. (1960) Bom. 67.

Partition—Suit for—Onus of proving the particular item of property is joint family property rests on party asserting it: (1968) 34 Cut.L.T. 778.

It is elementary that the normal state of every Hindu family is joint; the presumption is that unless proved to the contrary such a family continues to be joint; even the burden to prove an old partition still lies on the party which asserts partition; but where the partition asserted is ancient (more than century old as in the instant case,) such burden may not be discharged by evidence, obliterated or lost by lapse of time; but the partition may be gathered from subsequent acts and conduct of the family members like record of rights showing the family lands to be joint in successive settlements and their joint purchases of lands about three decades earlier; the family continued to be joint: A.I.R. 1985 N.O.C. 60 (Ori.) (D.B.).

Partition is severance of joint status and occurs on communication by a member of the family of his intent to separate; it is not to be confused with *de facto* division and allotment of shares to the members, by mere communication of the intent, the joint family stands disrupted; no separation of the estate by metes and bounds is necessary. The burden to prove the continuance of the joint family would lie on the party that asserts it; that is so in respect of the joint family partitioning part of the joint family property while remaining joint *qua* the unpartitioned property; if such partial separation is admitted or proved, the burden would still lie on the party pleading continuance of jointness in respect of the remaining property to prove it: A.I.R. 1991 Bom. 10: (1991) 1 Hindu L.R. 224: (1990) 3 Bom.C.R. 328.

Partition—Plaintiff alleging severance of status in particular year—Defendant admitting severance but contending that it was in different year—Burden of proving that it was in different year is on defendant: I.L.R. (1966) 32 Cut. 226.

Hindu law—Partition—Allegation of separation—Burden of proof. *See* A.I.R. 1957 Pat. 398. Partition list proved—Onus to prove jointness is heavy on party alleging it: A.I.R. 1928 Mad. 865. Partition—Re-union—Onus. *See* A.I.R. 1957 Andh. Pra. 744: (1957) 1 An.W.R. 31; A.I.R. 1957 Mad. 269.

The burden of proof of partition is upon the plaintiff: A.I.R. 1971 Mys. 145: (1971) 1 Mys.L.J. 50 (D.B.).

Plea that all properties except suit houses were partitioned, *held*, has to be proved by the party who pleads it: (1978) 2 M.P.W.N. 75.

Suit for partition—Defendants denying jointness of family—Onus of. *See* A.I.R. 1957 Him. Pra. 39.

Where in a suit for partition it was proved that there was sufficient nucleus of funds from the joint family lands and there was no other source from which the disputed property could have been purchased, *held*, the onus would shift to the other party which claims the property to be self-acquired to prove that it was so: (1990) 2 Hindu L.R. 1 (Mad.) (D.B.). *See* also A.I.R. 1983 All. 348.

In the matter of onus, a partition suit does not *stand out* as a category apart; it is for the plaintiff to first *prima facie* establish his case of the property being joint family property; if he shows that the joint family had certain properties which could form a nucleus of sufficient value for acquisition of the suit property, the burden would shift to the other party to show that it was self-acquired, unaided by the joint family property. However, there is no such presumption in case of business even if it is carried on and managed by the *karta* unless it is shown that the business in the hands of a coparcener was developed with the assistance or funds of the joint family: (1978) 91 Mad.L.W. 590.

Where in a suit for partition the defendant sets up a prior partition by agreement between the parties, the burden of proving the alleged partition lies upon the defendant and, therefore, it is for him to begin and lead evidence to prove the agreement before the plaintiff can be called upon to prove its invalidity. It is also his duty to produce the agreement with his written statement or at least produce at the first hearing a list of documents on which he relied and include the agreement in the list: A.I.R. 1956 Sau. 89.

Where each and every plea of the plaintiff in a suit for partition was disputed by the defendants though they set up their title by way of ouster to some of the suit properties, *held*, the entire burden of proof cannot be placed on the defendants to prove their case; it is for the plaintiff to discharge his burden of proof by leading evidence first though he may exercise his option to adduce his evidence of rebuttal after the defendants had adduced their evidence: (1992-1) 40 B.L.J.R. 280.

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In a suit for partition even if the plaintiff admits the memo of partition, still it would not absolve the defendants from proving the fact of actual oral partition. This is an independent fact disassociated from the fact of the execution of the document: A.I.R. 1980 J.&K. 54: 1980 Kash.L.J. 84 (D.B.).

Where in a partition suit it was proved that it was the plaintiff who acted as *karta* upto the final decree in the previous partition suit and that he was collecting the income of the joint properties, *held*, the onus was upon the plaintiff *karta* to prove how much money he realised out of the joint property and how much money he spent to meet the joint liabilities: A.I.R. 1977 Cal. 99: (1975-76) 80 Cal.W.N. 753 (D.B.).

Where a joint family property sought to be partitioned was earlier sold in execution and the suit for possession by the auction-purchaser was compromised on payment of certain amount by two of the joint family members, and thus, in the partition suit those two members contended that it being their self-acquired property was not liable to partition, *held*, the property continued through out to be in possession and enjoyment of the joint family and the auction-purchaser had merely relinquished his right, and the nucleus of the joint family had sufficient potentiality to purchase the property, therefore, the burden was on the defendants to prove hat it was their self acquired property: (1990) 1 Bom.C.R. 661: (1991) 1 Hindu L.R. 97.

In a case of partition the plaintiffs claimed unity of title and possession in respect of certain lands. The Courts below having accepted that there was a normal presumption of jointness, tested the normal presumption by the conduct of parties and thereafter came to a finding that there was absence of unity of title and possession. *Held*, it could not be said that the finding of lower Courts was vitiated on account of onus having been wrongly placed upon the plaintiffs. [A.I.R. 1945 P.C. 128; A.I.R. 1957 Pat. 398; A.I.R. 1960 Pat. 548, Disting.]: A.I.R. 1984 Pat. 191: 1984 Pat.L.J.R. 407.

Where in a suit for partition defendants resist by setting up acquiescence in the permanent right of occupancy in a part of the land, the burden of proving existence of those rights is on them: 56 I.A. 248: I.L.R. 52 Mad. 549: A.I.R. 1929 P.C. 156: 57 M.L.J. 1 (P.C.).

Manager of Hindu family admitting that family possessed certain unaccounted cash—Burden of proving that division of that amount was in fact made, lies on him: (1961) 3 S.C.R. 792: A.I.R. 1961 S.C. 1077.

Partition—Some of the co-parceners separating—Presumption as to others: 1961 Jab.L.J. 616.

Where the coparcener comes forward with a case of partial partition, *held*, the presumption will be that the partition was complete and burden will be upon the coparcencer to show that it was not so: A.I.R. 1985 All. 133: 1984 All.C.J. 647.

The burden of proving a reunion after partition is on the person who asserts it: A.I.R. 1982 Karn. 301.

Marumakathayam law undoubtedly lays down that the partition of tarwad properties requires consent of all its adult members; the burden of proving that the tarwad had been divided by conduct lies on the party which sets up such a plea: A.I.R. 1976 Ker. 105.

Marumakathayam law—Tarwad—Partition—Suit for—Burden of proof—Acquisitions by Karnavan—Presumption. *See* (1955) 2 M.L.J. 36.

Suit for partition of tarward property—Burden lies on plaintiff to prove that property was partible—Burden not affected by frame of issue in negative form—Once plaintiff had not proved that, it was quite immaterial whether property belonged to defendant as the last surviving member of the tavazhi or was his self-acquisition: I.L.R. (1963) 2 Ker. 227: (1963) 2 Comp.L.J. 106: A.I.R. 1964 Ker. 1 (F.B.).

Where the defendants stated in their written statement that the tarwad of plaintiff and defendants originally belonged to one common tarwad, but became separate with no one community of interest between each other, some time prior to the year 1000, M.E., it was for them to make out by satisfactory evidence as to when and how exactly the division took place and what were the properties allotted to each of the tarwards at the time of the alleged division: I.L.R. (1958) Ker. 389: A.I.R. 1958 Ker. 178 (F.B.).

(*c*). Alienation.—It is well settled that the burden of proving that the alienation of property was for "legal necessity" lies on the alienee; it is for him to prove that he had made due and proper enquiry that such necessity indeed existed; the recitals in the sale deed proximate in point of time like providing education is not of much import unless it is supported by independent evidence; on facts, burden not discharged: (1986) 1 Hindu L.R. 691 (Karn.) (D.B.); (1992) 1 Hindu L.R. 648 (Mad.).

Two things are well settled that the authority of the *karta* to borrow on the security of family property is a limited one, and that in the case of a loan to them the burden of proof in the first instance rests upon the lender to show that both the borrowings and the terms were within the authority which *karta* can exercise: A.I.R. 1928 P.C. 64.

Where the manager of a joint Hindu family alienates joint family property, the alienee is bound to inquire into the necessity for the alienation, and the burden lies on the alienee to prove either that there was legal necessity in fact, or that he made proper and *bona fide* enquiries as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity: A.I.R. 1974 Ori. 218: (1974) 1 Cut.W.R. 350. But where the existence of family necessity is established, the manner in which it should be met and the manner of the application of the money for the purpose of meeting the necessity, is a matter entirely for the manager to decide. The purchaser is not bound to see that the money advanced by him was actually applied to meet the necessity: 1984 Hindu L.R. 401 (Mad.) (D.B.).

Where the challenge to the alienation made by the *karta* or father of the joint Hindu family is on the ground that the antecedent debts incurred by father of the joint Hindu family were tainted by immorality, it is for the sons to prove that the antecedent debts were immoral and also that the purchasers had notice that they were so tainted: 1984 Hindu L.R. 401 (Mad.) (D.B.).

It is well settled that it is for the party that wants the Court to uphold alienation of a debuttar property to prove that it was made for legal necessity. [A.I.R. 1917 P.C. 33; A.I.R. 1922 P.C. 356 and A.I.R. 1966 S.C. 1011, Rel. on]: A.I.R. 1975 Cal. 389 (D.B.).

Legal necessity for alienation—Burden of proof: A.I.R. 1959 Bom. 491.

Joint family property—Alienation—Necessity—Onus—Duty of alienee. *See* A.I.R. 1957 Andh. Pra. 744: (1957) 1 An.W.R. 31; A.I.R. 1959 Ori. 112.

Hindu law—Alienation—Necessity or benefit—Onus—*Held*, that the alienee has to prove that the alienation was for necessity or benefit of the family including minor member—Value of recitals in the deed of alienation as proof. *See* 1977 Kash.L.J. 337.

Alienation by *karta* of joint Hindu family—Alienee is under no obligation to give proof of legal necessity when there is no plea raised as to want of necessity: A.I.R. 1971 S.C. 2228: 1971 U.J. (S.C.) 311.

Actual proof of necessity which justifies an alienation under Hindu law is not essential to establsh its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper enquiry to satisfy himself of its truth: A.I.R. 1918 Pat. 469 (S.B.).

The rule as to the burden resting on an alienee (under a sale or mortgage executed by a Hindu father, family manager or limited owner) who seeks to affect the rights of persons not parties to the transaction in his favour, is derived directly from the substantive law whereunder the powers of alienors are limited to the existence of necessity, benefit or antecedent debt. Another rule that alienee is protected if he can satisfy the Court that in entering into the transaction he acted *bona fide* on the representation of the alienor as to the existence of necessity, benefit, etc. If a mere recital as to the existence of necessity, were decisive against the assailant, these rules could easily be circumvented. But the recital as such is not proof, though it is evidence, of the existence of necessity, etc., that is to say, the onus resting on the alienee is not discharged merely by producing the deed and relying on the recitals therein. The weight, which may be attached to a recital of such nature will depend upon other circumstances in the case. There is no special rule of onus in cases relative to the passing of the consideration, apart from what is necessarily involved in the general rule by which the burden of satisfying the Court that a transaction is good under the substantive law devolves on him who seeks to support it. The initial burden which he carries cannot be enhanced by any plea on the part of the consideration. The proposition that where a transaction is sought to be enforced against persons who do not claim through the executant, the admission in the documents as to the receipt of consideration is not enough concerning the sufficiency of proof and not the onus. The real question in such cases is whether the executant as an individual received the consideration recited and there is no reason why his new admission in a solemn deed as to its receipt should be regarded as of little value. Such an admission is not to be ruled out as *'res inter alios acta'*, because the mere fact that he received the consideration mentioned is, by itself, of no legal effect against others. Unless such a recital is necessarily to be viewed with suspicion (for which there is no warrant in substantive law) it may well be taken as *prima facie* proof of such receipt. It cannot be argued that in all cases such a recital should be considered inadequate in law. Nor is there any presumption of law that such recitals are not correct and that they are fraudulently made: 1956 An.W.R. 65.

The burden to prove legal necessity is on the defendant-vendee but at the same time, it is necessary for the plaintiffs who want to challenge such sale to atleast allege in the plaint that such sale was without legal necessity: 1982 Hindu L.R. 646 (Raj.).

Before the question of burden of proof arises, there must be a question for proof. Where an alienation is by itself not void *ab initio*, before it can be set aside, it must be impeached, and where a case of impeachment has not been properly raised by a plaintiff, he cannot, by merely relying on the abstract

doctrine of burden of a proof, be heard to say that because the alienee has not proved legal necessity or a case of antecedent debt, he is entitled to question the alienation and get back the alienated property: 1957 Raj.L.W. 173: I.L.R. (1957) 7 Raj. 101.

Alienation by father of family property when valid—Impeachment of alienation by sons—Burden of proof: A.I.R. 1966 Ker. 305; A.I.R. 1968 Mys. 329. Onus of proving that debt of father was immoral or illegal lies on sons: A.I.R. 1923 Pat. 143 (D.B.); A.I.R. 1921 Lah. 205; I.L.R. (1954) 4 Raj. 328 (D.B.).

Debt—Hindu law—Liability of son—Avyavaharik debt—Burden of proof: A.I.R. 1968 S.C. 534.

Where a Hindu son assails the sale of a joint family property by his father, the burden lies upon him to establish that the debt for payment whereof the sale was effected was of such a nature that he, as a son of the Hindu father, was under no pious obligation to discharge; it is, thus, for the son to establish that the debt was incurred for an immoral purpose; adduction of evidence tending to show his father's general immorality is not sufficient; it is not necessary to prove by direct evidence that the money borrowed was expended on vices but the sons must establish the connection between the debt and his father's immoral habits, either by direct evidence, if available, or by circumstances, which are more telling and can never tell lies. Thus, where the son established that his father, when he contracted the debt, was indulging in a life of vice which, but for the borrowings, he could not, and that there was no other necessity or purpose for such borrowing connected with the family, *held*, it would be reasonable to infer that the debts borrowed were for immoral purpose; it is not necessary for the son to further establish by direct evidence that the debts borrowed were indeed utilised to feed the vice: 1984 Hindu L.R. 53 (Andh. Pra.). *See* also 1979 Hindu L.R. 307 (Punj.).

Where defendants in a suit for partition pleaded that certain mortgages were effected by the *karta* of a branch of the Hindu joint family, *held*, the burden lay upon them to prove that he was in fact the *karta*; on facts, burden not discharged: A.I.R. 1972 Mys. 81: (1971) 2 Mys.L.J. 462.

In a suit for the declaration that the mortgage effected by the plaintiff's father in respect of the coparcenery property, being without any valid necessity, was not binding upon them, *held*, the onus was on the mortgagee to prove legal necessity for the mortgage; the plaintiffs were not required to prove that the mortgage-debt in dispute was tainted with illegality or immorality before a decree could be passed in their favour. [A.I.R. 1967 S.C. 727, Foll.]: A.I.R. 1974 P.&H. 7 (D.B.).

In execution of money decree against the father alone, the whole family property may be brought to sale and when such property is sold, the son cannot get the sale set aside unless he proves that the debt for which the decree was passed, has been contracted by the father for immoral purpose: I.L.R. 15 Cal. 717 (P.C.).

Mortgage by manager to satisfy decrees obtained against him—Liability of other coparceners—Burden of proof: A.I.R. 1956 Nag. 285.

Where it was found on facts that the mortgagee was not acting as *karta* of the joint family but only in his individual capacity when the property was mortgaged to him by his brother, *held*, the starting point of limitation for a suit for redemption would be the acquisition of knowledge by the plaintiff of the alienation, and the burden would lie on the defendant to prove that the plaintiff had acquired that knowledge on a specific date: A.I.R. 1972 Mys. 81: (1971) 2 Mys.L.J. 462.

Alienation—Legal necessity—Pleading and burden of proof—Sale by coparcener only—Existence of widow having interest in property—Nature of interest acquired by alienee—Suit by alienee for declaration of title and confirmation of possession: 1963 B.L.J.R. 536: A.I.R. 1963 Pat. 277.

Where joint ancestral estate has passed out of joint family, either under a conveyance executed by father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay father's debt, cannot recover that the property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted: I.L.R. 5 Cal. 148 (P.C.). This rule is limited to antecedent debts, and it does not cover cases in which a sum of ready money has been paid over to the father by the vendee or mortgagee: I.L.R. 15 All. 75 (F.B.).

Alienation by a limited owner—Onus of proof—Transferee has to prove that alienation was for legal necessity or that he made *bona fide* enquiry about such legal necessity: A.I.R. 1967 Pat. 172.

Onus lies on him who wants to take benefits under a transaction by a limited owner to prove justifying necessity; it is incumbent upon alienee to prove that he acted honestly and had made due inquiry as to existence of necessity: A.I.R. 1933 Cal. 900 (D.B.); A.I.R. 1922 P.C. 39; A.I.R. 1916 P.C. 110; A.I.R. 1914 P.C. 90.

The onus of supporting a sale from a Hindu widow is on the purchaser who should adduce evidence to prove such legal necessity as would bind the husband's estate and not rely simply on recitals in the schedule attached to the sale deed: A.I.R. 1914 P.C. 38.

Burden of proof—Alienation beyond life time by limited owner—Burden to prove that alienation was for legal necessity is on transferee: 1966 B.L.J.R. 406.

Suit to set aside alienation—Allegation that property is ancestral—Burden of proof. *See* A.I.R. 1954 Sau. 269.

A wahivatdar or a manager has not got an unqualified power of alienation in respect of debuttar properties. His powers in that regard are restricted. He can alienate debuttar properties only for legal necessity or for the benefit of the deity. The burden of establishing the circumstance justifying an alienation of debuttar property is on the alienee: A.I.R. 1973 Mys. 207 (D.B.).

Alienation of tarwad property—Burden of proof of legal necessity: 1962 Ker.L.T. 804.

Malabar law—Tarwad—Alienation by Karnavan—Validity—Necessary—Burden of proof. *See* A.I.R. 1958 Ker. 18 (F.B.).

(*d*). **Family business**.—Joint family business—Presumption—Burden of proof. *See* A.I.R. 1954 Punj. 162: I.L.R. (1953) Punj. 439; A.I.R. 1946 Nag. 84 (D.B.); A.I.R. 1950 Assam 195 (D.B.).

Hindu joint family business—Plea of change into partnership—Burden of proof: A.I.R. 1959 Cal. 380.

There is no presumption that business carried on by member of joint family is joint family business—Nor is there any presumption that business carried on by such member in partnership with stranger is joint family business: A.I.R. 1957 Mad. 100 (D.B.).

Where the business of explosives stood in the name of a member of the Hindu joint family, be he its *karta, held*, there is no presumption that it belonged to the family; the onus lies heavy on the plaintiff who sues for its partition to prove that it belonged to the joint family; he may discharge the burden by direct proof that it was run and grow up with the joint family's assistance or indirectly that the joint family had sufficient surplus nucleus to set it up: 1981 Hindu L.R. 686 (Mad.) (D.B.). *See* also I.L.R. (1964) 1 Mad. 872 (D.B.).

61. Jurisdiction.—Bar of jurisdiction—Party seeking to oust jurisdiction of civil Courts must establish its right to do so: A.I.R. 1967 S.C. 781; A.I.R. 1966 S.C. 1718; A.I.R. 1968 Del. 162. *See* also A.I.R. 1928 Lah. 121 (F.B.); A.I.R. 1946 Pat. 385 (D.B.); A.I.R. 1959 Ori. 144 (D.B.).

A suit, amongst other things, for damages for wrongful arrest and for illegal search and seizure of goods is *prima facie* competent in a civil Court and, if for any reason the defendants want to contend that the Court has no jurisdiction to try the suit, they have got to make good this contention: 1957 Jab.L.J. 869: 1957 M.P.C. 429.

Where the matrimonial Court's jurisdiction was invoked by the husband on the ground that the parties had last resided together for 10 days within its local limits which was hotly contested by the wife on the ground that it was a temporary stay as a guest in a relation's house on their visit to attend a marriage, *held*, the burden to prove that they had last resided together at that place lay on the husband; he did not chose to enter the witness box to elucidate and sustain his contention; his wife's testimony of living as a guest did not, and could not, amount to residing together; the matrimonial Court had no territorial jurisdiction to try the case: (1988) 1 Hindu L.R. 233 (J.&K.).

Prosecution has to prove that Court taking cognizance has territorial jurisdiction: (1965) 2 Cr.L.J. 775: A.I.R. 1965 Ker. 295.

62. Labour cases.—Though the Evidence Act as such does not apply to industrial adjudications, but the principle of law enunciated on the burden of proof and onus of proof being a basic principle of law, the Industrial Tribunals are also required to follow it: (1973-74) 78 Cal.W.N. 787.

Suit claiming exemption under S. 16(1), Provident Funds Act—Burden of proof: A.I.R. 1970 Bom. 418 (D.B.). *See* also (1926-27) 31 Cal.W.N. 286.

Where a firm employed more than twenty workers in a previous year, the burden of proving that number of workers was curtailed below twenty in subsequent years is on the firm for going out of reach of the Employees' State Insurance Act, 1948: 1982 Lab.I.C. 148 (Ori.). *See* also (1965) 29 F.J.R. 239 (Mad.) [Managing partner cannot be included in twenty—Has to be proved by the company.]

Burden to prove that an employee is not "workman" lies on employer: (1978) 2 M.P.W.N. 108.

Normally, it is for the person putting forward the claim to establish the facts and circumstances supporting the claim. Where in an industrial dispute it was claimed that the employee was retrenched, the onus to establish that fact is on the employee. *Held*, on facts, that the employer justified in letting in evidence to rebut the claim of the employee and the decision of the Labour Court which was arrived at after appreciation of the evidence could not be interfered with in a petition under Art. 226 of the Constitution: (1964) 1 M.L.J. 303: (1948) 8 Fac.L.R. 343: (1964) 2 Lab.L.J. 86: A.I.R. 1964 Mad. 255.

Balance-sheet and Profit and Loss Account of company—Evidentiary value—Admissibility in proceedings before Industrial Tribunal—Burden of proof as to correctness of statement therein: (1960-61) 65 Cal.W.N. 1029: A.I.R. 1962 Cal. 375.

Reference of dispute by State Government—Question whether dispute referred is industrial dispute or not—Burden of proof—It is for the party who challenges opinion of State Government and contends that industrial dispute exists or is apprehended to establish its case: (1966) 13 Fac.L.R. 63 (All.).

Where in a reference under Industrial Disputes Act, a rebuttable presumption of existence of industrial dispute arises, the duty lies upon the employer to adduce evidence in rebuttal: (1980) 1 Cal.H.N. 22.

Where in an order purported to have been made by the Government under S. 3, U.P. Industrial Disputes Act, 1947, there is no expression of the opinion formed by the State Government in regard to matters mentioned in that section, the burden of proving that it was necessary to make the Government order for one of the purposes mentioned in S. 3 would be on the State Government: A.I.R. 1956 All. 689.

Burden to prove that the lock-out was justified is on the management: (1988) 2 L.L.N. 48 (Bom.).

Termination held to be illegal and unjustified—Normal rule of reinstatement with full back wages—Employer claiming benefit of deduction from wages—Onus is on him to plead and prove circumstances justifying such deduction: 1979 M.P.L.J. 773 (D.B.).

Where the act of dismissal of his services was challenged as unfair labour practice under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, *held*, the burden of proving the same was upon the employee: (1985) 1 Bom.C.R. 94.

Burden of proof on plaintiff to prove negligence on part of defendant in a claim under the Fatal Accidents Act—Both parties, however, producing evidence about cause of accident causing death of deceased—Question of burden of proof loses much of its importance: I.L.R. (1960) 2 All. 586: 1960 All.L.J. 770: 1960 All.W.R. (H.C.) 584: A.I.R. 1961 All. 14.

Loss of pecuniary benefit due to death of deceased—To sustain action under the Fatal Accidents Act, plaintiff has to prove reasonable expectation of pecuniary advantage—Expectation of pecuniary advantage is mixed question of fact and law: A.I.R. 1970 Mys. 13: (1969) 1 Mys.L.J. 247 (D.B.).

Accident in course of employment—Burden of proof: 1966 M.P.L.J. (Notes) 160; A.I.R. 1942 Bom. 175 (Burden is on workman).When a workman proves that the injury by accident was in the course of employment, his claim for compensation is established. And then it is for the employer to prove the existence of circumstances which negative payment of compensation: A.I.R. 1957 Cal. 601.

Claim for compensation by relatives of deceased employee—Burden of proof—Nature of proof: 1968 Lab.I.C. 786: A.I.R. 1968 Guj. 113.

Compensation—Death of employee—Onus to prove wilful disobedience is on the employer: A.I.R. 1928 Pat. 508.

Fencing dangerous part of machinery under S. 21(1)(*iv*)(*c*) of Factories Act, 1948—Obligation to fence is absolute except in certain cases—Burden of proving exception is on accused: (1965) 1 Lab.L.J. 528 (Guj.).

English case—Safe place of work—Duty of employer to keep working place safe—Onus of proof is on employer to show that he, so far as is reasonably practicable, made and kept the place safe: 1968 Lab.I.C. 627 (H.L.).

Bonus—Claim for—Burden of proof: A.I.R. 1957 Cal. 500.

Bonus—Available surplus—Replacement of machinery at future date—Cost of—Employer has to discharge the burden by adducing proper evidence: 1968 Lab.I.C. 531: A.I.R. 1968 S.C. 538.

Burden of proof and evidence—Court on consideration of entire evidence recording clear finding that transaction was by way of wages—Question of burden of proof is no longer material: A.I.R. 1967 Cal. 25.

Breach of contract of employment by employer—Liability for payment of salary—Existence of mitigating circumstances—Burden of proof: 1969 Lab.I.C. 1324: A.I.R. 1969 Bom. 373.

Non-maintenance by an employer of any of the documents and records as required by S. 18 of the Minimum Wages Act and Rr. 25 and 26 framed under it may give rise to an adverse inference against the employer. But this does not mean that the burden of proving that a particular employee has not worked overtime is on the employer. An employee claiming relief under the Act must support his claim by evidence which may get strengthened by the employer's failure to maintain the required documents and records. It is for the person who makes claims to establish the same. The Act and the Rules framed thereunder do in no manner depart from that basic rule: (1965) 1 Mys.L.J. 461: (1965-66) 27 F.J.R. 314: (1965) 2 Lab.L.J. 26: A.I.R. 1965 Mys. 317.

Fixation of minimum wage—Allegation of discriminatory tenant—Burden is on party alleging to prove: 1968 Lab.I.C. 27: A.I.R. 1968 Ker. 18.

63. Land acquisition.—(*See* also S. 106, Note 11, *infra*). Suit to set aside a claim order—Onus is on plaintiff to prove that he is the real owner: 1961 M.L.J. 268.

Where the fact of plaintiff being a lessee of the land acquired under the Land Acquisition Act was controverted by the defendants specifically, *held*, it was incumbent on the plaintiff to prove that he was a lessee of the land by leading unimpeachable and reliable evidence: A.I.R. 1972 Guj. 131 (D.B.).

Award under Land Acquisition Act and offer under R. 4 of U.P. Defence of India (Compensation and Arbitration) Rules, 1943 compared—Burden of proof to find out market value of property: A.I.R. 1964 All. 488.

Market-value of land acquired—Determination of—Prices paid for adjacent lands in *bona fide* transactions may be considered—Claim for enhanced price—Onus is on claimant to produce evidence: (1966) 2 An.W.R. 186: A.I.R. 1967 Andh. Pra. 230.

Land acquisition—Higher rate claimed—Onus of proof on claimant: A.I.R. 1969 Guj. 270. Burden of proving that valuation made by the Special Acquisition Officer is insufficient and unfair lies on the claimant: A.I.R. 1938 Sind 225; A.I.R. 1931 Lah. 364 (D.B.); A.I.R. 1969 Madh. Pra. 28.

Party claiming enhanced compensation under S. 18 of the Land Acquisition Act, 1894 must prove inadequacy of award—If he *prima facie* proves it, Land Acquisition Officer must support his award: (1969) 18 Law Rep. 467 (Mys.).

In a reference under S. 18 of the Land Acquisition Act, the burden of proving that the amount of compensation awarded by Collector is inadequate lies upon the claimant but the weight of burden depends upon the thoroughness of the enquiry held by the Collectors: A.I.R. 1959 Andh. Pra. 52 (D.B.).

Where in a reference by the claimants to the Court under S. 18 of the Land Acquisition Act, 1894, for enhancement of compensation, the Special Land Acquisition Officer contended that the claim for such enhancement was barred by virtue of S. 25(2) of the said Act, *held*, the burden was on the Land Acquisition Officer to show that the prerequisite conditions which barred the claim under said section, had been satisfied: A.I.R. 1974 Mys. 5 (D.B.).

Land acquisition proceedings—Affidavits—Proposed acquisition impugned as in colourable exercise of power—Respondent is required to disclose relevant material: (1966-67) 71 Cal.W.N. 499.

Grounds of appeal—New point—Claim for compensation in respect of granite within patta land—Land Acquisition Officer proceeding on basis that there was grant of minerals—Same stand taken before District Judge—Plea that minerals did not pass with grant and that regarding onus of proof of that fact—Land Acquisition Officer not permitted to raise those pleas for first time in appeal: (1967) 1 Mys.L.J. 159.

A person must prove that he did everything that the law required him to do, but a party to a civil proceeding cannot be asked to prove what some other persons had to do under a law. Where the State Government acquired certain land by invoking the provisions of the Land Acquisition Act, *held*, the burden of proving the validity of acquisition was not on the plaintiff but the State Government or its agents alone were competent to answer any charge of violation of any provision of the said Act: A.I.R. 1985 Pat. 221.

64. Landlord and tenant.—(*See* Note 43, *supra*).

65. Lease/licence.—S. 105 of the Transfer of Property Act, 1882 does not stipulate service of prior notice, unless the agreement itself so provides, before terminating a licence; a licence creates no interest in the property in favour of the licensee; the burden to prove that termination was bad for want of notice, thus, would lie on the party impugning the termination of licence to prove that such notice was a condition precedent: A.I.R. 1991 N.O.C. 107 (Gau.).

In a suit by a lessee for a declaration of his title to the property leased, the foundation of the suit being surrender by the recorded tenant in favour of the landlord, it is for the plaintiff to prove the factum of surrender: A.I.R. 1959 Ori. 38.

Where a lessee sought an injunction to restrain the Municipal Council from interfering in his possession of a tank within the Municipal area on the ground that it did not belong to the Council and was Government property vested in the Council for mere management and pisciulture, *held*, the burden lay on the lessee to prove his assertion; the original lease not having been produced, the lessee could not be said to have discharged his burden: A.I.R. 1984 N.O.C. 41: (1983) 56 Cut.L.T. 356.

Surrender of lease by lessee by endorsement on lease deed itself—Suit by lessor for recovery of possession of land—Suit based on surrender—Surrender denied by lessee—*Held*, that burden to explain why lessee subscribed to endorsement, if he really did not surrender the property was on lessee: (1963) 76 Mad.L.W. 431: I.L.R. (1964) 1 Mad. 443: (1964) 2 M.L.J. 242.

Surrender of lease—Burden of proving surrender is on person alleging it: (1969) 1 M.L.J. 503.

Plaintiff sued on basis of lease by landlord in his favour for plot in dispute—Land recorded as defendant's ancestral holding—Effect on onus of proof: A.I.R. 1930 Pat. 149 (1).

Lease by gauntia without protected status—Whether illegal—Suit for title and possession—Plea under S. 3(1)(*a*) of Orissa Tenants Relief Act—Plaintiff whether gauntia with protected status—Onus of proof: 29 Cut.L.T. 85.

Lessee's application for declaring landholder's notice not *bona fide*—Burden of proof on lessee: 1957 Nag.L.J. (Notes) 133 (Rev.).

In the absence of contract, lessor not bound to effect repairs to the property leased: A.I.R. 1963 Cal. 198.

66. Legislation—Challenge to.—Validity of enactments, *see* I.L.R. (1955) Mad. 887: (1954) 2 M.L.J. 475: A.I.R. 1954 Mad. 993; I.L.R. 32 Pat. 1148: A.I.R. 1954 Pat. 266.

The fundamental right of a citizen to carry on trade or business is not absolute but subject to reasonable restrictions in the interest of the general public; there is undoubtedly a presumption of constitutionality of legislations unless it is *ex facie* violative of a fundamental right and must be pronounced invalid unless shown by the State to be otherwise by bringing on record the relevant materials: A.I.R. 1972 Pat. 412: 1972 B.L.J.R. 329 (D.B.).

When a citizen challenges a restriction/prohibition on the exercise of a fundamental right under Art. 19(1)(*g*) of the Constitution, the onus of proving its reasonability to the satisfaction of the Court lies upon the State or the authority concerned: A.I.R. 1995 Del. 17.

He who assails the reservation under Art. 16(4) of the Constitution must satisfactorily establish that there has been a violation of Art. 16(1): A.I.R. 1971 S.C. 1777.

Whereas presumption of constitutionality will remain attached to a statute which has been challenged on the ground that it violates Art. 14 of the Constitution, and the burden to prove the contrary by pleading the

necessary facts would be on the petitioner, the onus to prove that the restriction imposed on a fundamental right guaranteed to a citizen under Art. 19(1) is reasonable, will be on the State, once it is shown that the right has been taken away, or even abridged by the impugned legislation: A.I.R. 1983 J.&K. 100

The allegations regarding the violation of constitutional provision should be specific, clear and unambiguous and should give relevant particulars, and the burden is on the person who impeaches the law as violative of constitutional guarantee to show that the particular provision is infirm for all or any of the reasons stated by him. [A.I.R. 1995 S.C. 55, Foll.; A.I.R. 1981 S.C. 2138; A.I.R. 1975 S.C. 583; A.I.R. 1964 S.C. 1781, Rel. on]: A.I.R. 1995 S.C. 1340.

There is a presumption of constitutional validity of a statutory provision. Whoever assails the validity of any provision on the ground that it is violative of Art. 14 of the Constitution takes the burden of pleading by necessary averments and establishing that the classification is violative of Art. 14: (1983) 55 Cut.L.T. 362 (D.B.).

Defence of India (Part XII-A, Gold Control) Rules, 1962, are within rule making power conferred by S. 3(1)—Burden of proving invalidity of Rules—Lies on person who challenges their validity: A.I.R. 1970 Andh. Pra. 47 (D.B.).

Where the State of Uttar Pradesh demanded tax from sugar mills on their purchases of sugarcane at a rate regulated not by value but by weight and they impugned its validity, *held*, such litigants must produce the socio-economic bio-data of the impugned legislation, explaining the "how", "why" and "why not" of each clause lest lay minds legally attuned should miss the meaningful sound and social sense which the socio-economic experts might make audible and perceptible: A.I.R. 1980 S.C. 286: (1980) 1 S.C.C. 223: (1980) 1 S.C.R. 769.

Legislation whether discriminatory—Burden of proof—Burden is on person challenging legislation as discriminatory: (1963) 1 S.C.R. 404: A.I.R. 1962 S.C. 1733.

67. Limitation.—The burden to prove that a suit is filed within the period of limitation is on the plaintiff: A.I.R. 1917 Mad. 930 (D.B.); A.I.R. 1993 J.&K. 14.

Where exclusion of time for reckoning limitation was sought on the ground that the plaintiff had been prosecuting in good faith another *bona fide* proceeding which plea was denied in the written statement and exclusion of time was opposed, *held*, the initial burden lay on the plaintiff to adduce sufficient evidence to establish his good faith—that is, his prosecuting those proceedings with "due care and attention"—the burden did not shift on the defendant to disprove the plaintiff's assertion. [A.I.R. 1958 S.C. 767, Rel. on]: A.I.R. 1984 P.&H. 185.

Time requisite—Burden to show is on party who wants such time to be excluded: 1961 Raj.L.W. 521.

The burden of proving that a suit is barred under O. 2, R. 2, C.P.Code, is upon the defendant: 102 I.C. 31: A.I.R. 1927 Lah. 840.

The onus lies on the creditor to prove that the acknowledgement to pay a money debt was made within time; and it would be contrary to the provisions of Ss. 101 to 104 to require that the burden lies on the defendant who acknowledged the liability: A.I.R. 1932 All. 199: I.L.R. 53 All. 963. Defendant thinking that suit is barred by limitation—It is for defendant to establish facts that support his plea: A.I.R. 1934 Pat. 44. Burden of proof as to bar of limitation. *See* A.I.R. 1955 Nag. 126: I.L.R. (1955) Nag. 321.

Where the plaint specifically alleged that the plaintiff was in prior possession but was dispossessed, *held*, the case is covered under Art. 142 of Limitation Act, 1908; the burden would lie on the plaintiff to prove his dispossession by the defendant within 12 years next before the suit's institution. [A.I.R. 1973 S.C. 2537 A.I.R. 1977 S.C. 1123, Foll.]: A.I.R 1984 Madh. Pra. 147.

Suit for damages for loss of goods—Burden is on defendant, who seeks to non-suit the plaintiff on the ground of limitation, to establish that the loss occurred beyond one year from the date of suit: I.L.R. (1964) Cut. 526: A.I.R. 1964 Ori. 168.

If a Mahomedan wife sues her husband for dower payable on demand within three years from the date of the demand, and the husband pleads divorce and communication of the divorce to the wife at a time more than three years before the suit, the onus is on him to prove what he alleges in order to defeat the claim on the ground of limitation: (1943) 45 Punj.L.R. 231: A.I.R. 1943 Lah. 215.

Allegation of fraud to save limitation—Burden of proof: A.I.R. 1969 Ori. 62.

Onus of proof in cases falling under Art. 142 of Limitation Act: A.I.R. 1968 Punj. 60.

Exemption from limitation—Burden of proof that cause of action for suit was within twelve years of suit is on plaintiff: A.I.R. 1970 All. 289.

Burden of proof under S. 14 of the Limitation Act—Good faith—Proof of: I.L.R. (1941) Mad. 347: (1941) 1 M.L.J. 257: A.I.R. 1941 Mad. 319.

Burden of proving that his case comes within S. 14, Limitation Act is on the plaintiff: A.I.R. 1958 S.C. 767; A.I.R. 1941 Mad. 319 (F.B.).

Under the Limitation Act, 1963 the burden lies on the defendant pleading adverse possession to prove the date when his possession became adverse to the plaintiff: A.I.R. 1971 P.&H. 482: (1971) 73 Punj.L.R. 224 (D.B.). *See* also Note 22, *supra*.

68. Maintenance.—In proceedings under S. 125 of the Code of Criminal Procedure, 1973 the presumption is that the wife is living with her husband to discharge her marital obligations; if the husband asserts that the wife is not doing that, the burden would lie upon him, if the wife disputes, to prove the same; but if the wife admits or it is proved that she is not living with him and claims maintenance, the burden lies on her to prove "just grounds" for not living with the husband: (1986) 1 Hindu L.R. 62 (Ker.).

Undue importance cannot be attached to the technicalities of the rules of pleadings and of burden of proof, in an application for maintenance under S. 125 of the Code of Criminal Procedure. No doubt, the wife is required to plead and prove that she was unable to maintain herself, but the rules of pleadings cannot be applied as strictly as in a civil suit and the evidence, if otherwise, available on the record, can very well be looked into to arrive at a just conclusion, without attaching undue importance to the question of burden of proof: 1984 Hindu L.R. 166 (Madh. Pra.).

Under Ss. 101 to 104, the plaintiff has to prove her case, but the proof which is demanded from the party is a proof which can be obtained by the plaintiff with reasonable care and diligence. In a suit for maintenance, the plaintiff is not supposed under S. 104 to prove a thing which, under the circumstances, is impossible for the plaintiff to prove, especially when the facts regarding the income are within the special knowledge of the defendant-husband. When the question regarding the proof of the income is to be determined, in such circumstances the plaintiff can only give the figure on guesswork and not the exact figure: A.I.R. 1985 Guj. 187: (1985-1) 26 Guj.L.R. 374: (1985) 2 Hindu L.R. 29.

Burden of proving "just ground" under S. 125(3), Cr.P.Code lies on wife: 1981 Cr.L.J. 1898 (Ker.).

Failure of able-bodied husband to maintain wife and children—It is for him to show that he is incapable of doing so: 1968 Cr.L.J. 1153: A.I.R. 1968 Del. 174.

In a petition for maintenance, it is not necessary for the wife to aver that she is unable to maintain herself; burden to prove contrary is on the husband: 1981 Raj.L.W. 477.

In a proceeding for maintenance under S. 125, Cr.P.Code, when the husband seeks to negative the claim of the neglected wife depicting her as a kept-mistress on the plea that he was already married, *held*, the burden is on the husband to satisfactorily prove the subsistence of a legal and valid marriage: (1991-1) 11 Guj.L.H. 380 (S.C.).

Hindu law—Wife's claim for separate maintenance—Unchastity—Plea of—Burden of proof: A.I.R. 1957 Mad. 766.

Though S. 20 of the Hindu Adoptions and Maintenance Act purportedly preserves the child's right to maintenance, but casts an absolute duty on the parent to provide maintenance to the child, *held*, the burden would, thus, lie on the parent to prove that he was not amiss in performance and discharge, of his duty to maintain the child: A.I.R. 1986 Andh. Pra. 126: (1985) 1 An.L.T. 468 (D.B.).

69. *Mala fide*.—The burden of establishing *mala fides* is very heavy on the party alleging it; allegations of *mala fides* are more easily made than proved; the very seriousness of such allegations demands proof of a very high order of credibility. A.I.R. 1974 S.C. 555: (1974) 4 S.C.C. 3. Circumstances creating a suspicion are not enough. Merely flunging of series of charges of oblique conduct would not be sufficient to establish *mala fides*. [A.I.R. 1974 S.C. 555, Foll.]: (1983) 56 Cut.L.T. 111. Top administrators are often required to take steps in execution of their duties which are necessary but might affect others adversely; in the absence of the knowledge of full facts and surrounding circumstances, such acts

might easily lend themselves to misconstruction and suspicion to the *bona fides* of their author. The Courts would be rather slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the allegations are grave and made against the holder of an office of high responsibility: (1991) 43 Del.L.T. 179 (D.B.).

Bad faith is a matter to be established by a party propounding bad faith and such a party has not only to allege the same but also to prove it: A.I.R. 1970 S.C. 564. But such a burden does not require proof to the hilt but to render the same as reasonably probable being only for the purposes of finding whether or not there has been a valid exercise of the statutory power: A.I.R. 1953 Ori. 121 (D.B.).

The allegations of *mala fides* are very often made than proved and the burden of e stablishing *mala fides* is very heavy on the person who alleges it. The seriousness of such allegations demands proof of a high order of credibility. Where in the writ petition the petitioner alleged that the taking over of Industry by the Corporation by way of sale was the result of collusion between tne two, *held*, on facts, the petitioner was not able to prove the so called collusion between Corporation and opposite party and accordingly said assertion of the petitioner was negatived: A.I.R. 1985 Ori. 153 (D.B.).

Writ petition against State Government—Petitioner alleging *mala fides* against Minister—Return filed by Under Secretary, not on basis of personal knowledge but on basis of official records—Court will be justified in drawing inference in favour of petitioner's allegations in absence of Minister's affidavit controverting allegations: I.L.R. (1965) 2 Punj. 32: (1965) 67 Punj.L.R. 921: A.I.R. 1966 Punj. 16.

Where allegations of *mala fides* were made against the Excise Minister upon whom no notice under S. 80 of the C.P.Code had been served and no suit against him therefore, lay, *held*, mere allegation in the plaint was not enough to establish his *mala fides*; heavy onus lay on the plaintiff to establish; a mere assertion that he was not acting in his official capacity would be of no avail: A.I.R. 1972 Pat. 128.

Mala fide—Onus—Transfer of shares—Directors power to refuse registration—*Mala fides*—Burden of proof: A.I.R. 1957 Cal. 709.

Plea of bias—Proof—Burden is on party setting up case of bias to prove same by cogent evidence: (1963) 3 S.C.R. 22: A.I.R. 1963 S.C. 1.

Burden of proof—Allegation of bias—Denial of charge of Authority: A.I.R. 1967 All. 378.

Burden to prove that the order of detention is *mala fide* is on the detenu and it is certainly a heavy burden to be discharged by him: A.I.R. 1953 S.C. 451.

Where a Deputy Superintendent of Police on probation not confirmed in due time moved the High Court by way of a writ petition as his further promotion was thereby adversely affected but during its pendency he was charge-sheeted and suspended and he impugned the same as *mala fide* actuated by his filing of the writ petition, *held*, that is too slender a basis to establish *mala fides*; the burden to prove it lies very heavy on the party alleging it; on facts found the proceedings were initiated long ago but the decision to charge-sheet and suspend was delayed due to proverbial slow pace of official machinery: A.I.R. 1976 Pat. 158 (D.B.).

Requisition order under West Bengal Premises Requisition and Control (Temporary Provisions) Act whether *mala fides*. *See* A.I.R. 1954 Cal. 171: (1952-53) 57 Cal.W.N. 719.

An order of any executive authority, even within its jurisdiction will be quashed by the High Court if it is satisfied that the authority has not been exercised honestly, *bona fidely*, and reasonably. It will be an abuse of power indeed if the authority exercising such a power takes into account extraneous matters not pertaining to the object sought to be achieved by the exercise of the authority. The test in all such cases is as to what is the dominant purpose which can be said to have implied the action. If it is based on personal vendetta then the garb it is given is immaterial. The High Court has to go behind the order and ascertain if really the order sought to be challenged is the result of reasons not connected with the purpose desired to be attained. The burden of proof is on the petitioner who alleges *mala fides* and suspicion however strong, cannot take the place of proof. It is no doubt true that some time it is difficult to find out the motive of the authority passing an order but there must be sufficient objective data produced by the petitioner on which one can come to a reasonable

conclusion about lack of *bona fides*: 1970 Serv.L.R. 291: I.L.R. (1970) 1 Punj. 468: A.I.R. 1970 Punj. 322 (F.B.).

70. *Malicious prosecution*.—It is well settled that in an action for *malicious prosecution* the plaintiff has, *inter alia*, to prove that his prosecution resulted from the defendant's malicious intention and there was no reasonable and probable cause for the defendant to prosecute him; thus, absence of reasonable cause for the prosecution allows every aggrieved person to sue for damages with risk of no other liability except to pay costs if unsuccessful. It is also well settled that the burden to prove the absence of a reasonable and probable cause, though negative, lies on the plaintiff and even slight evidence thereof would discharge the onus; but malice by itself is not enough unless the want of reasonable and probable cause is also shown to exist though in rare cases the later may be inferred from the former. [A.I.R. 1953 Ori. 56 and A.I.R. 1945 Bom. 320, Foll.]: A.I.R. 1975 Ori. 121: (1975) 41 Cut.L.T. 424: I.L.R. (1975) Cut. 594.

To succeed in a suit for damages for malicious prosecution, the plaintiff must prove that (*i*) he was prosecuted by the defendant; (*ii*) the proceedings complained of terminated in the plaintiff's favour; (*iii*) the prosecution was instituted without any reasonable and probable cause; (*iv*) it was due to a malicious intention of the defendant and not with a mere intention of carrying the law into effect; and (*v*) the plaintiff has suffered damages: 5 I.C. 50 (P.C.); A.I.R. 1958 Pat. 329 (D.B.); A.I.R. 1957 Andh. Pra. 347 (D.B.); 1970 Raj.L.W. 201; 1971 M.P.L.J. 266 (D.B.).

Malice in law—Burden of proof: A.I.R. 1957 All. 671.

Malicious prosecution—Plaintiff has to prove malice and absence of reasonable and probable cause—Onus: A.I.R. 1960 Ker. 131.

In a suit for *malicious prosecution* burden to prove want of reasonable and probable cause and malice is always on the plaintiff: A.I.R. 1958 Manipur 32: A.I.R. 1954 Kutch 39; A.I.R. 1952 Cal. 242.

In case of a suit for damages for *malicious prosecution, held*, the burden lies on the plaintiff to prove that the defendant had no probable or reasonable cause for lodging the criminal complaint and that he was actuated by malice: A.I.R. 1977 N.O.C. 369: 1977 Kash.L.J. 350; I.L.R. 25 Bom. 332 (P.C.).

Malicious prosecution—Ingredients of—Absence of reasonable and probable cause—Burden of proof: I.L.R. (1962) 14 Assam 470: A.I.R. 1962 Assam 129; 1965 All.L.J. 317.

Malicious prosecution—Suit for—Essentials to be proved—Burden to prove that prosecution was instituted without reasonable and probable cause with malicious intention lies upon plaintiff—Onus not shifted even where defendant purports to be an eyewitness to the offence alleged: I.L.R. 41 Pat. 369: A.I.R. 1962 Pat. 478.

In a case for *malicious prosecution*, the absence of reasonable and probable cause, even though a negative assertion, has nevertheless to be proved as also the malice by the plaintiff; where the accusation was the commission of the offence in the presence of the defendant, the plaintiff can, and has to discharge the burden by examining himself on oath and denying the occurrence supported by other corroborative evidence; irrespective of the worth of his evidence, the evidence of his mere denial of the occurrence would not shift the burden on the defendant to prove the occurrence as alleged by him; if the plaintiff proves the negative and the defendant fails to prove the positive, malice and want of reasonable and probable cause would stand established. When evidence about the occurrence is adduced by both sides, the question of burden would become irrelevant: A.I.R. 1971 All. 109: 1970 All.L.J. 1260.

Malicious prosecution—Suit for damages—Essentials—Onus and presumption: A.I.R. 1970 Ori. 91: (1969) 35 Cut.L.T. 835 (D.B.).

Malice—Prosecution against Police Officer alleging malice—Onus—Madras Police Act, S. 53—Applicability: 1956 An.L.T. 1023.

71. Marriage.—(*See* also Note 56, *supra*). It is well settled that where a marriage was in fact performed, necessary ceremonies therefor would be presumed to have been duly performed; it is for the party challenging its validity to rebut the presumption by evidence that the form of marriage in some respect or the other is invalid; the witnesses to the marriage are not required to prove all the details which taken together constitute a valid Hindu marriage. [(1911) I.L.R. 38 Cal. 700 (P.C.), Rel. on]: A.I.R. 1974 Ori. 107: (1973) 2 Cut.W.R. 1108. *See* also A.I.R. 1979 Ori. 51.

Normally, when a person sets up a marriage between him and another, it would

necessarily connote that he is pleading the existence of a valid marriage. Therefore, every circumstance which would render it other than valid will have to be shown not to exist. This may appear to be a right rule though it is often a fairly workable rule. Even if one does not go to this extent it is safe to hold that only in a case where evidence goes to show that a marriage has in fact taken place but a party challenges that marriage on the ground of some alleged infirmity attaching to it that he can be called upon to establish his imputation of infirmity. But this rule cannot apply to a case where even the first step, namely, the proof of the factum of marriage is not satisfied. Where the parties are Indian Christians governed by the Christian Marriage Act, the party setting up marriage has to prove factum of marriage in conformity with the provisions of the Act: (1964) 2 An.W.R. 136.

Normally, a marriage should be presumed to be legitimate rather than illegitimate. That is the normal approach. However, it must be admitted that the Hindu Marriage Act has introduced a special provision making second marriages in the presence of the first married spouse after the commencement of the Act to be void. In other words, bigamy has been prohibited amongst the Hindus after the enforcement of the said Act. It should also be admitted that the date of marriage is within the special knowledge of the parties concerned. Therefore, the burden to prove such date should be upon the party concerned.

The Court is not entitled to assume that the second wife must have been married after the enforcement of the said Act. The burden is upon the petitioner to establish that the second marriage took place before the enforcement of Hindu Marriage Act, 1955: 1980 All.W.C. 369.

Marriage is both a sacrament as well as civil contract; it is a simple contract requiring no high degree of intelligence to comprehend; the simple test is whether a party to the marriage was capable of understanding the nature of the contract or whether his mental condition had rendered him incapable of doing so; the spouses must be able to comprehend the significance of marital promises and vows; there being a strong presumption that such consent was given, a heavier burden lies on the spouses to prove want of consent in the marriage than in a mere commercial contract; it has to be established that due to mental disorder, the other spouse was unable to know the nature and consequence of the marriage; a mere weakness of intellect, mild mental retardation or phychic inability is wholly inadequate a ground to annul a marriage for want of consent: A.I.R. 1988 Ker. 96: (1988) 1 Hindu L.R. 12: (1987) 2 Ker.L.T. 582 (D.B.).

Marriage—Presumption as to formalities and ceremonies—Burden of proof in rebuttal: A.I.R. 1959 Bom. 508.

Marriage—Onus. *See* A.I.R. 1954 Ori. 17. In spite of presumption of marriage arising from long co-habitation the burden of proof of marriage actually lies with the person who desires to prove it: 1945 Nag.L.J. 489.

The burden would lie on any party who asserts, that any rules, rites, ceremonies and customs were not observed, to prove not only the omission but also that such rules, rites, ceremonies or customs were absolutely essential and indispensable in the sense that on account of their not being duly performed, the marriage itself was void: I.L.R. 56 All. 428: A.I.R. 1934 All. 273.

Law presumes in favour of marriage and against concubinage and on him who challenges the legitimacy must be thrown the burden of proving it. Thus, where a party admits the paternity of the other party but pleads that he is of illegitimate descent, the legal presumption being in favour of legitimacy, the onus lies on the party alleging illegitimacy to prove it: 1957 M.P.L.J. 481: A.I.R. 1957 Madh. Pra. 174; A.I.R. 1929 P.C. 135.

The burden to prove both the marriages as ingredients of the offence under S. 495 of the Indian Penal Code certainly lies on the prosecution: (1974) 40 Cut.L.T. 1145.

When a man and a woman live together as husband and wife for sufficiently long time and were treated as husband and wife for sufficiently long time by friends, relatives and neighbours, there is always a presumption in favour of their marriage. If children are born to such a couple, there is a further presumption in favour of their legitimacy. The presumption in favour of marriage does not get mitigated or weakened merely because there may not be positive evidence of any marriage having taken place. Though

marriage ceremony said to have taken place may not be valid, the marriage can be held to be valid by force of habit and repute and the onus of rebutting such a marriage would be on the person who denies the marriage and the presumption of law in favour of marriage and legitimacy is not to be repelled lightly by mere balance of probability. The evidence for that should be strong, satisfactory and conclusive. [A.I.R. 1952 S.C. 231; A.I.R. 1978 S.C. 1557; A.I.R. 1984 Bom. 229; A.I.R. 1972 Ori. 143, Foll.]: A.I.R. 1987 Bom. 27: 1986 Mah.L.J. 186: (1986) 2 Hindu L.R. 29: 1986 Mah.L.R. 864: (1986) 2 Bom.C.R. 146: I.L.R. (1986) Bom. 1281; A.I.R. 1981 Karn. 40 (D.B.). *See* also A.I.R. 1930 Rang. 341.

Where a presumption of a legal and valid marriage arises in view of cohabitation between the parties for a long time, *held*, the party who wants to rebut that presumption has the burden to prove that contention and not the other party in whose favour such presumption arises: A.I.R. 1994 Karn. 247 (D.B.).

Where a Christian male sought a declaration that a Christian female and her son were not his wife and son, respectively as the marriage was never solemnised nor did they ever cohabitate and no marriage was admittedly solemnised in a Church, *held*, the woman's plea that the agreement of marriage was registered before the Sub-Registrar and marriage was solemnised by exchange of rings and garlands in his presence did not amount to a valid marriage between them as it did not satisfy the requirement of S. 5(4) of the Indian Christian Marriage Act, 1872 unless it was shown that the Sub-Registrar was a Christian and was appointed as a Marriage Officer under S. 7 of that Act; the burden of proof not discharged by the woman: (1988-1) 101 Mad.L.W. 76.

Where on the question as to whether there was in existence a valid and legal marriage, both the parties had adduced evidence, *held* the Court would have to decide the question on the basis of the evidence placed before it and not merely on the question of burden of proof as the burden of proof became an academic question in view of the fact that both sides had led in evidence. [A.I.R. 1959 S.C. 31, Foll.]: A.I.R. 1994 Karn. 247 (D.B.).

Where the parties have been examined by the Court and issues have been framed, the *onus probandi*, sometimes called the right to begin, would vest in the party which would fail if no evidence was adduced; when evidence of both sides has been recorded, the second stage arises where the Court has to decide where the burden of proof lay. Thus, where the evidence showed that the husband did not disclaim the wife, children had been born to them and they had cohabited and accepted as spouses by the society, for well over 30 years with the knowledge of her divorce, *held*, there is a strong presumption of marriage in her favour; the husband's plea of invalidity of marriage on the ground that her earlier divorce was illegal was raised for the first time in his written statement; she could not be expected or called upon to prove the validity of her more than 30 years old divorce, the burden lay on him to prove the invalidity which he failed to discharge: 1981 Hindu L.R. 211: (1980) 21 Guj.L.R. 887 (D.B.).

A husband seeking annulment of his marriage on the ground that his wife's marriage with another person was subsisting and continued to subsist till his marriage sought to be annulled, *held*, must prove the same by adducing clear and cogent evidence; evidence creating mere suspicion is no proof: (1988) 1 Hindu L.R. 223 (P.&H.).

Where the first wife seeks a declaration of the nullity of her husband's second marriage with another woman, *held*, though the burden to prove the second marriage would rest on the first wife, the standard of proof was not required to be beyond all reasonable doubt; and the decision had to be taken on preponderance of probabilities: A.I.R. 1979 Ori. 51.

Where a wife suing for divorce on the ground of her husband having contracted a second marriage who emphatically denied it but the wife nevertheless adduced no evidence of the performance of the ceremonies of the second marriage, *held*, even a marriage with the second wife has to be proved as a fact like any other marriage; the burden of proof lay on the wife; the trial Court erred in decreeing divorce: (1986) 2 Hindu L.R. 36 (Pat.).

A married woman started living with another married man and her husband was said to have observed her funeral and proclaimed her dead. Claiming to have been married to her paramour at a temple, she sought a succession certificate in respect of the debts left behind by her paramour upon his death. In support of her marriage she did

not examine any body to prove her second marriage nor the register of marriage at the temple. The only evidence she adduced was their application before the Mukti Mandep Sabha, the receipt granted by the Sabha and the entry in the marriage register, but none of them was proved. *Held*, her marriage with her paramour was not proved; besides, in the absence of any proof of her first husband having divorced her or having died, the second marriage, even if solemnised, was invalid: 1981 Hindu L.R. 636: (1981) 51 Cut.L.T. 513.

72. *Mesne profits*.—(*See* also S. 106, Note 10, *infra*). The burden of proof, as a matter of law, in an application for ascertainment of *mesne profits* as in any other case, lies on the plaintiff who substantially asserts that he is entitled to *mesne profits*. The burden of proof as a matter of adducing evidence (onus of proof) shifts from one party to other depending upon the weight of evidence adduced. If so, the burden of proof lies on the plaintiff who seeks to claim *mesne profits*. The onus of proving the amount actually received lies on the defendant as that matter is within his knowledge. But even in case of profits that the defendant might have received, though initially the onus might lie on the plaintiff, it may shift to the defendant if the former, has adduced some evidence direct or circumstantial, raising a presumption in his favour. But the question of burden of proof becomes immaterial if both parties have adduced evidence and the Court is called upon to ascertain profits on the basis of the evidence so adduced. Under O. 26, Rr. 9 and 10, Cr.P.Code, Commissioner can be appointed by a Court directing him to make a local investigation for purposes of ascertaining the amount of *mesne profits*. The report of the Commissioner and the evidence taken by him are evidence in the suit. Any party to the suit may examine the Commissioner in Court upon any of the matters referred to by him. But the information gathered by him behind the back of the parties is not evidence in the case: (1958) 1 An.W.R. 427: 1958 An.L.T. 19: A.I.R. 1959 Andh. Pra. 64.

The burden of proving the profits actually received is on the person who received them (S. 106) but the burden of proving the profits that the person in occupation might have received is on the person who claims them: A.I.R. 1925 Mad. 145; A.I.R. 1939 Cal. 387; A.I.R. 1943 Pat. 69.

In a suit for partition and *mesne profits* the burden of proof in regard to the rate of *mesne profits* is upon the plaintiffs: A.I.R. 1958 Ker. 301.

73. Minority.—(*See* also Note 47, *supra*). It is for the party pleading minority to make out his case before the adverse party can be required to rebut it: A.I.R. 1917 Mad. 535; A.I.R. 1920 Nag. 245.

Where the alienation is challenged on the ground of alienee's minority, the party asserting minority must prove it: A.I.R. 1918 P.C. 35; A.I.R. 1919 Oudh 261 (D.B.). *See* also A.I.R. 1922 Lah. 75; A.I.R. 1934 All. 406 (F.B.).

Where the executant, who is a minor, represented himself to be a major at the execution, and subsequently, sets up a plea of minority, *held*, the burden of proof is very heavy on him: A.I.R. 1928 P.C. 152.

The burden of proving that a Mahommedan girl attained majority either by completing her fifteenth year or by reaching state of puberty at an earlier period, rests upon the person who so alleges: A.I.R. 1916 P.C. 250.

74. Misrepresentation.—*See* Notes 47 and 48, *supra*.

75. Money-lending.—"Money-lender in regular course of business"—Proof—Onus on defendant—Discharge of onus—Party can rely upon opponent's evidence in support of his defence—Positive evidence on his side not always necessary: 29 Cut.L.T. 495.

Where the plaintiff suing on a mortgage bond did not plead that he was not a professional money lender and the loans on the bond were only casually advanced to the defendant, *held*, it could not be said that the plaintiff had discharged the "burden of proof" as a matter of law and pleading; the evidence adduced by him that loans were only casually advanced could not be looked into; the burden of adducing evidence to the contrary did not shift on to the defendants; the suit was barred under S. 4 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939. [A.I.R. 1961 S.C. 1474; A.I.R. 1969 Pat. 294 (F.B.), Rel. on]: A.I.R. 1974 Pat. 103 (D.B.).

Debt Laws—Bihar Money Lenders (Re-gulation of Transactions) Act (VII of 1939), S. 4—Section does not bar jurisdiction of civil Court—It makes suit by unregistered money-lender not maintainable — Bihar

Money Lenders Act (III of 1938), S. 3—Notification under is an exception to S. 4—Party relying on it has to plead and prove it—Suit by unregistered money-lender—Burden of proof that plaintiff is not money-lender on whom lies: 1965 B.L.J.R. 774.

76. Mortgage.—(*See* also Note 36, *supra*). In a suit for declaration of title based on an irredeemable mortgage amounting to sale (*chora othi*) the burden lies on the plaintiff to plead and prove execution of the mortgage and its date and also, if an acknowledgment is pleaded for extension of limitation, that such acknowledgment pertained to the suit deed and was made within the prescribed period of limitation. [A.I.R. 1967 S.C. 935, Rel. on]: A.I.R. 1976 Mad. 142: (1975) 88 Mad.L.W. 683 (D.B.).

Where a mortgagor sues for possession of the property mortgaged but afterwards sold by the mortgagee for valuable consideration, the period of limitation under S. 61(*b*) of the Limitation Act is 12 years reckoned from the date the mortgagor acquired the knowledge of such transfer; the burden lies on the mortgagor to prove the date on which he acquired the knowledge. [A.I.R. 1961 S.C. 1474; A.I.R. 1936 Bom. 322 and (1970) 1 M.L.J. 132 and A.I.R. 1972 Mad. 185, Rel. on]: A.I.R. 1977 Mad. 34: (1976) 89 Mad.L.W. 462: (1976) 2 M.L.J. 161.

Mortgage in favour of co-operative society by debtor alleged to be on behalf of joint family—Allegation not denied by subsequent mortgagee in suit for declaration that award in favour of society is void—Still society must prove that mortgage was on behalf of joint family—In absence of proof award is without jurisdiction: 30 Cut.L.T. 509.

Where once a mortgage has been admitted, the onus is on the mortgagee to show that the mortgage has been extinguished by subsequent sale: 57 I.A. 86: I.L.R. 11 Lah. 199: A.I.R. 1930 P.C. 91: 59 M.L.J. 53 (P.C.).

As to evidence of conduct and probabilities, *see* 75 I.C. 733: A.I.R. 1923 Lah. 436. Suit on lost mortgage bond—Denial of execution by defendant—Alternative plea of payment does not relieve plaintiff from proving loss: I.L.R. 49 All. 78: A.I.R. 1926 All. 741.

Where the defendants prove that the property purported to be mortgaged did not exist, it is for the plaintiffs to prove that the entry in the deed was not fictitious and that it was a mistake: A.I.R. 1914 P.C. 67.

In a case where there is a simple mortgage-deed, when a party claims that the mortgaged properties were handed over as per an oral agreement with the direction that the income was to be adjusted towards interest, the burden is heavily on him to prove the same: I.L.R. (1956) Trav.-Co. 1130.

Where a deed contained all the terms contained in a sale deed besides the condition that on the executant paying Rs. 1,000, the consideration for the transaction within two years, the vendee would reconvey the property to the executant, *held*, the transaction is covered by S. 58(*c*) of the Transfer of Property Act, it will be a mortgage by sale only; the burden would lie on the party asserting it to be otherwise to prove, either from its language or attendant circumstances, that it was intended to be an outright sale; the party may do so by two means: (*1*) by express words employed in the deed which indicate that it meant to be of outright sale; and (2) by establishing attendant circumstances necessarily leading to the inference that it was only an outright sale. [A.I.R. 1954 S.C. 345, Foll.]: A.I.R. 1978 Mad. 75: (1976) 89 Mad.L.W. 364.

Where the contention was that the mortgagee had created the sub-mortgage with notice to the mortgagor, *held*, the onus to prove the contention lies on the party which asserts the positive: A.I.R. 1989 Ker. 163: (1989) 1 Ker.L.T. 63: (1988) 2 Ker.L.J. 805.

Case from Punjab—Redemption of mortgage—Tenancy created by mortgagee in course of management—When binding on mortgagor—Burden of proof lies on tenant to establish *bona fides* of mortgagee: (1965) 67 Punj.L.R. 64: A.I.R. 1965 Punj. 231.

77. Negotiable instruments.—(*See* also Notes 36 and 47, *supra*). Negotiable instruments—Burden of proof under S. 76(*c*), Negotiable Instruments Act. *See* A.I.R. 1955 Cal. 338: (1953-54) 58 Cal.W.N. 545.

Negotiable Instruments Act, S. 118—Presumption under—Shifting of onus. *See* A.I.R. 1957 Madh. Bh. 82.

Negotiable Instruments Act, S. 118—Presumption regarding consideration for a promissory note—Burden of proof—Scope. *See* (1979) 92 Mad.L.W. 225: (1979) 2 M.L.J. 137.

Presumption under S. 118, Negotiable Instruments Act, 1881—Rebuttal—Nature

and onus of rebuttal: (1965) 78 Mad.L.W. 573: 1965 Mad.W.N. 293.

Presumption as to consideration of negotiable instrument — Rebuttal of — Onus: A.I.R. 1960 Punj. 500.

As soon as the execution is proved, S. 118 of the Negotiable Instruments Act imposes a duty on the Court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is, the burden of establishing a case shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and if, he adduced acceptable evidence, the burden again shifts to the plaintiff and so on. The defendant may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff: A.I.R. 1961 S.C. 1316.

Promissory note executed by *A*—Burden of proving that no consideration passed under it is on *A* who denies it—Admission by *A* in another deed that he had received the amount of the promissory note—Burden is on *A* to prove that the admission was made under a mistake and is not true: (1954) 1 M.L.J. 622: 1954 S.C.R. 919: I.L.R. 33 Pat. 313: A.I.R. 1954 S.C. 316.

Since there is a presumption under S. 118 of the Negotiable Instruments Act, 1881 that a negotiable instrument drawn and delivered was for consideration, *held*, the burden to prove that there was no consideration lies on the party denying consideration: A.I.R. 1981 N.O.C. 39 (Cal.).

Negotiable instrument—Consideration—Plaintiff showing different consideration in the plaint—Burden of proof. *See* A.I.R. 1957 Raj. 159.

The execution of a document having been duly proved, the burden is on the debtor to prove want of consideration especially in the case of a negotiable instrument (conceded): 1957 Ker.L.T. 518: A.I.R. 1957 Ker. 164.

In case where dishonour of cheques takes place, the onus to prove that they were issued under mistake of fact and misrepresentation and by an incompetent person is on the defendant: A.I.R. 1981 J.&K. 64: 1981 Kash.L.J. 301.

Suit on promissory note—Denial of consideration and execution by defendant—Allegation that he had entrusted to plaintiff blank paper bearing his thumb-impression and signature—Presumption and burden of proof. *See* A.I.R. 1957 Ker. 63.

Where the date on the pronote was apparently written by an ink other than that used in its body, which was found to be a subsequent introduction in the note, *held*, the burden to prove that the date was not so subsequently added to the note, would lie on the person in whose custody the note remained after it had been executed. [A.I.R. 1966 Andh. Pra. 267, Foll.]: A.I.R. 1986 Andh. Pra. 120.

A suit was filed under O. 21, R. 63, C.P.Code, to set aside the order rejecting a claim for the raising of an attachment on the ground that the attached property belonged to the claimant-plaintiff by virtue of a sale deed by the judgment-debtor and was in his possession. The debts which were the consideration for the sale deed, as stated on the face of it, were a promissory note for a certain sum, certain costs and certain interest amounting to about Rs. 10,000 and the promissory note was produced. The only ground on which the defendant sought to justify the dismissal of the suit was that some weeks before the conveyance of the property, to the plaintiff, the judgment-debtor had received a sum of Rs. 30,000 in cash and that in those circumstances it must be presumed that the debts which the judgment-debtor owed to the plaintiff and for which the sale deed was executed were discharged by the judgment-debtor out of this amount. *Held*, that the promissory note having been produced, there was *prima facie* evidence on the part of the plaintiff that the consideration had really passed, as stated in the deed. In those circumstances, the burden was on the defendant to prove that the suggested discharge had taken place and not on the plaintiff to prove that it had not taken place: (1946-47) 51 Cal.W.N. 850: A.I.R. 1947 P.C. 98: (1947) 2 M.L.J. 54 (P.C.).

Pronote reciting consideration as Rs. 600 in figures and Rs. 300 in words—Defendant alleging receipt of only Rs. 300—Onus. *See* 1960 Nag.L.J. (Notes) 35.

Mere execution of a document does not prove that it was for consideration. If the document is a promissory note there is a statutory presumption that the amount mentioned in it is given for consideration; but, when the document is a bond and its

execution is proved, the onus no doubt lies on the defendants to show that it was without consideration. Still, if they succeed in establishing a probability that the debt was not due or that consideration did not pass, the onus shifts to the plaintiff and he has to prove fully that consideration did pass: I.L.R. (1956) Hyd. 707: A.I.R. 1957 Hyd. 18.

Promissor admitting the execution of promissory note—Allegation of misrepresentation—Promissor to prove circumstances that would vitiate the consent: A.I.R. 1968 All. 224.

Plaintiff's case that promissory note was executed while criminal proceedings were pending against father who executed note—Burden is on plaintiffs to prove case: (1964) 2 M.L.J. 232: A.I.R. 1964 Mad. 327.

Negotiable instrument—Suit based on handnote—Endorsement portion of handnote below the stamp and upto the date written in the pen of defendants—It is a negotiable instrument—Circumstance that body portion is not in the pen of defendants does not make any difference—Presumption will arise that it was made or drawn for consideration—Burden lies on defendants to rebut that presumption: I.L.R. 47 Pat. 846: 1969 Pat.L.J.R. 26: A.I.R. 1969 Pat. 215.

S. 47, Companies Act making it expressly clear that hundi shall be deemed to have been made by the company—All the onus is upon the company to show that the hundi did not bind the company at all: A.I.R. 1967 Cal. 75.

78. Notice.—(*See* also Note 43, *supra*). Once the defendant admits to have received the notice under S. 80, C.P. Code, 1908, the onus which lay on the plaintiff to prove that he has given requisite notice, shifts to the defendant and if he alleges that the notice is not in accordance with S. 80, it is for him to produce the notice and show to the Court that it does not fulfil the requirements of law. It is for the defendant to produce notice received by him, before the Court. The contents of the notice cannot be proved by oral evidence in view of S. 92. The onus being on the defendant to produce the notice, the notice cannot be rendered invalid only because the plaintiff fails to produce a copy of it or on the basis of oral statement made by him: A.I.R. 1968 All. 321.

In a suit to cancel a sale for arrears of revenue, onus of showing that there has been an irregularity and illegality in the preparation and service of notice rests on the person who seeks to have the sale set aside: (1901-2) 6 Cal.W.N. 688. *See* also (1905-6) 10 Cal.W.N. 137. However, *see* I.L.R. 17 Cal. 478.

Where in a suit against a Co-operative Society, the plaint contained no mention of the requisite notice under S. 76 of the H.P. Co-operative Societies Act having been served on the Registrar of Co-operative Societies and the preliminary objection to the maintainability of the suit for want of notice was taken, *held*, it was for the plaintiff to prove that the notice as required under the Act was served: A.I.R. 1992 Him. Pra. 34.

Notices sent by registered post to lessee on the addresses as mentioned in lease-deed—Presumption of effective service—Onus shifts on lessee to prove non-service: A.I.R. 1966 Cal. 63.

79. Official acts.—(*See* also Notes under S. 114). Where a party challenged the grant of land by the Tehsildar, an official act, *held*, there is a presumption that he did so in accordance with proper procedure; obviously, the burden is on the party to call for necessary records, implead the Tehsildar in the suit and show that the procedure followed by the Tehsildar was vitiated by want of notice or violation of the principles of natural justice: A.I.R. 1984 Karn. 45: (1983) 2 Karn.L.J. 409.

80. *Pardanashin* ladies.—(*See* also Notes 31 and 48, *supra*). The expression *"pardanashin"* has not to be confused with a lady observing parda. A lady observing parda may not be a *pardanashin* lady in the legal sense of the term. The term *"pardanashin* lady" is not a term of art. It has special significance as one who is unable to understand the transaction by virtue of the manner in which she has been brought up: A.I.R. 1972 Pat. 325: 1972 B.L.J.R. 842 (D.B.).

The *pardah* system as understood by Indian Courts is not the practice of keeping women under veil indoors in the *zenana* but in seclusion away from the knowledge of the world; they are not ordinarily allowed to interact with males and have no social intercourse and communion with the outside world; they may not be illiterate but may still be ignorant because of their imperfect knowledge of the world. Therefore, the rules regarding transactions by the *pardanashins* apply equally to illiterate women though not

pardanashin in the strict sense; the illiterate women who under social compulsion move out to work for livelihood in the fields or elsewhere and are not thus disabled and deprived yet they will not know the contents, character and effect of the deed and have to be presumed to be ignorant thereof by sheer ignorance; the burden of proof in respect of deeds allegedly executed by them would rest not on those who attach it but on those who base their claim on the deed to establish affirmatively and conclusively that the deed was executed after it had been explained and really understood by the executrix who signed it not under duress but of her own free volition. [A.I.R. 1939 Lah. 309, Rel. on]: (1993) 1 M.L.J. 535: (1993-1) 111 Mad.L.W. 466 (D.B.).

Law gives special protection to *pardanshin* ladies due to social conditions of the time; they are presumed to have imperfect knowledge; if a document has been taken from them, the Court has to ascertain whether the executrix was a free agent and duly informed about the nature of the document; the normal presumption that a person affixing his name to a document knows about its contents does not apply to *pardanshin* ladies. It is well settled that the burden of proof always rests upon the person who seeks to sustain a transaction with a *pardanashin* lady to establish that she had executed the deed after having carefully understood its nature and it was not only her physical but also mental act; this special burden can be discharged by proving that the deed was explained to, and understood by, her but also by other direct and circumstantial evidence. This special rule for protection of *pardanashin* ladies should not be confused with the other doctrine of fraud, duress and undue influence applicable to all persons, whether *pardanashin* ladies or others: A.I.R. 1984 Pat. 257: 1984 B.B.C.J. (H.C.) 605.

In the case of document executed by a *pardanashin* woman it is not enough to prove mere execution by her but it is further necessary to prove that she understood what she was doing. It is, therefore, for the person who desires to rely on and take advantage of such document to establish that the document in question was not only duly executed by the *pardanashin* woman but it was her mental act, that is, she executed it with a full understanding as to its contents and legal effect. And once the due execution of the document as being the intelligent act of the said woman is established, the onus then will be on the other person to establish all those circumstances which would destroy its binding nature on him before he can ask the Court to ignore it: A.I.R. 1964 All. 53.

In case of documents taken from *pardanashin* woman, the Court has to ascertain that the party executing them has been a free agent and duly informed of what she was about. The reason for the rule is that the ordinary presumption that the person understands the document to which he has affixed his name does not apply in the case of a *pardanashin* woman: (1974) 40 Cut.L.T. 469.

Though ordinarily the burden is on the person impeaching the document, but in case of a *pardanashin*, illiterate old lady, the burden would lie on the beneficiary under the document to prove that she had executed the document after understanding its import with independent advice and after it was read over and explained to her; the execution by her should not only be a physical but also a mental act: A.I.R. 1990 Ori. 64; A.I.R. 1983 Ori. 53 (D.B.); (1975) 41 Cut.l.T. 506: (1975) 1 Cut.W.R. 292; (1973) 1 Cut.W.R. 762. But this is not an absolute and invariable rule like when she is shown to have business capacity and strength of will and the deed in the circumstances is not an unnatural disposition of her property; the burden will then be on the lady if she attacks the document to prove her plea by evidence. Thus, where a *pardanashin* lady continued to stay with her husband in the house but the entire landed properties and the homestead was conveyed under a gift deed purportedly executed by her, *held*, indication being that she was not aware of the deed's contents, she was being deprived of her entire properties, the burden lay on the beneficiary to prove due execution of a valid gift deed: A.I.R. 1991 Ori. 125: (1990) 70 Cut.L.T. 579.

The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a *pardanashin* lady to establish that the said document was entered into by her after clearly understanding the nature of transaction. But this rule cannot be extended to an ignorant and illiterate woman also. Further, aforesaid rule should not be confused with other doctrine, such as, fraud, duress and actual undue influence which apply to all persons whether they be *pardanashin* ladies or not; in such cases, the burden of proof will lie on the person who says that

he/she was subjected to fraud, duress or actual undue influence. [A.I.R. 1933 Pat. 306; A.I.R. 1963 S.C. 1203, Rel. on]: (1986) 34 B.L.J.R. 319 (D.B.).

Where the plaintiff alleges that the document was executed by a *paradanashin* lady but the defendant is able to prove that notwithstanding such an allegation in the plaint, the lady could not be deemed to be a *pardanashin* lady, the legal protection to the lady in such a case would vanish. [A.I.R. 1963 S.C. 1203, Rel. on]: A.I.R. 1972 Pat. 325: 1972 B.L.J.R. 842 (D.B.).

Women in India being *pardanashin* in some parts and some communities and illiterate in most parts have to transact their business generally through men and live a life dominated by men even though law recognises their independent rights; the curse of male dominance has always invariably stood in the way of women exercising their legal rights; the Courts in India accept that onus lies upon the other party to show that a transaction entered into by such woman was not tainted by fraud, undue influence or coercions and that they were fully and faithfully informed about the contents of the deed before it was executed: (1992-2) 110 Mad.L.W. 209: (1993) 1 M.L.J. 259 (D.B.).

In India *pardanashin* ladies have been given a special protection. As regards documents taken from *pardanashin* woman the Court has to ascertain that the party executing them has been a free agent and duly informed of what she was about. The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a *pardanashin* lady to establish that the said document was entered into by her after clearly understanding the nature of the transaction. The burden can be discharged not only by proving that the document was explained to her and that she understood it but also by other evidence, direct and circumstantial. The rule evolved for the protection of *pardanashin* ladies should not be confused with other doctrine such as fraud, duress and actual undue influence, which apply to all persons whether they be *pardanashin* ladies or not: I.L.R. 42 Pat. 134: (1963) 1 S.C.R. 456: A.I.R. 1963 S.C. 1203; (1966) 8 Ori.J.D. 94; I.L.R. (1963) Cut. 554: (1963) 5 Ori.J.D. 274.

Those who want to take advantage of a document executed by a *pardanashin* lady must prove that she knew its contents and executed it with full knowledge of its effects and consequences and that she had independent advice in the matter. In such a case the burden is always, in the first instance, on the person founding on that document to show that the grantor intelligently understood the deed, and if they fail to establish that point, then the document is not binding on the executant or anyone else and is void *ab initio*: 1965 B.L.J.R. 800: A.I.R. 1966 Pat. 110. *See* also A.I.R. 1936 P.C. 207.

The burden of proof is always on the person who seeks to sustain a transaction entered into with a *pardanashin* lady or an illiterate person to establish that the said document was executed by them after clearly understanding the nature of the transaction, and unless that burden is discharged the physical act of signing the document cannot be treated as the mental act of its author. The onus is heavy on the propounder to prove that the will was executed by the testator voluntarily with his free will and mind. [A.I.R. 1962 Andh. Pra. 178; A.I.R. 1965 S.C. 354; A.I.R. 1962 S.C. 567; A.I.R. 1959 S.C. 443, Rel. on]: A.I.R. 1975 Ori. 161: (1975) 41 Cut.L.T. 644. *See* also (1900-1) 5 Cal.W.N. 505 (S.B.).

In order to show that execution is the mental act of the executant of a document, it has to be established that she was aware of the consequences of the transaction. In a case where the executant was being deprived of her entire property, this requirement is all the more necessary, and the burden of leading evidence to sustain the transaction becomes heavier: (1971) 37 Cut.L.T. 282.

In case of dispute as to whether a particular document executed by *pardanashin* or illiterate woman disposing her property was executed by her knowing the contents thereof and whether such document was read over and explained to her, *held*, onus to prove that it was so read over and explained to the executant lies on the person who supports such disposition of property. [A.I.R. 1928 P.C. 303; A.I.R. 1963 S.C. 1203, Foll.]: A.I.R. 1974 Cal. 316 (D.B.).

The protection under S. 104 in respect of a document alleged to have been executed by a *pardanashin* lady is also extended to an old and illiterate woman. In view of this protection onus to prove due execution of a document would lie on the person who seeks to rely on it for his claim and he must prove that

(1) she knew of its contents, and (2) she executed it with full knowledge of its effect and consequences: 1984 Raj.L.W. 343; 1984 All.W.C. (Supp.) 305.

Where it was found that the woman executing the sale deed and suing for its cancellation was not only of advanced age but also an illiterate rustic village woman with a very weak eye-sight, *held*, she is entitled to the protection law accorded to *pardanashin* ladies; such protection necessarily arises from old age, infirmity, ignorance, illiteracy, mental deficiency, inexperience and dependence on others. [1965 All.L.J. 1080, Foll.]: A.I.R. 1981 All. 222; 1981 All.L.J. (N.O.C.) 153.

Pardanashin lady—Mortgage by—Suit to enforce—Burden of proof—Proof of independent advise: A.I.R. 1958 Ori. 62. *See* also A.I.R. 1938 P.C. 38. (The general rule is that in some exceptional cases the Courts will demand affirmative proof on the subject of the lady's intelligent understanding and execution of a deed and will not readily hold this onus to have been discharged where it is not shown that the lady had any independent advise).

Mortgage-deed—Mortgage executed by *pardanashin* lady—Burden lies on mortgagee to prove that deed was explained to her before she put her signature and that she became a willing partner of the document after understanding the nature and character of the document: A.I.R. 1961 Ori. 178.

Pardanashin lady—Person in position of her guru acting as her manager—When can claim adverse possession against her—Documents signed by her accepting maintenance and receipts—Evidence value—Burden of proof: 32 Cut.L.T. 343.

Where the defendant in unequivocal terms denied in the written statement the plaintiff's claim of being a *pardanashin* lady as false but there was no specific denial in reply to the para in the plaint where such claim was raised, *held*, it clearly amounted to an implied refutation of the plaintiff's claim of being *pardanashin*; the burden remained on the plaintiff to prove her claim: A.I.R. 1981 Pat. 161: 1981 Pat.L.J.R. 244: 1981 B.B.C.J. (H.C.) 208: 1981 B.L.J.R. 599 (D.B.).

Where executant of a sale deed is an illiterate *pardanashin* woman, it must be proved that she executed the same after clearly understanding the contents and the nature of the transaction effected by the document. In the absence of certificate to the effect that the plaintiff (*pardanashin*) executed the said deed after understanding the contents of the same, when it is merely stated therein that the said deed was read over and explained to her, but it is not stated by the scribe of the deed, that the contents of the deed were understood by the executant and after understanding the same she executed the said deed, that is not sufficient: (1975) 41 Cut.L.T. 978; (1977) 44 Cut.L.T. 26.

81. Partnership.—Partnership *prima facie* legal—Suit by partner for dissolution and accounts—Illegality of partnership alleged by defendant—It is for defendant to establish illegality. *See* A.I.R. 1954 Mad. 1074; A.I.R. 1965 Andh. Pra. 98 (D.B.). *See* also I.L.R. (1970) 2 Del. 384 (It is the managing partner who has authority to borrow money for firm's business—To prove otherwise is on the other partners); A.I.R. 1922 Lah. 235 (D.B.).

Whether or not the new firm, reconstituted on admission of a new partner, becomes liable to existing creditor, has to be determined in the light of the question whether new firm has assumed liability to pay the debt and whether the creditor agreed to accept the new firm as his debtor and to discharge the old firm from its liability: A.I.R. 1957 Mad. 8 (D.B.).

The admission of a minor to the benefit of partnership must be proved and cannot be implied: A.I.R. 1934 P.C. 138.

Question whether creditor of a firm had notice of dissolution of firm by retirement of one of partners from it is one of fact and onus of proving it, is on partner who alleges that he has retired: A.I.R. 1935 P.C. 14.

Mere cessation of business does not bring about a dissolution of a firm. It has to be specifically pleaded and proved: I.L.R. (1978) 2 Cut. 391 (D.B.).

Since the plaintiff has come forward with a definite case that the partnership was dissolved on the date mentioned by him, the burden is upon him to establish that fact. This is so not by virtue of S. 109 of the Evidence Act but of the rule that the plaintiff must establish every fact on which he relies and which is relevant in order to entitle him to the relief claimed, unless such fact is admitted by the defendants. Therefore, it is not

necessary for the defendants to establish that the partnership was dissolved much earlier unless and until the plaintiff discharged the burden which lay upon him by adducing *prima facie* evidence and that evidence is accepted by the Court: (1958) 60 Bom.L.R. 203: I.L.R. (1959) Bom. 29: A.I.R. 1959 Bom. 528.

The onus to prove that the restrictions imposed in an agreement in restraint of trade are reasonable, is on the party which pleads them to be reasonable; thus, on the defendant challenging a clause in the dissolution deed as being in restraint of trade, *held*, the onus would lie upon the plaintiff to prove that the restraint was reasonably necessary to protect his interests. [A.I.R. 1967 S.C. 1098, Foll.]: A.I.R. 1980 Raj. 155: 1980 Raj.L.W. 306: 1980 W.L.N. 200 (D.B.).

In a prosecution against partnership firm for offences under the Drugs and Cosmetics Act, 1940, it is the complainant (Drug Inspector), who has to discharge the initial burden of proving that the accused partners were in overall control of the business: 1984 Mad.L.W. (Cr.) 271.

82. Paternity.—(*See* also Notes under S. 112, *infra*). If a child is in possession of filiation acknowledged by the parents and has repute in the society, legitimacy should be presumed and if anybody challenges such legitimacy of the child, the onus is upon him to prove that the child is illegitimate. [A.I.R. 1918 Oudh 103; A.I.R. 1927 Mad. 733 (D.B.); A.I.R. 1929 P.C. 135; A.I.R. 1933 Lah. 520, Rel. on]: A.I.R. 1979 Cal. 3 (D.B.).

In view of S. 112, there is a presumption regarding legitimacy of a child born during the continuance of a valid marriage, the burden for proving non-access is on the husband who so alleges: 1982 Hindu L.R. 304 (Raj.).

Pre-nuptial pregnancy of wife—Evidence of paternity—Nature of onus on husband: A.I.R. 1968 Cal. 105.

Illegitimate children—Proof of their paternity—Extract from birth register—Probative value of—Information for record in birth register supplied by mother—Not binding on presumed father—Presumption of law as to paternity—Burden of proof as to paternity in such case: (1962) 2 M.L.J. 107: (1962) 1 Cr.L.J. 437 (2): A.I.R. 1962 Mad. 141.

If a person claimed to be a preferential heir to the estate of the deceased, over another person, on the ground that the latter was illegitimate, the former must adduce "sufficient general evidence" of illegitimacy so as to throw the onus on the latter of proving his legitimacy: I.L.R. (1960) Cut. 230.

Where the lower authority dismissed a claim on the ground that the plaintiff had failed to discharge his duty of proving that the person concerned was not born to his purported mother who in her turn was not born to her own purported parents, *held*, the authority had certainly misplaced the burden of proof because negative aspects cannot be proved conclusively; rather both the parties should have been asked to prove as to who were the parents of the persons concerned and to base its conclusion after appraising the weight and credibility of their respective proofs; the misplaced burden of proof has resulted in biased findings which are perverse and vitiated. Case remanded: 1981 R.D. 45: 1981 All.W.C. 19 (Rev.).

Where a daughter claimed as a sole surviving heir of her father who had died intestate but the opposite party pleaded her to be an illegitimate child as her parents had not been married together, *held*, the burden conclusively lay on the opposite party to prove that there was no valid marriage between her parents and she was illegitimate; presumption under S. 114 also supports such view. [A.I.R. 1918 Oudh 103; A.I.R. 1957 Madh. Pra. 174, Rel. on]: A.I.R. 1984 Bom. 229: 1984 Mah.L.J. 345: (1984) 2 Bom.C.R. 356.

Though the defendants had not succeeded in establishing their case that the plaintiff was the daughter of one *J*, the onus that lay on the plaintiff to prove that she was the daughter of *K* could not, for that reason, be held to have been discharged: 19 Cut.L.T. 316: A.I.R. 1954 Ori. 40.

Suit for declaration that plaintiff being mother of deceased, is entitled to his share—Denial of relationship by defendant—Allocation of onus on defendant by trial Court—Amounts to error of procedure—Revision maintainable: 1968 Cur.L.J. 554 (Punj.).

Where in a suit for possession, the plaintiff bases her claim on the fact that she was the daughter of the last male holder, she has to prove that fact by cogent evidence and in doing so, she cannot take advantage of the failure of the defendant to prove his case: 1958 B.L.J.R. 475: A.I.R. 1958 Pat. 600.

83. Payment.—Though it is true that the burden of proving payment is upon the

person alleging the payment, in a case in which the claimant himself realises the rents due to his co-debtors, it is for the claimant to prove what he has realised and thus to show that the amount claimed by him as being due to him from the debtors is still due and has not been realised. The burden of proof in such a case is upon the claimant and not upon the debtors and if the burden is not discharged the law will presume that the amount claimed has been paid off: A.I.R. 1952 All. 353.

Where in a suit for recovery of a deposit, the defendant pleads payment, *held*, the burden would lie on the defendant to prove the payment: A.I.R. 1972 Cal. 393: I.L.R. (1972) 2 Cal. 104 (D.B.). But *see* (1931) 32 Punj.L.R. 407 (D.B.), cited under Note 5, *supra*.

Suit for recovery of amount borrowed—Burden of proving repayment is on loanee: 1969 M.P.W.R. 480: 1969 M.P.L.J. 323; (1979) 1 M.P.W.N. 48.

Appropriation—Normally payment is towards interest—Debtor must show agreement that payment would be appropriated towards principal: A.I.R. 1970 S.C. 161: (1970) 1 S.C.R. 523.

84. Personal law.—A Hindu is governed in India by his personal law; he carries it with him wherever he goes. However, *prima facie*, it is the personal law of the region which governs him. The burden is, therefore, on him to prove that he had come from a different region where he was governed by a different law and/or special custom prior to his migration. It is then for the other party to prove that the immigrant had renounced the law prevailing in the place of his origin and had adopted the law of the region to which he had migrated; the onus, therefore, would lie on the person so alleging: (1990) 1 Hindu L.R. 306 (S.C.); A.I.R. 1973 Pat. 160. *See* also A.I.R. 1969 S.C. 101; A.I.R. 1957 Nag. 79 (D.B.); A.I.R. 1957 J.&K. 3; (1868) 1 Beng.L.R. 26 (P.C.).

85. Possession.—(*See* also Notes 22, 43 and 101). "Possession"—Meaning of—Connotes conscious and voluntary act—Incriminating article recovered from Kotha of house—House in occupation of more than one member of family—Possession of individual member is question of fact and not of presumption—Burden of proof is on prosecution: 1964 All.L.J. 562.

Possession—Burden of proof: 1957 Raj.L.W. 554: A.I.R. 1958 Raj. 265.

Objector obstructing auction-purchaser's possession claiming to be in possession of disputed house or portion thereof on his own account—Burden of proof is on objector: A.I.R. 1964 All. 302.

Where in a suit, the plaintiffs admit that the defendant is in possession of the suit properties but they assert that he is there as mutawalli and that his possession is on behalf of the Sunni Muhammadan community and for that reason the plaintiffs say that a declaratory suit will lie and that they need not sue for possession, then the burden lies on the plaintiffs to prove their claim. As the defendant is admittedly in possession and except for the fact that the plaintiff's claim that he is in possession on their behalf (a fact which the defendant denies) the plaintiffs are out of possession, they must prove that the defendant is in possession on their behalf. The only way in which the plaintiffs can do that is by showing that the properties in suit, are wakf property: A.I.R. 1956 S.C. 713.

Presumption in law is that possession goes with ownership. To rebut that presumption, material must be placed before the Court to the contrary: (1990) 3 Karn.L.J. 283.

In a suit for possession and injunction, the burden lies on the plaintiff to establish his title to and possession over the disputed property as also the cause of action leading to the institution of the suit; however, where both sides have led evidence on the facts in issue, the burden to prove loses its importance; the case has to be decided on appraisal of the evidence on record: (1993) 22 All.L.R. 315; (1949) 7 J.&K. L.R. 144 (D.B.); I.L.R. (1967) Mys. 276; 1979 W.L.N. (U.C.) 155; A.I.R. 1931 Lah. 379.

In a suit for possession of land and mandatory injunction seeking demolition of construction made by defendant on ground that plaintiff had acquired title to the land by purchase from ex-zamindars under U.P.Z.A. and L.R. Act, *held*, burden of proving that plaintiff had acquired valid title by alleged purchase lay on plaintiff. [A.I.R. 1954 S.C. 526; A.I.R. 1965 S.C. 1506, Foll.]: 1983 All.L.J. 509.

Possession of immovable property—Question whether permissive or hostile—Onus is on the person alleging that it is of a

particular kind: 33 Cut.L.T. 672: I.L.R. (1967) Cut. 532: A.I.R. 1967 Ori. 187.

86. Pre-emption.—Right of pre-emption under—Conditions to be fulfilled—Burden of proof: I.L.R. (1962) 2 Punj. 290.

Rights of pre-emption when they exist, are valuable rights and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved: A.I.R. 1914 P.C. 11.

Right of pre-emption—Requisites of—Pre-emptor must be co-sharer—Right must subsist up to date of decree—Burden of proof is on plaintiff—Each and every landowner in estate is not co-sharer: (1964) 66 Punj.L.R. 1063.

The burden of proving that the pre-emptor had expressed his inability to buy the house in question is on the vendor: 1955 Madh. Bh. L.J. (H.C.R.) 1639 (D.B.).

The right of pre-emption under the Muslim law is a very weak right; the burden, thus, lies on the claimants to plead and prove that he indeed is the owner of the property on the basis whereof he is basing his claim: A.I.R. 1980 Raj. 116: 1980 Raj.L.W. 176.

Decree in pre-emption suit—Default in depositing full amount in compliance with the decree—Onus to prove that default was due to mistake of Court is on the decree-holder: 1969 Cur.L.J. 779 (Punj.).

Where the plaintiff claimed right of pre-emption under S. 15(2)(*b*) of the Punjab Pre-emption Act, 1913, *held*, the burden is on him to prove by positive evidence that the suit land had been inherited by the lady from the deceased son and it was not for the vendees to prove that she acquired the land by purchase: A.I.R. 1971 P.&H. 329.

Pre-emption—Price stated in sale deed exceeding market-value—Burden of proof—Price paid in good faith—Pre-emptor must pay same to get himself substituted: 1957 Nag.L.J. 348.

Pre-emption—Suit for, brought by minor son of one of vendors—Defence that suit was collusive at the instance of vendors—Onus on vendees to prove that suit was for vendor's benefits—Finding that vendees failed to establish it is finding of fact: 1964 Cur.L.J. 427 (Punj.).

87. Private land.—Lands situate in inam village—Private or ryoti lands—Presumption and onus of proof—Test to determine whether particular land is private land of land holder: A.I.R. 1968 S.C. 1005.

Private land—Burden of proof: (1957) 1 An.W.R. 332: A.I.R. 1957 Andh. Pra. 495.

88. Processes of Court.—Presumption under S. 27, General Clauses Act—Rebuttal of—Burden lies on addressee of notice—Quantum of evidence depends on facts and circumstances of each case: 1969 All.L.J. 849: 1969 Ren.C.R. 849: 1969 All.W.R. (H.C.) 477.

It is the established law that, where a sale or a decree is impeached on the ground of non-service or fraudulent suppression of notice and summons and where the plaintiff denies such notices, the initial onus is on the person who alleges service, that is to say, on the defendant to the action who tries to maintain the impugned sale: 1955 B.L.J.R. 583: A.I.R. 1956 Pat. 161.

When there is an affidavit of the peon serving the notice, of proper service thereof, the party who impugns the fact ought to prove that there was no service: A.I.R. 1928 Cal. 722.

Suit to set aside *ex parte* decree on ground of non-service of summons—Burden is on plaintiff to prove non-service: A.I.R. 1961 Pat. 88.

Presumption as to notice and other processes of Court: A.I.R. 1957 Pat. 487.

Presumption under S. 27, General Clauses Act as to proper service of notice sent by registered post—Addressee alleging that he was not served with notice—Failure of postman to identify addressee—Presumption is not rebutted: 1969 All.L.J. 849: 1969 Ren.C.R. 849: 1969 All.W.R. (H.C.) 477.

89. Purchaser.—It is well settled that the onus to prove the exception carved out in S. 19(*b*) of the Specific Relief Act, 1963 is on the subsequent purchaser; the section clearly provides that a contract may be specifically enforced against either party or a third person claiming under it by a title arising subsequently to the contract, except a transferee for value in good faith and without notice of the original contract; such notice may be actual or constructive, that is when except for wilful abstention from enquiry or search or gross negligence, he would have known it: A.I.R. 1994 Bom. 358; 1982 M.P.W.N. 294.

It is well settled that in a case for specific performance of contract the initial burden of proving that the subsequent transferee was a

purchaser in good faith and without notice lies upon the transferee and not upon the transferor to establish the circumstances which will entitle him to the benefit of S. 19(*b*) of the Specific Relief Act. [A.I.R. 1932 P.C. 228; A.I.R. 1934 P.C. 68; A.I.R. 1948 P.C. 97; A.I.R. 1977 All. 328, Rel. on]: A.I.R. 1983 All. 5.

It is well settled that if in a suit for specific performance of a contract the plaintiff proves his prior contract, the burden to prove the subsequent *bona fide* purchase for value without notice would lie on the subsequent purchaser; but it is also well settled that very little evidence, and in certain circumstances a mere denial or want of knowledge of the suit contract by the subsequent purchaser is sufficient to discharge such burden, shifting the onus upon the party seeking specific performance. [A.I.R. 1929 Pat. 300, Rel. on]: A.I.R. 1984 Pat. 277: 1984 Pat.L.J.R. 827.

Where a suit by a purchaser is contested by the person in possession on the ground that plaintiff's vendor had no title to the property, the onus is on plaintiff to prove that his vendor owned the suit property: 146 I.C. 445: A.I.R. 1933 Rang. 174.

Where a suit was filed by purchasers of the suit property for possession and it was contested by the appellants who were admittedly in possession, *held*, the onus was on the respondents/plaintiffs to prove that their vendor had the necessary title. [A.I.R. 1924 Cal. 558; A.I.R. 1918 P.C. 35 and A.I.R. 1959 S.C. 31, Rel. on]: A.I.R. 1991 Madh. Pra. 15.

Where specific performance of a contract is sought against the subsequent purchasers, *held*, the burden lies on the subsequent purchaser to show that he was a *bona fide* purchaser in good faith without notice of the previous sale; ordinarily, such burden is discharged by the subsequent purchaser's own testimony in the witness box; however, if other circumstances do reflect upon his *bona fides*, his own testimony of mere denial may not by itself be enough to discharge the burden: A.I.R. 1982 N.O.C. 18: 1981 Ker.L.T. 463 (D.B.).

Prior agreement to sell—Subsequent transferee must inquire into character of possession of persons in possession: A.I.R. 1968 Mad. 383.

Good faith of a subsequent transferee without notice in a case for specific performance of a contract is a question of fact, depending upon the facts and circumstances of each case; there can be no hard and fast rule as to the quantum of evidence required to prove good faith; it is the cumulative effect of evidence placed on the record which is to be seen; thus, where the subsequent transferee and her husband had made enquiries from the transferor and her husband, supplemented by investigations at the Registration Office to find out any earlier transaction relating to the property, *held*, the transferee's good faith as well as want of notice was established. [A.I.R. 1932 P.C. 228; A.I.R. 1934 P.C. 68; A.I.R. 1946 P.C. 97; A.I.R. 1977 All. 328, Rel. on]: A.I.R. 1983 All. 5.

Where the decree-holders sued under S. 53 of the Transfer of Property Act for avoidance of certain sales made by the judgment-debtor on the ground that they were meant to defeat or delay the creditors, *held*, the onus of proving want of good faith in the transferee would lie on the decree-holders; but if the fraud on the part of the transferor was established, the burden to prove that the transferee fell into the exception contemplated under S. 53 would lie on the transferor. He must establish that he was not a party to the fraud and honestly believed that the sales were in the ordinary and normal course of business. [A.I.R. 1963 S.C. 1150, Rel. on]: A.I.R. 1986 Karn. 225: (1985) 2 Karn.L.J. 389: (1986) 1 Hindu L.R. 175 (D.B.).

Purchaser for value without notice—Burden of proof. *See* I.L.R. (1954) Mys. 413: A.I.R. 1955 Mys. 3. Good faith and consideration—Onus. *See* A.I.R. 1958 Mys. 35.

Party seeking to impugn what is *ex facie* a valid disposition has to prove bad faith. [A.I.R. 1938 P.C. 152, Rel. on]: 1971 M.P.L.J. 808 (D.B.).

Bad faith—Proof: I.L.R. (1965) 1 Ker. 578: A.I.R. 1965 Ker. 253.

Agreement for sale with one but sale to another—Burden of proving *bona fide* is on vendee: A.I.R. 1926 Lah. 580: 96 I.C. 175.

Defendant purchasing property after contract of sale in favour of plaintiff—Burden is on defendant to prove that he is a *bona fide* purchaser for value without notice of earlier contract: A.I.R. 1970 Pat. 304 (D.B.); A.I.R. 1957 Pat. 224; 1987 All. L.J. 634.

Purchaser of a property belonging to a lady from her husband has the onus to prove

that the husband had implied agency on behalf of his wife to sell the property; the subsequent purchaser of said property from the wife could not be burdened with the onus of proving that husband has no such agency: A.I.R. 1971 All. 494.

Suit to set aside transfer by insolvent challenged—Burden of proof: 1961 M.P.L.J. 708: A.I.R. 1961 Madh. Pra. 15.

90. Raiyati rights.—Where in a suit for declaring the plaintiff's raiyati rights, his ownership of the land was admitted and he was proved to be in possession of, and cultivating, the land, *held*, the onus was on the defendant to establish himself to be the *bataidar*: A.I.R. 1972 Pat. 472.

Under-raiyati right claimed to be heritable and transferable—Onus to prove it is on a claimant. (Tenancy Laws—Orissa Tenancy Act (II of 1913), S. 237): (1967) 33 Cut.L.T. 725: A.I.R. 1967 Ori. 86.

Applicability—Person setting up invalidity of transfer by way of exchange under S. 27(1), Sonthal Parganas Settlement Regulation—Burden of proving that subject-matter of exchange was raiyati land situate in Sonthal Parganas lies on him—Discharge of onus—Onus shifts to other side to show that transfer comes within exception to rule laid down in S. 27(1) and he must show that record of rights contained an entry authorising transferor to transfer raiyati land (Sonthal Parganas Settlement Regulation (III of 1872), S. 27(1): (1968) 2 Um.N.P. 1135: 1969 B.L.J.R. 270: A.I.R. 1969 S.C. 204.

91. Record of rights.—Where a purchaser in a revenue sale wants to bring a suit for a declaration that the land in question forms part of the mal assets of a particular touzi, the initial onus is upon him to show that it is part of the mal assets of the said touzi.

This onus cannot be discharged by relying on *A* and *C* Registers prepared under Land Registration Act. It is now well-settled that *A* and *C* Registers kept under the Land Registration Act, 1876, cannot determine the question as to whether or not a particular land forms part of the mal assets of a particular touzi. [I.L.R. 45 Cal. 574, Rel. on].

But this initial onus which is upon the plaintiff can be discharged if the plaintiff can show that the rent was paid at any time in respect of the land to the superior landlords, or if there is an entry in the settlement record which supports the plaintiff's contention. And if there is an entry in a settlement record which indicates that the land in question is part of the mal assets of a particular touzi, then by production of the settlement record the plaintiff would discharge the initial onus which is cast upon him: (1956-57) 60 Cal.W.N. 6. *See* also A.I.R. 1963 Ori. 121, cited under Note 7, *supra*.

Entries in *wajib-ul-arz*: A.I.R. 1957 S.C. 286.

Record of rights showing land in plaintiff's name—Onus lies on defendant to prove his independent title to half land: A.I.R. 1968 Tripura 5. *See* also 76 I.C. 347.

Where land sold by a widow was sought to be pre-empted by her husband's brother's sons under S. 15(2)(*b*) of the Punjab Pre-emption Act, 1960 and the pedigree table and the *jamabandi* adduced by him in evidence merely proved the widow to be so related to him and in occupation of the land sold as its owner, *held*, no presumption could be drawn that she must have inherited it from her deceased-husband or son; the burden lay on the plaintiff to establish the factum of inheritance by positive and independent evidence: A.I.R. 1971 P.&H. 329: 1970 Punj.L.J. 776.

Record of rights—Entries in—Correctness—Burden of proof. *See* A.I.R. 1954 Nag. 223: I.L.R. (1954) Nag. 457; 82 I.C. 879 (P.C.); A.I.R. 1925 Pat. 530; 61 I.C. 420.

According to the decision of the Judicial Committee in A.I.R. 1931 P.C. 157, there is a distinction between the grant of an office to be remunerated by the use of land and the grant of land burdened with service. When the entries in the settlement record are capable of supporting either side and are equivocal then it is for the plaintiffs in a suit for resumption of lands to establish their own case and to show that the lands in question come within the first category mentioned in the Privy Council case: (1955-56) 60 Cal.W.N. 385: A.I.R. 1956 Cal. 79.

92. Recovery of arrears of rent.—East Punjab Urban Rent Restriction Act (III of 1949), S. 13—Non-payment of rent—Burden of proof: 1964 Cur.L.J. 356 (Punj.).

Suit for recovery of arrears of rent—Burden is upon tenant to allege and prove delivery of possession of property back to landlord: I.L.R. (1964) 2 Mad. 586: A.I.R. 1965 Mad. 417.

Partition of property of *A* and *B*—Liability of tenant to pay rent—Tenant taking plea that he had paid it to *A*—Onus is on him to prove it: A.I.R. 1969 Ori. 276.

Registered letter containing notice sent to tenant in arrears—Letter refused—Presumption of receipt of notice by tenant will be raised: A.I.R. 1963 All. 250: 1963 All.L.J. 25.

Suit for rent from agricultural land filed on 31st March, 1960—Cause of action shown as 31st March, 1957, *i.e.*, last day of period of tenancy—No proof of terms of tenancy—Defendant alleging that rent is payable earlier at time of harvest—Neither custom nor legislation requiring payment of rent at time of harvest—Normal rule that rent is payable at close of period of lease, is attracted—Defendant pleading special period must establish his case—Suit is not barred by limitation: (1967) 80 Mad.L.W. 438.

Suit for rent—Part of sum claimed relating to dues in respect of electric charges—Defendant denying existence of liability—It is for plaintiff to prove by tangible evidence how sum was made up: A.I.R. 1953 Madh. Bh. 247: I.L.R. (1954) Madh. Bh. 62.

93. Redemption.—In a suit for redemption, the plaintiff must prove mortgage: (1921) 8 Oudh L.J. 401. If he fails to do so, he cannot succeed in the suit even if it is found that the defendant is in possession of the property as a motgagee: 1954 Ker.L.T. 695 (D.B.).

Although in a suit for redemption the initial burden of proof rests upon the plaintiff-mortgagor to prove the mortgage by some *prima facie* evidence, this burden of proof is comparatively not heavy when the question of the quantum of the evidence required from either party has to be considered; it is the defendant who would naturally have the mortgage deed, and it would be more in his or her power to give evidence of its contents than in that of the plaintiff: A.I.R. 1958 Raj. 110: 1958 Raj.L.W. 275.

In a suit for redemption, burden lies on the plaintiff to prove his entitlement to redeem and that his suit is within time: (1978) 2 M.P.W.N. 179.

Suit for redemption of unspecified date—Burden of proof: A.I.R. 1959 Ker. 377.

94. Restitution of conjugal rights.—When the petitioner, husband or wife as the case may be, adduces proof regarding the withdrawal from the society of another without reasonable excuse, then the burden lies on the other side of proving reasonable excuse, if any, for withdrawal from the society. *Explanation* to S. 9, as added by the Amendment Act, 1976, would not make any difference in this position. [A.I.R. 1972 Bom. 182, Foll.]: A.I.R. 1987 Karn. 24: (1986) 1 Karn.L.J. 422: (1986) 2 Hindu L.R. 216; (1986) 2 Hindu L.R. 152 (Madh. Pra.).

In case of restitution of conjugal rights, the party who has withdrawn from the society of the other spouse has to prove by positive evidence the justification for his failure to discharge the marital obligations: A.I.R. 1971 P.&H. 35.

Matrimonial case—Petition for restitution of conjugal rights—Burden of proving the conditions in S. 9(1) of the Hindu Marriage Act is on the petitioner: A.I.R. 1969 Punj. 139.

In a proceeding for restitution of conjugal rights under the Hindu Marriage Act, 1955, *held*, burden of proving reasonable excuse for withdrawing from the society, is on the person who has withdrawn from the society: (1987) 1 Hindu L.R. 148 (Ker.) (D.B.); (1989) 1 Hindu L.R. 582 (Andh. Pra.) (D.B.); (1988) 2 Hindu L.R. 569 (P.&H.); (1988) 1 Hindu L.R. 722 (P.&H.); (1987) 1 Hindu L.R. 1 (Ker.) (D.B.); (1986) 1 Hindu L.R. 530 (Madh. Pra.); (1986) 1 Hindu L.R. 622 (Madh. Pra.); 1984 Hindu L.R. 492 (P.&H.); 1981 Hindu L.R. 452 (P.&H.); 1980 Hindu L.R. 194 (Raj.); 1980 Hindu L.R. 744 (P.&H.).

Where the husband sought restitution of conjugal rights under S. 9 of the Hindu Marriage Act on the ground that his wife, from whom he had begotten a son, had been removed from her matrimonial home at the instance of her parents under a warrant by the sub-Divisional Magistrate and they planned to marry her off to another person and the validity of the marriage was denied, *held*, having admitted the performance of marriage ceremony including *saptpadi*, the burden shifted on the wife to prove that the marriage was not valid. [A.I.R. 1963 Madh. Pra. 160, Disting.]: (1991) 1 Hindu L.R. 402 (Madh. Pra.).

95. Reversioners.—Widows—Accretions—Acquisition—Burden lies on claiming reversioner to show that it formed part of deceased's estate. *See* A.I.R. 1954 S.C. 601.

Alienation by Hindu widow—Suit by reversioner for declaration that it was not binding—Hindu Succession Act coming into force—Burden lies on defendants to prove that suit was not maintainable as widow had become full owner: (1953) 4 Guj.L.R. 509: A.I.R. 1955 Guj. 84.

Suit for possession on ground of plaintiff being nearer reversioner than defendants—Genealogies produced by defendants not proved—Still plaintiff must establish his title to property, to claim possession from defendants who were in possession at the time of suit, by proving that he was the nearer reversioner: 1964 B.L.J.R. 152: A.I.R. 1964 Pat. 187.

96. Route permit.—Scheme under S. 68-C, Motor Vehicles Act, 1939—Proceedings under S. 68-D—Objection that scheme does not satisfy S. 68-C—Burden of proof is on objector: A.I.R. 1969 Mys. 319.

The onus to prove that a scheme formulated and approved under S. 68-C of the Motor Vehicles Act, 1939 is not in public interest lies on the persons who raise objection thereto under S. 68-D of that Act; such onus is discharged not merely by preferring objections but by substantiating and establishing them: A.I.R. 1980 Ori. 122: I.L.R. (1979) 2 Cut. 26(D.B.).

97. Sanction for prosecution.—Where the plaintiff averred that a *khorposh* deed was void *ab initio* for want of the Commissioner's previous sanction as required under S. 12-A of the Chota Nagpur Encumbered Estates Act, 1876, *held*, the burden lay on the plaintiff to prove that the necessary conditions for attracting S. 12-A were satisfied; upon his failure to prove their existence, the deed was not void: A.I.R. 1981 S.C. 1937.

Validity of sanction—Burden of proof—Prosecution to prove that sanctioning authority was competent to sanction prosecution and had applied its mind to the facts of the case—Facts constituting offence not appearing on facts of order sanctioning prosecution—Prosecution must prove same by other evidence: I.L.R. (1962) 12 Raj. 327: (1962) 2 Cr.L.J. 786: A.I.R. 1962 Raj. 250.

Affirmation of fact and onus—Public servant charged with having committed offence has to satisfy Court, at any stage of trial, that he cannot be prosecuted for want of sanction under S. 197 (1), Cr.P.Code: 1967 Cr.L.J. 1304: A.I.R. 1967 Goa 121.

Allegation by defence that the person authorising prosecution lacked competence—Defence must establish it by *prima facie* evidence: 1969 All.W.R. (H.C.) 862.

Criminal trial—Prosecution of accused for defaming Government servant—Prior sanction under S. 198-B—Requisites of—Burden of proof lies on prosecution: 1969 Cur.L.J. 227: (1969) 71 Punj.L.R. 322: 1969 Cr.L.J. 1318.

98. Self-defence.—(*See* also under S. 105, Note 7, *infra*). It is well settled that the burden on the accused to establish the plea of self-defence under S. 105 is not so onerous as is cast on the prosecution by S. 101 to prove its case beyond reasonable doubt; the accused is required to establish his plea of self-defence by a mere preponderance of probability. Thus, where it was shown by the accused by such evidence that the deceased, within striking distance, was poised for imminent attack with a spear when the accused fired the fatal gunshot on the deceased, *held*, the plea of self-defence stood established: A.I.R. 1976 S.C. 966: (1976) 2 S.C.C. 798: (1976) 1 S.C.R. 757.

Right of self-defence—Burden of proof: (1961) 1 Cr.L.J. 57: A.I.R. 1961 Guj. 11.

Ordinarily the burden to establish the right of private defence is on the defence. It is true and the law is settled that the benefit of the right of private defence can be extended to the accused, if the materials on record justify it even though the defence as stated by the accused is one of denial: (1971) 37 Cut.L.T. 1040.

Where serious injuries are found on the person of the accused, as a principle of appreciation of evidence, it becomes obligatory on the prosecution to explain the injuries so as to satisfy the Court as to the circumstances under which the occurrence originated. But before this obligation is placed on the prosecution, two conditions must be satisfied: (*a*) that the injuries on the person of the accused must be very serious and severe and not superficial and (*b*) it must be shown that the injuries must have been caused at the time of the concurrence in question: 1982 Cr.L.J. 1585 (Ori.) (D.B.).

Where the accused had set up the defence that the deceased had assaulted one of them by a *bhala* blow on his chest and they had, therefore, acted in self-defence and the injury

report showed one grievous injury on his chest and 6 other injuries on his person, all caused by sharp pointed weapons, which was not sought to be explained by the prosecution till 5 years thereafter and that too unsuccessfully, *held*, the prosecution did not discharge its burden of proof; the defence version was more probable; conviction set aside: 1992 Cr.L.J. 942 (Pat.) (D.B.).

A defence of killing *se defendando* is a defence of justification, or, to put it in terms of pleading, a confession and avoidance. In civil cases this plea is always to be proved by the party setting it up; and it is perhaps, not altogether easy to see why it should not be so in a criminal case, more especially as when self-defence is set up, the facts must often be known only to the defendant who relies on it. But, in murder or manslaughter, the rule that the onus is on the prosecution permits of no exception except as to proof of insanity. The rule that the onus always remains on the prosecution does not mean that the Crown must give evidence in chief to rebut a suggestion of self-defence before that issue is raised, or, indeed, need give any evidence on the subject at all. If, on a consideration of all the evidence, the jury are left in doubt whether the killing or wounding may not have been in self-defence, the proper verdict would be not guilty. A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence which may have one of three results: It may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may, and sometimes does, strengthen the case for the prosecution. It is, perhaps, a fine distinction to say that before a jury can find a particular issue in favour of an accused, he must give some evidence on which it can be found but, nonetheless, the onus remains on the prosecution. What it really amounts to is that if, in the result, the jury are left in doubt where the truth lies the verdict should be not guilty, and this is as true of an issue as to self-defence as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence: (1957) 1 All E.R. 734.

Where the plea of self-defence was held to have been proved by the accused. *See* (1992-1) 40 B.L.J.R. 673 (D.B.).

99. Specific performance.—*See* Notes 36 and 89, *supra*.

100. State's act.—The power to transfer a Judge from one High Court to another under Art. 222(1) of the Constitution, inasmuch as it can be exercised without consent of the Judge, is extraordinary and can constitute a threat to his sense of independence and impartiality; it must be used most sparingly and only for very strong reason; the onus to justify the transfer lies heavily on the State. [As *per* Pathak, *J.*] A.I.R. 1982 S.C. 149.

Where a contract is *ex facie* executed on behalf of the Governor by a Deputy Secretary to the State Government ostensibly in the course of official business and in discharge of executive functions, *held*, it is to be taken to conform to the requirements of Art. 299 of the Constitution; the burden would, thus, lie on the State to establish to the Court's satisfaction that the Deputy Secretary was not authorised to execute the contract which for that reason was void: A.I.R. 1977 Pat. 258 (D.B.).

101. Title suits.—(*See* also Notes 22, 43 and 85, *supra*). In a suit on the basis of plaintiff's title, the onus to prove title lies upon him: 1983 M.P.W.N. 60.

In a suit for declaration of title the plaintiffcan succeed only on the strength of his own case and not on the defendant's weakness. [A.I.R. 1946 P.C. 59; A.I.R. 1954 S.C. 526, Rel. on]: A.I.R. 1979 Cal. 50; 1982 M.P.W.N. 360.

The general rule of evidence is that if, in order to make out a title, it is necessary to prove a negative, the party who avers a title cannot be absolved from proving it: 13 R.D. 480: A.I.R. 1929 Oudh 204; I.L.R. 60 Cal. 1253: A.I.R. 1934 Cal. 68.

Wherever a person claims title to the estate of another by inheritance or succession, it is imperative for him to prove not only that he was related in some way or other with the last male holder of the estate but also that under the law of succession governing the parties he was the only heir entitled to succeed to the estate at the material time. In other words, he must prove not only that he was related in a particular manner but also that no nearer heir was in existence. This will imply no doubt a proof of a negative assertion. There is, however, no invariable rule that all :llegations must be proved by the party who

affirmatively asserts them. Unless such evidence is adduced, it cannot be said that the plaintiff has discharged the onus that initially lay upon him to prove *prima facie* case. When the plaintiff adduces evidence in *prima facie* proof of the case that no nearer heir existed, the onus will shift to the defendants to prove affirmatively that there was in existence an heir nearer than the plaintiff. There will be no shifting of this onus unless the initial burden of proof that law casts on the plaintiffs was discharged: 1957 B.L.J.R. 658: A.I.R. 1958 Pat. 249.

Suit under O. 21, R. 103, C.P.Code—Title to possession must be proved by plaintiff—Onus of proof. *See* A.I.R. 1955 Tripura 11. In a suit for possession of land the plaintiff has to prove that the land lay within his holding and it is not for the defendants to prove that it lay outside: I.L.R. 56 Cal. 805: A.I.R. 1929 Cal. 325. *See* also (1940) 42 Punj.L.R. 294: A.I.R. 1940 Lah. 311.

Obiter:—When a plaintiff comes to Court with a prayer for a declaration of title and for possession, the burden obviously is on him to establish that on the date of the suit he had a subsisting title to the property. Such a subsisting title could only be established apart from other proof by satisfying the Court not only that the plaintiff in fact had a title but also that title was in fact subsisting. This he could succeed in doing only if he established that he had possession within 12 years before suit: I.L.R. (1963) 15 Assam 509: A.I.R. 1964 Assam 106.

Where the plaintiff unsuccessful in proving his possession as contemplated in S. 145 of the Cr.P.Code had discharged his onus to prove his title to the lands in the suit instituted by him, *held*, the burden shifted on the defendants to prove that they had acquired title by prescription or by reason of subsequent events the plaintiff had lost his title. [A.I.R. 1984 S.C. 136, Rel. on]: (1990-2) 38 B.L.J.R. 1171.

Where the defendant in answer to the plaintiff's claim of being owner in possession of the land pleaded that the plaintiff had only a life estate, *held*, the burden lay on the defendant to affirmatively prove his plea; on his failure to adduce sufficient legal proof, the defendant is bound to fail: 1991 Punj.L.J. 430.

Where a minor sued the State and his father for a declaration that he was the owner in possession of the suit land having purchased the same and that it was wrongly entered in the revenue record as having vested in the State on the ground that his father was a big *raiyat* which claim was admitted by his father but contested by the State, *held*, it was for the plaintiff to prove his title because the principle of law is that the plaintiff must succeed on the strength of his own case and not the weakness of the contesting defendant's version; it could not be lost sight of that the other defendant was the minor's father. [A.I.R. 1946 P.C. 59; A.I.R. 1954 S.C. 526, Rel. on]: A.I.R. 1982 Cal. 251.

Will conferring property on daughter subject to life interest of wife—Donee from wife ceases to have any interest in or title to property after her death—His suit for declaration of title and possession of property against subsequent transferee from wife cannot succeed on the ground that latter had no better title to property than himself. Plaintiff, if he wishes to succeed on ground that wife was the heir of predeceased daughter and hence gift conferred title on him after death of wife, must allege and prove that there were no nearer heirs to property which was the stridhan of daughter. In absence of such plea and proof Court should dismiss suit and cannot of its own accord proceed on that ground and decree it: I.L.R. (1953) Mys. 169: A.I.R. 1953 Mys. 72.

Where the title of a deceased person to certain properties is disputed and it is shown that those properties belonged to the partnership firm, the onus lies on persons claiming through the deceased persons to prove that those properties belonged to him at the time of his death: A.I.R. 1929 Sind 182.

When a person claims to succeed another on ground of relationship with the latter, he should establish not only his own relationship with the last male holder, but also *prima facie* that no nearer heirs are alive: 151 I.C. 338: A.I.R. 1934 All. 117.

Where in a suit for injunction by the Managing Committee of a *mosque* for ouster of trespassers from the mosque land, *held*, the plaintiff's title thereto may be established, in the absence of documents, by long possession which itself is also evidence of title; if the defendants set up a title better than that of the plaintiff, the burden lies on them to prove the same, on the plaintiff's long possession

having otherwise been established: A.I.R. 1973 Raj. 322: 1973 Raj.L.W. 456: 1973 W.L.N. 448.

In an auction for eviction based on title, the plaintiff cannot succeed merely by proving his possession of the lands in question, even assuming that he obtained possession by virtue of a Patta. In order to succeed, he had to prove both title and possession, and if he is not able to establish his title to the disputed land, the Court cannot grant him any relief: 1960 Raj.L.W. 596: I.L.R. (1960) 10 Raj. 1197.

Suit for title and possession of land—Defendants pleading that two other persons were in occupation of part of such land—Proof of such persons being necessary parties to suit—Onus is on defendants: (1966-67) 71 Cal.W.N. 302.

Plaintiff's assertion that she derived title to property under award-decree—Assertion is not allegation of fact—Title even if not denied in written statement would not absolve plaintiff from burden of its proof: A.I.R. 1966 Pat. 75.

In a suit for declaration that the plaintiff was a hawkdar of certain land by virtue of being in possession thereof the land having been delivered to him by the Court, it is for the defendants to establish their title to the land if they want to have the claim of the plaintiff dismissed: A.I.R. 1958 Mys. 14: I.L.R. (1957) Mys. 120.

Plaintiffs alleged that Rambharos (husband of plaintiff No. 1) got the suit lands in 1922 from the Ruler and thereafter he and plaintiffs were in possession of the land. But in pursuance of a mortgage deed by defendant No. 2 in favour of defendant No. 1 the possession of the suit land was taken by him in 1955. The Courts below held that Rambharos did not acquire the land from the Ruler in the manner alleged but relying upon the weakness of the case of defendant No. 2, passed a decree for possession in favour of the plaintiffs.

Held, that the Courts below while passing decree for possession disregarded the well-established principle that a person claiming title to the land must depend on the strength of his own case and he could not get any relief on the basis of the weakness of the defence of his adversary. When the title set up by the plaintiffs was not proved, the decree of the Courts below could not be sustained and must be set aside: 1963 M.P.L.J. (Notes) 94.

Suit for ejectment and khas possession—Defendant 2 alleged to be in occupation under an illegal and unlawful transfer of suit tenancy by defendant, the tenant, without plaintiff landlord's consent—Onus to prove alleged transfer by way of sub-letting is on the plaintiff—Suit must fail where he fails to discharge the onus—No presumption of subtenancy or sub-letting arises under the enactment in every case in which the tenant leaves the station permanently, as under the English Act: (1960-61) 65 Cal.W.N. 1175.

Ejectment suit—Suit for declaration of title and for possession impugning certain documents executed by an old illiterate lady of a village and involving large acreage of land—Onus: 26 Cut.L.T. 304: A.I.R. 1961 Ori. 100.

Where the disputed land is a forest waste, unenclosed in the midst of still larger waste, the fact that there is no satisfactory evidence of possession cannot relieve the Court of the duty of settling a line upon the evidence which is laid before it. The ordinary rule regarding the onus incumbent on the plaintiff has really no application to cases of that kind. The parties to the suit are in the position of counter-claimants; and it is the duty of the defendant, as much as the plaintiff, to aid the Court in ascertaining the true boundary. [I.L.R. 21 Cal. 504, Foll.]: 1958 Ker.L.J. 457: 1958 Ker.L.T. 303.

Suit for restraining defendants from entering upon disputed land and interfering with cultivation of plaintiffs—Defendants contending that they had acquired occupancy rights over suit land under Madras Act I of 1908—*Held*, onus of proving acquisition of permanent occupancy interest was on defendants: I.L.R. (1966) Cut. 790: 32 Cut.L.T. 1134.

102. Torts.—Slander of title or slander of goods—Proof: (1966) 1 Mys.L.J. 508.

Vicarious liability—Liability of State for acts of its employees—Burden of proving existence of circumstances to claim immunity lies on State and its employee: A.I.R. 1970 J.&K. 5.

Vicarious liability for tort committed by servant—Onus to prove employment: A.I.R. 1970 Mys. 13.

Even in an action in torts, if the defendant gives no rebutting evidence but a reasonable explanation, equally consistent with the presence as well as with the absence of negligence, the presumptions or inferences based on *res ispa loquitur* can no longer be sustained. The burden of proving the affirmative, that the defendant was negligent and the accident occurred by his negligence, still remains with the plaintiff; and in such a situation it will be for the Court to determine at the time of judgment whether the proven or undisputed facts, as a whole, disclose negligence: A.I.R. 1979 S.C. 1848.

103. Trade mark/patents.—Application for removal of trade mark from register—Onus: A.I.R. 1957 All. 683.

Likelihood of deception—Burden of proof: A.I.R. 1959 Cal. 636.

The burden of proving that the trade mark sought to be registered is not likely to deceive or cause confussion is upon the applicant: A.I.R. 1953 S.C. 357.

Trade mark—Infringement of—Initial burden on plaintiff—When burden shifts: A.I.R. 1969 Punj. 290.

In an action for passing off, the burden of proof is on the plaintiff to show that the defendant's mark has near resemblance to his mark and there is likelihood of deceit and confusion: A.I.R. 1973 Andh. Pra. 51: (1973) 1 An.W.R. 129: (1973) 1 An.L.T. 278.

Onus of proving that a trade mark is not calculated to deceive or cause confusion is on the person pleading it: A.I.R. 1969 Bom. 24: (1968) 70 Bom.L.R. 37.

Burden of establishing proprietorship of trade mark lies on applicant—It is for applicant to satisfy Court as to his user: (1968) 70 Bom.L.R. 37: A.I.R. 1969 Bom. 24.

Trade mark alleged to have violated provisions of law—Onus of proving violation is on the applicant: A.I.R. 1967 Mad. 186.

Application for registration of trade mark—Claim of honest concurrent user—Burden to prove user lies heavily on applicant—Evidence must be clear, cogent and specific—Burden of proof—Application for registration of trade mark—Applicant must allege and prove that he is proprietor of mark: A.I.R. 1967 Mad. 148.

Action for infringement of registered trade mark and for passing off—Burden of proof on plaintiff—Extent of: A.I.R. 1967 Del. 141.

Infringement of Patent—Burden of proof on plaintiff: A.I.R. 1969 Bom. 255.

Patents and Designs—Onus of proving invalidity of Patent is on defendant: A.I.R. 1969 Bom. 255.

104. Trust.—Where the discoverable origins of property show it to be trust property, the onus of establishing that it must have illegitimately come into the trustee's own right does not rest upon the beneficiaries. On the contrary, the onus is, and is heavily, upon the trustees to show by the clearest and most unimpeachable evidence the legitimacy of his personal acquisition: I.L.R. (1968) 18 Raj. 803: 1968 Raj.L.W. 347: A.I.R. 1968 Raj. 314.

The plaintiffs brought the suit claiming to be trustees and praying for a declaration of their own title as trustees and for a declaration that the defendants were not trustees and for possession of the trust properties and other incidental reliefs. It was found as a fact that the meeting at which the plaintiffs were elected trustees had not been held on due notice to all churches interested and was consequently not a valid meeting. *Held*, that in a suit of this description if the plaintiffs were to succeed they must do so on the strength of their own title. Since the election of the plaintiffs was not valid, their suit, in so far as it was in the nature of a suit for ejectment, must fail for want of their title as trustees: 1958 Ker.L.T. 721: 1958 Ker.L.J. 874: A.I.R. 1959 S.C. 31. Where the discoverable origins of property show it to be trust property, the onus of establishing that it must have illegitimately come into the trustee's own right does not rest upon the beneficiaries. On the contrary, the onus is heavily upon the trustee to show by the clearest and most unimpeachable evidence the legitimacy of his personal acquisition: A.I.R. 1960 S.C. 100.

Property in possession of Mahant whether his personal property—Presumption—Burden of proof: A.I.R. 1966 Ori. 221.

Where properties for long were held by Mahants as their personal properties wherefrom some ascetics occasionally found food and shelter and the Bihar State Board of Religious Trust claimed them to be owned by it as a public trust, *held*, the legal presumption would be in favour of the Mahants and the burden would lie on the Board to prove

its claim; the position will not change even if the Mahants, not fully conscious of their rights in the properties or unaware of the true state of law, had been mentioning them as public trust properties in their returns to the Board; the Mahants are not estopped. [A.I.R. 1971 S.C. 2057, Rel. on]: A.I.R. 1974 Pat. 95: 1973 Pat.L.J.R. 509 (D.B.). See also A.I.R. 1938 P.C. 195.

Where transfer by a Mahant of his personal property was objected to by the Deity claiming title thereto, *held*, burden is on deity to disprove the Mahant's title: A.I.R. 1980 N.O.C. 155 (All.); 1981 All.W.C. 714: 1981 All.L.J. 1082.

Orissa Hindu Religious Endowments Act (IV of 1939), S. 64 (2) and (1)—Suit by Mahant of math to set aside order of Commissioner under S. 64(1)—Onus is initially on plaintiff to show that order of Commissioner is wrong: A.I.R. 1967 S.C. 256.

Religious endowment—Debts—Decree obtained by creditor against Mahant—Sale of idol's property in execution—Succeeding Mahant not bound—Burden of proof: A.I.R. 1957 All. 77.

Trust property mortgaged for raising loan for repairs, etc.—Onus to prove necessity is on mortgagee: A.I.R. 1970 Cal. 292.

Temple built out of private funds—Certain property gifted to person appointed as vahivatdar of temple—No dedication of temple to public—Villagers impliedly allowed to offer worship to deity—Gram Panchayat levying tax on house in which temple was built—Temple held not in nature of public trust—Property whether under public or of private trust—Burden of proof: (1961) 63 Bom.L.R. 274.

Suit for rendition of accounts against trustee—Death of trustee—Liability and duty of L.Rs. of deceased trustee—Burden of proof to show that monies were due from deceased plaintiff: A.I.R. 1969 Del. 75.

Trusteeship—Application under S. 41(*c*) of Orissa Hindu Religious Endowments Act, asking to declare applicants as hereditary trustees of deity—Onus is applicants to establish that they are hereditary trustees: 34 Cut.L.T. 1111.

Breach of trust—Onus: A.I.R. 1957 S.C. 815: (1958) 1 An.W.R. (S.C.) 36: 1958 S.C.R. 214. Misfeasance—Burden of proof: A.I.R. 1930 Mad. 78.

"Hereditary trustee" of religious endowment—Suit for declaration—Burden to prove devolution of trusteeship from time of founder lies on plaintiff: I.L.R. (1963) Cut. 257.

Failure to submit budget and accounts by Mutawalli—Prosecution must prove that it was wilful: 1968 Cr.L.J. 1182: A.I.R. 1968 Mad. 332.

105. Undue influence.—(*See* also Notes 47 and 80, *supra*). Plea of "undue influence" to be investigated only when all particulars are pleaded—Relation of influence established—Person dominating to prove that no domination was practised: 1964 M.P.L.J. (Notes) 37.

A plea of undue influence, where set up, is a special plea. S. 103 of the Evidence Act places the burden of substantiating such a plea on the party which sets it up: A.I.R. 1974 S.C. 1999.

Undue influence—Onus: A.I.R. 1958 Punj. 190; A.I.R. 1955 S.C. 363.

Where the executrix, aged 75 and a patient of cancer, was living with and under the care of her close relation, that is, younger brother of her adopted son and who was in a position to dominate her will and had obtained substantial benefit under the deed by way of agricultural land, *held*, whether or not he had used his influence over the executrix to obtain the advantage could be established by the beneficiary by his own evidence; by not appearing as a witness in the suit, an adverse inference has to be drawn against him; as the deed *prima facie* appears to be unconscionable, the burden shifted on to him to prove that the deed was executed by the executrix without undue influence: A.I.R. 1975 Madh. Pra. 136: 1975 M.P.L.J. 156: 1975 Jab.L.J. 333 (D.B.).

Where the vendor was an old, blind, illiterate and tribal woman totally at the mercy of the vendee with whom she was living till her death, and the parties were so situated that vendee was in a position to obtain an unfair advantage over her, *held*, the initial onus to prove undue influence was on the plaintiff a person challenging the transaction and same was discharged when it was proved that no consideration passed at the time of the sale: A.I.R. 1993 S.C. 956.

Where the executor of a lease deed was an old and illiterate *pardanashin* lady unable to

see and hear, *held*, the onus to prove that she executed the lease deed after properly understanding the nature of deed is on the person who alleges its execution: 1981 (U.P.) R.C.C. 598.

106. Wagering contract.—*See* Note 32, *supra*.

107. Will.—A Will is proved after the testator is dead and gone and the best evidence is lost; a Will, very often, disturbs normal succession or inheritance; greater is, therefore, the necessity of circumspection; the mode of proving a Will is ordinarily not different from proving other documents except that attestation as prescribed in S. 63 of the Indian Succession Act is also to be proved and the propounder of the Will has to explain to the Court's satisfaction any suspicious circumstances surrounding the Will: A.I.R. 1983 N.O.C. 206: (1983) 56 Cut.L.T. 301.

A Will has to be proved as any other document; it does not need mathematical certainty but only the satisfaction of a prudent mind; one of the attesting witnesses must be examined if he is alive and subject to the Court process; allegations of fraud, undue influence, coercion, etc., have to be proved by persons alleging them. However, despite absence of such pleas, the Will may well be shrouded by mystery or circumstances creating doubt about its execution in which case it is for the beneficiary to remove the doubts and clear the judicial conscience by suitable evidence; the *onus probandi* to prove the Will lies upon him who propounds it; he has to prove that the Will is the last Will of a free person, having a sound disposing mind and memory, and was competent to make it: (1989) 1 Hindu L.R. 125: (1989) 1 Rev.L.R. 145 (P.&H.).

Where a Will is propounded the *onus probandi* is on the party who propounds the Will. He must prove that the Will was duly executed and that it was in existence at the date of the death of the testator: 57 Cal.L.J. 8: A.I.R. 1933 Cal. 449. *See* also A.I.R. 1955 Assam 81; A.I.R. 1960 Madh. Pra. 73. Applies to probate cases: I.L.R. 39 Cal. 245; A.I.R. 1922 P.C. 409.

It is undoubtedly for the propounder of a Will to establish its due execution and also to satisfy the Court's judicial conscience that it was executed by the testator in a sound and disposing state of mind in the presence of the attesting witnesses; where it was so proved by the propounder, the suspicious circumstances indicated by the other party, found, on facts, not sufficient to hold the Will as not duly executed: A.I.R. 1977 Andh. Pra. 348: 1976 An.L.T. 335.

The law casts upon the propounder the burden to prove satisfactorily that its executant had sound disposing mind and capacity to execute the Will and to explain and remove doubts from the Court's mind if there be circumstance against due execution; he has also to prove due execution by examining at least one of the attesting witnesses if available; *held*, on facts, suspicious circumstances explained: A.I.R. 1976 Gau. 94 (D.B.). *See* also A.I.R. 1964 S.C. 529 [Because the attesting witnesses were chance witnesses is no ground for disbelieving them.]

It is desirable that all witnesses capable of being called should be examined. *See* (1919-20) 24 Cal.W.N. 860 (P.C.).

The onus of proving a Will is on its propounder; in the absence of suspicious circumstances surrounding the Will, it is sufficient for the propounder to prove the executor's testamentary capacity as to his sound and disposing state of mind and his signature on the Will by disinterested, satisfactory and sufficient proof that onus is discharged; but where suspicious circumstances suggest that the Will was unnatural, improbable or unfair, the propounder has also the onus to explain them to the Court's satisfaction; where the propounder also took prominent part in execution of the Will which conferred upon him substantial benefit which is generally taken as a suspicious circumstance, the propounder must also remove that suspicion. [A.I.R. 1959 S.C. 443; A.I.R. 1964 S.C. 529 and A.I.R. 1965 S.C. 354, Rel. on]: A.I.R. 1984 All. 66. *See* also A.I.R. 1982 Cal. 599 (D.B.).

The presumption ordinarily is that the executant knew and approved all the contents of the Will; where his mental capacity is challenged and it is shown that it was very doubtful for the testator to have executed the Will, the Court ought to find out from the cumulative effect of all evidence on record and relevant circumstances whether the Will had been established to be a genuine transaction. [(1911) I.L.R. 38 Cal. 355 (P.C.) and (1894) I.L.R. 21 Cal. 279, Rel. on]: A.I.R. 1984 All. 66.

The propounder of the Will has to prove not only that it was duly executed and

attested as is required by the law, but also that it is genuine if there are any suspicious features surrounding the Will, the burden lies on the propounder to remove the suspicion: (1990) 1 Bom.C.R. 33.

The *onus probandi* lies in every case upon the party propounding a Will and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator.

If a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased. Whether there is any inherent suspicion or not will depend upon the facts of each case: 1955 B.L.J.R. 337: A.I.R. 1956 Pat. 377; 1957 M.P.C. 627; A.I.R. 1977 S.C. 74: 1977 Punj.L.J. 54 reversing A.I.R. 1975 P.&H. 377. *See* also I.L.R. 23 All. 472; A.I.R. 1946 P.C. 156; A.I.R. 1947 P.C. 169; A.I.R. 1949 P.C. 272.

The onus of proving the Will is on the propounder and in the absence of suspicious circumstances, surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator, as required by law, is sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the Will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court: A.I.R. 1985 Cal. 349: (1984) 2 Cal.L.J. 182: (1984-85) 89 Cal.W.N. 832 (D.B.). *See* also A.I.R. 1982 Cal. 599 (D.B.). It is only thereafter that Will can be held to be a genuine document: (1993) 1 Hindu L.R. 670 (P.&H.).

Merely because a Will is registered, its genuineness cannot be presumed. Registration of a Will does not change the onus of proof from its propounder to the challenger. Whether a Will is registered or not, it is for the propounder to establish by reliable evidence that the Will was signed by the testator, that he at the relevant time was in a sound and disposing state of mind and that he fully realised the nature and effect of the disposition and signed it on his own free will. As the burden is heavily upon the propounder to prove the Will he cannot adopt the stand that the registration of the Will itself is a circumstance to dispel any suspicious circumstance. When the genuiness of the Will is challenged, the propounder has necessarily to substantiate his case regarding its genuineness even in a case where it is registered. At best registration of a Will though not required by law is only a piece of evidence of the execution. But it cannot have greater sanctity: A.I.R. 1995 Ker. 208.

Where suspicion arises from the nature of the case put forward by the person claiming under the Will, *held*, he alone should remove that suspicion which his case creates: (1978) 1 An.L.T. 407: A.I.R. 1979 N.O.C. 41 (D.B.).

Where execution of the Will was surrounded by suspicious circumstances, *held*, the onus was on its propounder to explain them away to the satisfaction of the Court before the Will could be accepted as genuine: A.I.R. 1989 All. 17: (1989) 14 All.L.R. 814.

Where by and large suspicious circumstances surround the execution of a Will, it is necessary for the Court to see that all legitimate suspicions are removed before the document is accepted as the last Will of the testator. Naturally, the Courts start with suspicion and the presence of such suspicious circumstances tend to make initial burden very heavy and unless it is satisfactorily discharged, Courts would be reluctant to grant the prayer of the propounder. It is true that, if a caveat is filed by a caveator alleging fraud, undue influence or coercion, etc., in respect of the execution of the Will propounded, such pleas may have to be proved by the caveator; but nevertheless in the absence of such pleas also the propounder has a burden of proving the initial onus to remove any such legitimate doubts in the matter. Where delay in producing Will was clubbed with factors which threw doubt on its genuineness and the propounder failed to discharge the burden as to the execution of the Will, *held*, Will was not genuine: A.I.R. 1991 Ori. 289.

Construction—Suspicious circumstance: A.I.R. 1958 S.C. 1332.

In dealing with the case of an oral Will by a Hindu it is beyond doubt that the burden of proving an oral Will rests very heavily on the person who is desirous of propounding the oral Will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege as well as to prove with the utmost precision, the words on which he relies, with every circumstance of time and place: (1957) 59

Bom.L.R. 1178: A.I.R. 1958 Bom. 79. *See* also A.I.R. 1930 Lah. 579; A.I.R. 1931 P.C. 285; A.I.R. 1937 P.C. 174; A.I.R. 1942 All. 201 (F.B.).

The burden of proving an oral Will by a Hindu rests heavily on the person propounding such Will, *held*, on facts, evidence adduced being conflicting, the Will was not proved. [A.I.R. 1977 S.C. 74, Foll.]: A.I.R. 1986 J.&K. 61: 1986 Kash.L.J. 64.

Will—Genuineness and execution—Burden of proof: A.I.R. 1959 Andh. Pra. 360.

Genuineness of Will—Onus is on propounder: A.I.R. 1960 Pat. 318.

Onus of proof that testator was major when he made the Will and was competent to execute it is on person relying on Will: A.I.R. 1968 S.C. 947.

Person who relies on last Will of testator has heavy burden to discharge: 1968 All.L.J. 69.

Plaintiff alleging that the executor of a Will was Hindu—Burden is on him to prove the same—If he fails to do so, he cannot abandon on his own case and turn round to adopt that of the defendant that the execution of the Will got converted to Christianity. [A.I.R. 1957 Mad. 186; A.I.R. 1961 Mad. 289, Foll.]: A.I.R. 1988 Mad. 132: (1987) 100 Mad.L.W. 895: (1987) 2 M.L.J. 481.

Onus is on propounder—Person taking benefit preparing will—Burden heavily on him to prove genuineness: 1960 B.L.J.R. 56.

Mode of proof — Onus — Principles — When Court would grant probate: A.I.R. 1964 S.C. 529.

Validity—Burden of proof: A.I.R. 1967 Bom. 382. *See* also 13 Law Rep. 476 (Mys.).

Burden of proof—Onus to prove physical and mental act of testator lies on propounder: 1965 Kash.L.J. 337: A.I.R. 1966 J.&K. 75.

Burden of proof—What propounder has to establish—Rules of proof of Will how far differ in case of other documents like gift or settlement: (1965) 2 M.L.J. 259.

The plea that the Will was not a genuine one has to be proved by the party alleging the Will to be forged and if established is a good ground for revoking a probate granted of the Will and further more that is a ground on which the creditor of the testator's heir may also apply for the revocation. There can be no doubt that the onus of proving that the Will is not genuine will lie on the creditor who applies for the revocation of the Will: (1957-58) 62 Cal.W.N. 444: A.I.R. 1958 Cal. 377.

Revocation of Will—Burden of proof and presumption: A.I.R. 1967 Del. 128. *See* also A.I.R. 1953 Cal. 657.

Where a person seeks revocation of the probate for want of citation, *held*, the burden lies upon him to establish *prima facie* case therefor; if he shows that he ought to have been cited, the burden would shift on to the propounder of the Will that non-citation was of no substance and did not constitute just cause of revocation. [A.I.R. 1938 Rang. 261 (F.B.), Rel. on]: A.I.R. 1978 Madh. Pra. 201: 1978 M.P.L.J. 433: 1978 Jab.L.J. 570 (D.B.). *See* also A.I.R. 1928 P.C. 2.

Where a registered Will was proved by production of its registered copy, *held*, the burden of proving its revocation is on the person who claims that it had been revoked: A.I.R. 1990 N.O.C. 164: (1990) 1 Ker.L.T. 447.

Proper attestation—Contention that for valid attestation there must be something in Will itself to indicate that person concerned signed as witness and omission, lacuna or insufficiency, if any, in document in that behalf cannot be supplemented, or supplied by other evidence is an extreme proposition: I.L.R. (1966) 1 Cal. 408.

Where the plea of collusion or fraud raised by the objector of the Will was that it was procured after the executrix had become unconscious, her valuables had been removed and she had been left to die uncared for, as supported by medical certificate, *held*, the plea is not supported by sufficient particulars; the objector had, thus, failed to plead and prove the collusion or fraud. [A.I.R. 1963 S.C. 1728; A.I.R. 1967 All. 64, Rel. on]: A.I.R. 1971 All. 304.

Allegation of fraud, undue influence, etc., by caveator—Onus is on caveator: 1965 Kash.L.J. 337: A.I.R. 1966 J.&K. 75; A.I.R. 1964 S.C. 529.

Undue influence—Onus to prove undue influence is on caveator—Every influence is not undue influence and mere fact that bequest is in favour of persons who were looking after testator at or about time of Will does not by itself indicate that Will was executed under undue influence: I.L.R. (1966) 1 Cal. 408.

Where the caveator alleges undue influence, fraud and coercion in execution of a Will, the onus is on him to prove the same. If the caveator does not discharge the burden which rests upon him in establishing the

circumstances which show that the Will had been obtained by fraud or undue influence, a probate of the Will must necessarily be granted if it is established that the testator had full testamentary capacity and had, in fact, executed it validly with a free will and mind: (1992) 2 Hindu L.R. 157 (P.&H.).

Once it has been proved that a Will has been executed with due solemnity by a person of competent understanding, the burden of proving that it was executed under undue influence is on the party who alleges it. [A.I.R. 1919 P.C. 132, Rel. on]: A.I.R. 1955 S.C. 363; A.I.R. 1982 Cal. 599.

Execution of Will—Undue influence—Proof. *See* A.I.R. 1957 Ker. 115; I.L.R. 23 All. 472; I.L.R. 32 Mad. 400 (P.C.); (1920-21) 25 Cal.W.N. 779; (1920-21) 25 Cal.W.N. 45 (P.C.); (1993) 2 Bom.C.R. 67.

The law is well settled that the *onus probandi* lies on the person who propounds the Will, and this onus is in general discharged by proof of capacity, and the fact of execution, from which the knowledge and the assent to its contents by the testator will be assumed. But where a Will is prepared and executed under circumstances which excite the suspicion of the Court "it is for those who propound the Will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document". [A.I.R. 1949 P.C. 272, Rel. on].

The burden of proving undue influence cannot be discharged by merely establishing that a person has the power unduly to overbear the Will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the Will was obtained: (1973) 1 Cut.W.R. 697 (D.B.).

A plea of undue influence in execution of a Will is a special plea; under S. 103 the burden of substantiating such a plea lies on the party which sets it up. [A.I.R. 1971 All. 304, Rel. on]: A.I.R. 1974 S.C. 1999: (1974) 2 S.C.C. 600.

The burden of proving due execution is always on the propounder and it is not lessened by the fact that the propounder is stranger to the family and attesting witnesses are men of the opposite camp: A.I.R. 1939 Cal. 674.

Where the propounder pleaded that the Will was executed by the testatrix during the last moments of her life whereby her entire property was bequeathed to the propounder, an unnatural succession, and it was found that she was a feeble and sick lady of 80 years, that she had also executed an earlier Will of which there was no mention in the Will sought to be proved and that the propounder had taken active part in the execution of the second Will, *held*, the Courts below went wrong in holding that that were not suspicious circumstances; the Will was vitiated and not proved. [A.I.R. 1965 S.C. 354 and 1965 All.L.J. 1080, Rel. on]: A.I.R. 1981 N.O.C. 32 (All.).

Where a person was claimed to have executed a Will, just 18 days before his death, whereby he bequeathed his entire assets including a three-storeyed *haveli* at Jaipur and agricultural lands in the village to his younger brother to the exclusion of his own wife and minor children, *held*, the burden lay on the younger brother to explain to the Court's satisfaction the suspicion surrounding the Will; the propounder did not examine a handwriting expert but the expert examined by the widow deposed that the signatures on the Will did not tally with the deceased's proved signatures; there were other circumstances proved which rendered the Will even more suspicious; the propounder did not discharge his burden: (1990) 1 Hindu L.R. 529 (Raj.).

108. Workmen's compensation.— *See* Note 62, *supra* and A.I.R. 1957 Cal. 601, cited in Note 5, *supra*.

109. Miscellaneous.—Where the defendant raises the plea that he was a minor at the date of the transaction forming the subject-matter of the suit and for that reason the contract is void, the onus is on him to prove the fact of his minority at the time: A.I.R. 1953 Sau. 177: 6 Sau.L.R. 172.

Nuisance — Meaning of — Burden of proof: 1963 All.W.R. (H.C.) 522.

The criterion that the burden to prove the absence of *bona fides* resting upon the person who challenges the same is not a burden requiring proof to the hilt but to render the same as reasonably probable is only for the purposes of finding whether or not there has been a valid exercise of the statutory power. If the Court is called upon to decide positive existence of an impugned wrong motive, it must be proved to the positive satisfaction of the Court: I.L.R. (1952) Cut. 529: A.I.R. 1953 Ori. 121.

Fraudulent preference — Preference of the creditor over another on account of pressure — Dominant motive — Onus of proof: (1966) 1 An.W.R. 374: A.I.R. 1966 Andh. Pra. 157.

Onus of proving exception—Onus lies upon creditor: (1968) 1 An.W.R. 221.

Collusion—Burden of proof. *See* A.I.R. 1956 Trav.-Co. 266.

Influence of drink—Burden of proof: A.I.R. 1961 All. 89.

Garnishee disputing liability—It is for him to indicate on what grounds the dispute is being raised so that specific issues could be framed with respect to questions necessary for determining the liability: I.L.R. (1962) 2 All. 475: A.I.R. 1963 All. 313.

Hindu belonging to Adi-Dravida caste converted to Christianity ceases to belong to Adi-Dravida caste—Burden lies on him to prove that on conversion he again became member of Adi-Dravida caste: A.I.R. 1969 S.C. 101.

Finding based on no evidence—Proof: A.I.R. 1957 S.C. 478.

Stay of suit—Application for under S. 10 of Arbitration Act—Plaintiff opposing application on ground that the case was not fit for arbitration—Onus of proving this lies on the plaintiff: A.I.R. 1967 Mad. 201.

Application by judgment-debtor for instalments—"Circumstances of judgment-debtor"—Meaning—Burden of proof—No circumstances brought on record by judgment-debtor justifying grant of instalment—Court granting instalments exercises its jurisdiction illegally: 29 Cut.L.T. 581.

Proceedings before Collector—Nature of—Burden of proof: 1964 M.P.L.J. 220: A.I.R. 1964 Madh. Pra. 196.

Award of Collector challenged—Burden of proof: I.L.R. (1962) Cut. 635: A.I.R. 1962 Ori. 21.

Wilful default—What is—Burden of proof: (1967) 80 Mad.L.W. 144.

Affirmation of facts and onus—Burden of proof—It is for petitioner to plead all essential facts since he assails that order—He cannot throw the burden of proving that claim on respondent. Civil Writ Petn. No. 150 of 1968, dated 23rd July, 1968 (Raj.), Dist.—(Constitution of India. Art. 226—Burden of proof—*Certiorari*)—Civil Services—Rajasthan Medical Services (Collegiate Branch) Rules, 1962, R. 5(1)(*ii*): 1969 Raj.L.W. 568: (1970) 1 L.L.J. 199: 1970 Lab.I.C. 550.

Where the receipt of the goods sent by the seller was admitted by the purchaser, *held*, it was sufficient to raise the presumption that the purchaser had placed the order for supply of the goods on the seller; the burden would then shift on the purchaser to rebut the presumption by evidence: A.I.R. 1981 S.C. 977: 1980 U.J. (S.C.) 446: (1980) 3 S.C.R. 22: 1980 (Supp.) S.C.C. 1.

Mutual open and current account—When ceases to be so. It is for party alleging that account was closed to prove it: I.L.R. (1963) 13 Raj. 1108: A.I.R. 1964 Raj. 58.

Where the guarantor of a Bank's advance loan contract pleaded to be relieved of his liability on the ground that under the agreement the Bank was to advance money on the security of fully insured goods which it did not and the goods were in fact not under its control and had been lost whereby the guarantor's rights were impaired and his eventual remedies against the debtor were lost, *held*, the onus lay on the guarantor to prove its case; the decree set aside and the case remitted for deciding the issue on the basis of evidence adduced by both the parties: A.I.R. 1994 Ori. 329.

Where a Bank's customer made over cheques and moneys for depositing and crediting in her account with the Bank not to the Bank employee working on the relevant counter but to another employee who was her neighbour and her husband's close friend and the moneys were mis-appropriated by that latter employee, *held*, the Bank could not be held vicariously liable unless it was shown, the burden therefor being on the customer, that the latter employee was acting in the course of his employment while accepting the mis-appropriated cheques and monies: A.I.R. 1978 S.C. 1263: 1978 U.J. (S.C.) 514: (1978) 3 S.C.C. 399.

Person holding certain substantive post in former Indian State—Merger of such State into State of Orissa—Person must prove that his former substantive post was recognised expressly or impliedly by the new State: A.I.R. 1962 Ori. 189.

The burden of proving that after cession of territory by the Scindias to the British by treaty on 12-12-1860, the British acknowledged or recongised the sovereign rights of any person over some part of that

territory lies upon the party which pleads it, *held*, on facts, the burden is not discharged: A.I.R. 1982 S.C. 1201: (1982) 2 S.C.C. 414: 1982 U.J. (S.C.) 524.

Contract by former Bikaner State—Affirmance by State of Rajasthan—Burden of proof: A.I.R. 1960 Raj. 138.

Contract between plaintiff and Indian State—State merging with State of Bihar—Plaintiff alleging ratification by successor State—Latter State not taking plea of want of knowledge—Burden is on plaintiff to prove recognition of rights by the new successor State: 1960 B.L.J.R. 105.

When a doctor raised the plea that the patient had refused to give consent for the surgery or the medical treatment advised by him, the burden lies on him to prove that the non-performance of surgery or the non-administration of treatment was on account of the patient's refusal to accord his consent, and especially where the patient was not alive; consent is implicit where a patient submits to a doctor for treatment; the absence of consent is, thus, to be proved by the person alleging it. In most instances, the patient's consent is implied; a surgeon who failed to perform an emergency operation must prove by satisfactory evidence that the patient had refused to undergo the operation not only at the initial stage but even after he was informed about the dangerous consequences of not undergoing the operation: A.I.R. 1987 Ker. 52: 1986 Ker.L.T. 1026 (D.B.).

Where the right of sister is challenged on the ground that they are excluded in the presence of collaterals, the onus of proving the existence of collaterals is on those who challenge the sister's right: 10 O.W.N. 424: A.I.R. 1933 Oudh 231.

In case of persons hailing from a common ancestor who owned land, presumption would be that it devolved on them as co-sharers; the possession of co-sharers would ensure to other co-sharers unless their ouster is pleaded and proved by specific evidence. The inference of such ouster cannot be easily drawn: A.I.R. 1993 All. 168: 1993 All.L.J. 545.

Acquisition of occupancy rights—Purchasers of homestead lands claiming that their transferors had acquired such rights by virtue of S. 236(1) of the Orissa Tenancy Act (II of 1913)—Onus is on purchasers to specifically plead and prove such claim: A.I.R. 1967 Ori. 86.

Onus is on claimants to establish existence of usage by which agricultural land can be put to non-agricultural purposes without consent of landlord: (1968) 34 Cut.L.T. 863.

A.P. Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 and A.P. Agricultural Lands (Prohibition of Alienation) Act, 1972—In regard to alienations prior to 24-1-1971, the burden of proof remained as under the general law and was not affected by the provisions of either of the said two Acts dealing with prohibition of alienations: A.I.R. 1994 S.C. 471.

Gujarat Agricultural Lands Ceiling Act, 1960 (XXVII of 1961), S. 2(6), *Explanation*, Cl. (*f*)—Opinion of the Government—Whether Government has applied its mind—Burden of proof: (1966) 7 Guj.L.R. 244.

While computing the ceiling area under the Orissa Land Reforms Act, 1960, *held*, the burden lies on the Revenue Officer to establish that lands located in urban areas were linked with agricultural operations and were agricultural lands. [A.I.R. 1977 N.O.C. 298 (Ori.), Rel. on]: A.I.R. 1982 Ori. 83: (1982) 53 Cut.L.T. 1 (D.B.).

Burden of proof—Party claiming to be agriculturist within meaning of S. 2(2), U.P. Agriculturists Relief Act—Proviso to S. 2(2) whereby he is deprived of the status has to be proved by opposite party: 1964 All.L.J. 389: A.I.R. 1965 All. 65 (F.B.).

According to the provisions of the U.P. Consolidation of Holdings Act, the person who wants to dispute the correctness of the basic year entry has to prove the fact that the basic entry is incorrect and further according to S. 44 of the U.P. Land Revenue Act there is a presumption about the correctness of the entry and the burden lies on the person who wants to dispute it: 1981 All.W.C. 204: (1981) 7 All.L.R. 274.

Where admittedly *A* is in possession of the disputed lands after the death of *B* till the date of the suit, and *C* alleges that *A* was entrusted with the lands by *D* (widow of *B*) and after her death by *C*, it must be held that the onus of proving such entrustment of the lands is on *C*: (1971) 2 Cut.W.R. 814 (D.B.).

105. Burden of proving that case of accused comes within exceptions.—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

It cannot be laid down as a matter of law that no land in the Poona Cantonment could have been the subject-matter of private ownership before or after the settlement of the Cantonment limits. Thus, where some lands in the Cantonment were taken over by Government on the ground that they were resumable, *held*, the evidence relating to the terms on which the land was resumable must be placed before the Court by Government. Further, the conclusion which emerges from the consideration of the evidence in a particular case cannot be put on the pedestal of a proposition of law in another case. On the facts of each case, it will have to be found out whether the land in a Cantonment area belongs to the Government and whether there is evidence before the Court in regard to the actual tenure of this land. Till such evidence is adduced and found reliable, it would be unsafe to assume that the land belonging to a private person was taken over by the Government in pursuance of one or the other of the regulations framed by the Government. [A.I.R. 1931 P.C. 1, Rel. on; (1911) 13 Bom.L.R. 788 (P.C.), Disting.]: A.I.R. 1980 Bom. 9 (D.B.).

Publication of sale proclamation—Proof: (1956-57) 61 Cal.W.N. 468.

Where the settlees of a Housing Board Colony sought a *mandamus* to stop the Board from constructing building on the open space shown in the Colony's site plan as "reserved for other utility" and maintain it as such, *held*, that alone was not sufficient to raise the presumption that the area was earmarked for the settlees' common use; the burden of proof not discharged by the settlees: A.I.R. 1982 Pat. 236: 1982 B.L.J.R. 357: 1982 B.L.J. 411 (D.B.).

Madras Aliyasanthana Act (IX of 1949), S. 36 (6)—Pre-requisites for application of provision—Onus to prove their satisfaction: A.I.R. 1967 S.C. 1595.

Molesalam Garasias of Baroda territory—Applicability of S. 41, T.P. Act, 1882—Onus: A.I.R. 1968 Guj. 229.

Restriction of right—Reasonableness and justness of—Onus of proof: A.I.R. 1968 Pat. 310 (F.B.).

Question whether sale was to defeat or delay creditors within S. 53, T.P.Act—Entire evidence before Court—Question of burden of proof is merely academic—Except in a rare case where considerations are evenly balanced it would have little significance: (1963) 2 S.C.R. (Supp.) 55: A.I.R. 1963 S.C. 1150.

Succession — Saraswat — Brahmins of Gurdaspur district — Self-acquired property—Daughter excludes collaterals—Onus of proof. *See* A.I.R. 1955 S.C. 266.

Attachment of property under Criminal Law Amendment Ordinance, 1944—Objection to—Onus is on the objector to establish his independent right to the property attached, failing which his claim under S. 5 of the Ordinance is vitiated: 1969 Cr.L.J. 230: A.I.R. 1969 Pat. 30.

Village forming part of Tanjore Palace Estate—Lands in, treated by Raja as separate property—Effect of seizure by Government and subsequent regrant—Eviction of tenants in long possession by alienee from purchaser in execution—Burden of proof: (1957) 1 M.L.J. 72.

Section 105—Synopsis.

1. Scope.
2. Applicability.
3. *Alibi*.
4. Corruption cases.
5. Insanity.
6. Defamation.
7. Self-defence.
8. Free-fight.
9. Provocation.
10. Miscellaneous.

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1. Scope.—(*See* also Ss. 101-104, Note 14(*d*), *supra*). In S. 105 of the Evidence Act the phrase "burden of proving" is used in the

Illustrations

(*a*) *A*, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on *A*.

(*b*) *A*, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on *A*.

(*c*) Section 325 of the Indian Penal Code (45 of 1860) provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances bringing the case under section 335 lies on *A*.

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sense of introducing such evidence as will overcome the presumption of the absence of circumstances bringing the case within an exception. In the case of an accused when the burden is on him to prove an issue, he is not called upon to prove beyond all reasonable doubt, or in default to incur a verdict of guilty; it is sufficient if he succeeds in proving a *prima facie* case: A.I.R. 1950 Him. Pra. 18: 51 Cr.L.J. 786. The burden of proof laid on the accused in such a case is such as rests upon a plaintiff or defendant who is required to prove an issue in civil proceedings: I.L.R. (1964) Cut. 623. *See* also A.I.R. 1955 S.C. 123.

S. 105 places "burden of proof" on the accused in the first part and in the second part we find a presumption which the Court can draw regarding the absence of the circumstances which presumption is always rebuttable. Therefore, taking the section as a whole the "burden of proof" and the presumption have to be considered together. It is axiomatic when the evidence is sufficient as to prove the existence of a fact conclusively then no difficulty arises. But where the accused introduces material to displace the presumption which may affect the prosecution case or create a reasonable doubt about the existence of one or other ingredients of the offence and then it would amount to a case where prosecution failed to prove its own case beyond reasonable doubt. The initial obligatory presumption that the Court shall presume the absence of such circumstances gets lifted when a plea of exception is raised. More so when there are circumstances on the record (gathered from the prosecution evidence, chief and cross-examinations, probabilities and circumstances, if any, introduced by the accused, either by adducing evidence or otherwise) creating a reasonable doubt about the existence of the ingredients of the offence. In case of such a reasonable doubt, the Court has to give the benefit of the same to the accused. The accused may also show on the basis of the material a preponderance of probability in favour of his plea. If there are absolutely no circumstances at all in favour of the existence of such an exception then the rest of the enquiry does not arise in spite of a mere plea being raised. But if the accused succeeds in creating a reasonable doubt or shows preponderance of probability in favour of his plea, the obligation on his part under S. 105 gets discharged and he would be entitled to an acquittal: A.I.R. 1990 S.C. 1459: (1990) 2 Rec.Cr.R. 304: 1990 Cr.L.J. 1510.

The burden of proving the existence of the circumstances bringing the case within any of the general exception is upon the accused but this burden does not absolve the prosecution from discharging its initial burden: A.I.R. 1962 S.C. 605; A.I.R. 1964 S.C. 1563; A..R. 1968 S.C. 702. The evidence though insufficient to establish the exception may be sufficient to negative one or more ingredients of the offence, thus, casting a reasonable doubt on the case of the prosecution. The burden which rests on the accused to prove the exception is not of the same rigour as the burden of the prosecution to prove the charge beyond reasonable doubts: 1977 Raj.L.W. 212 (D.B.); A.I.R. 1974 S.C. 1570: (1974) 4 S.C.C. 764; 1989 Cr.L.J. 168 (Ori.) (D.B.).

S. 105 calls upon the accused to show that the circumstances bringing the case within the exceptions are present, as the Court cannot *suo motu* presume the "existence of the circumstances". The burden of proving the existence of circumstance must be liberally construed and the benefit should go in favour of the accused in view of the existent social millieu: (1987) 1 Crimes 791: 1988 Cr.L.J. 223 (Gau.) (D.B.).

The general rule in criminal cases is that the accused must always be presumed to be innocent and that the onus of proving the accused guilty of the charge against him is on the prosecution. S. 105 is an important qualification of this rule, and in view of that section the prosecution is not obliged to prove absence of facts which might bring the case of the accused within a special exception which the accused might plead in defence. It is for the accused to offer some explanation of the prosecution evidence, and if this appears to the Court reasonable, even though not beyond doubt, and to be consistent with the innocence of the accused, he should be given the benefit of that doubt: I.L.R. (1948) Nag. 903: A.I.R. 1949 Nag. 163. *K.C. Das Gupta, J.*—Where the evidence adduced by the accused to show that the case falls within an exception fails to satisfy the Court of the existence of circumstances bringing the case within the exception pleaded, the accused is still entitled to be acquitted, if on a consideration of the evidence of both sides, the Court is left in a state of reasonable doubt as to whether the accused is or not entitled to the exception pleaded: the test is not whether the accused has proved beyond reasonable doubt that he comes within the exception, but whether he has succeeded in throwing a reasonable doubt on the question of his guilt. Standard of proof required from the accused is not the standard of proof required from the prosecution. Per *Sen, J.* (*contra.*)—The proposition of law that the burden of proving everything essential to the establishment of a charge is upon the prosecution and that burden never shifts is not affected by any onus which is cast upon the accused by S. 105 of the Evidence Act. The standard of proof under S. 105 of the Evidence Act is the same as the standard which is required of the prosecution in criminal trial. *Mitter, J.*—While agreeing with the view of *Sen, J., held* that A.I.R. 1949 Cal. 182 was not obiter and that he was bound by it: (1953-54) 58 Cal.W.N. 279: A.I.R. 1954 Cal. 258.

An accused who pleads not guilty throws on the prosecution the burden of proving that the facts alleged in the indictment are true, but if he pleads a special plea and the prosecution traverses it, the burden is on the accused of proving that the facts alleged in his plea are true. If the prosecution does not give sufficient proof of the alleged facts to establish a *prima facie* case, a verdict of not guilty has to be directed. [(1909) 25 T.L.R. 612, Rel. on]: I.L.R. (1972) 22 Raj. 632: 1972 Raj.L.W. 384: 1972 W.L.N. 375.

See I.L.R. 20 All. 459; 11 Cal.W.N. 1085; 25 Cr.L.J. 1077: A.I.R. 1925 Nag. 37. Burden of proof that case comes within exceptions of the Penal Code. *See* I.L.R. 6 All. 220: 1898 All.W.N. 208; I.L.R. 21 All. 122. *See* also 1940 P.W.N. 795; I.L.R. (1947) Kar. 1.

The general burden of establishing the guilt of accused is always on the prosecution and it never shifts. Even in respect of the cases covered by S. 105 the prosecution is not absolved of its duty of discharging the burden. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. He may adduce the evidence in support of his plea directly or rely on the prosecution case itself or he can indirectly introduce such circumstances by way of cross-examination and also rely on the probabilities and the other circumstances. Then the initial presumption against the accused regarding the non-existence of the circumstances in favour of his plea gets displaced and on an examination of the material if a reasonable doubt arises the benefit of it should go to the accused. The accused can also discharge the burden under S. 105 by preponderance of probabilities in favour of his plea. In case of general exceptions, special exceptions, provisos contained in the Penal Code or in any law defining the offence, the Court, after due consideration of the evidence in the light of the above principles, if satisfied, would state, in the first instance, as to which exception the accused is entitled to, then see whether he would be entitled for a complete acquittal of the offence charged or would be liable for a lesser offence and convict him accordingly: A.I.R. 1990 S.C. 1459: (1990) 2 Rec.Cr.R. 304: 1990 Cr.L.J. 1510.

Under S. 105, the burden is on the accused to prove that he is entitled to an exception; he can discharge the burden even without leading independent evidence; he can use prosecution evidence to show that he exercised his right of private defence; the degree of proof necessary to establish private defence is preponderance of probability; it is not as onerous as the burden of the prosecution to prove its case beyond a shadow of reasonable doubt; even if he cannot prove his plea of private defence but if can still create a reasonable doubt about the prosecution case, he is entitled to acquittal: (1993) 1 An.L.T. (Cr.) 305 (D.B.).

The quantum of proof required under S. 105, is not proof beyond reasonable doubt. The accused pleading right of private defence need merely make out a *prima facie* case, in other words, it is sufficient if he satisfies the Court of the probability of what he is called upon to establish: A.I.R. 1948 Pat. 294: I.L.R. 27 Pat. 35. Even though the accused denies *in toto* the facts alleged, if it appears from the evidence for the prosecution that there are reasonable grounds for holding that the case falls within an exception, the presumption enacted in the last line of S. 105 does not arise at all. The burden is on the prosecution to establish guilt of the accused beyond reasonable doubt, and if upon a review of all the materials on the record there appears a reasonable doubt as to whether the case falls within any exception, the prosecution has failed to discharge that burden, and the accused must be acquitted or convicted only of the minor offence, as the case may be: I.L.R. 14 Rang. 666: A.I.R. 1937 Rang. 83 (F.B.).

It is for the accused persons to substantiate their plea as required by S. 105 of the Evidence Act if they can claim the benefit of any exception; but that proof may or may not be conclusive. This onus can be discharged without leading any evidence, and by bringing certain circumstances on the record which advance their plea. It is enough if they are able to prove that the version put forward by them may be true. [A.I.R. 1966 S.C. 97 and A.I.R. 1934 Lah. 696, Rel. on]: 1967 Cur.L.J. 850: 1968 Cr.L.J. 712 (Punj.).

Burden of proof: 1959 M.L.J. (Cr.) 986: A.I.R. 1961 Mys. 48.

The initial burden of proving that the case of the accused comes within an exception is on him. But the burden of proof is not as heavy as it is on the prosecution to establish that the accused committed the offence: I.L.R. (1975) Cut. 1254: 1976 Cr.L.J. 772; (1975) 77 Punj.L.R. 676; 1976 Raj.L.W. 345: I.L.R. (1976) Raj. 499: 1977 Cr.L.J. 59; (1977) 2 Karn.L.J. 412 (D.B.); 1984 Cr.L.J. 440: (1983) 2 A.P.L.J. 270; 1985 Cr.L.J. 1943 (Bom.).

Burden of proving exceptions is on the accused: 1966 Cr.L.J. 42: A.I.R. 1966 Ori. 15; 1975 C.L.R. (S.N.) 15 (P.&H.); A.I.R. 1951 Ori. 354 (D.B.); A.I.R. 1921 Cal. 1 (S.B.); A.I.R. 1915 Cal. 773 (F.B.).

The plaintiff who wants to take advantage of an exception to a statutory bar must clearly prove that his case is covered by the exception: I.L.R. 31 Pat. 484: A.I.R. 1953 Pat. 140; I.L.R. 29 All. 685 (F.B.); 1962 M.L.J. (Cr.) 355 (Mys.) (D.B.); 1974 Ker.L.T. 792.

Burden is not of same nature as one which lies on prosecution to establish commission of offence beyond reasonable doubt: (1969) 35 Cut.L.T. 802.

Discharge of burden—Accused claiming benefit of exception need only prove his case beyond a reasonable doubt: 1968 Cr.L.J. 836 (Mys.).

According to the scope and construction of S. 105, the accused is presumed to be innocent till his guilt is established by the prosecution beyond reasonable doubt. The natural corollary of the presumption is that it is not for the accused to establish his innocence. If there is even the slightest doubt as to his guilt, the benefit must go to him. Even where the law casts a burden on the accused to prove the existence of circumstances which bring the case under any of the exceptions or proviso, it does not expect the same standard of proof that is expected of the prosecution. The legal burden of proving the guilt remains on the prosecution throughout the case and never shifts. What S. 105 of the Evidence Act provides is that the Court shall not presume the existence of facts which may bring a case within the exceptions. Where in a murder charge, the prosecution evidence itself establishes the circumstances which support a plea of self-defence by the accused and which the prosecution has failed to explain, the conviction of the accused for murder cannot be sustained: 1961 M.P.L.J. 71: 1961 M.P.C. 31: A.I.R. 1961 Madh. Pra. 241 (D.B.).

The burden of proving the existence of circumstances bringing the case within the general exceptions, which under S. 105, lies on the accused, is not so onerous as it is on the prosecution. The prosecution must prove the offence beyond reasonable doubt, but onus on the accused is as in a civil proceeding. If the accused proves that the probabilities of the case are greater on his side, the burden stands discharged though it is not established beyond reasonable doubt. In a case where positive assertions of facts are to be made, the defence case definitely becomes a weaker when the plea taken is a complete denial: 31 Cut.L.T. 516: A.I.R. 1967 Ori. 1; A.I.R. 1966 Ori. 199: 32 Cut.L.T. 441: 1966 Cr.L.J. 1176.

Under S. 105, the initial burden of proving the existence of circumstances bringing the case within the exception to S. 300 of the Penal Code is upon the accused. He cannot discharge this burden by complaining that the prosecution has not examined witnesses who are not material witnesses: 1960 M.L.J. (Cr.) 808: (1961) 1 Cr.L.J. 120: A.I.R. 1961 Mys. 21.

It is no doubt true that by S. 105, the burden of proving the existence of circumstances bringing the case within the exceptions contained in S. 499, I.P.Code, is upon the accused and the Court starts with the presumption about the absence of such circumstances, but the burden is not as heavy as is required for positive proof of an event or fact. The degree of proof is not as high as is required of the prosecution: 1971 All.L.J. 1005.

If the accused is able to succeed in raising a reasonable doubt in the mind of the Court with regard to either the requisite intention or the requisite knowledge, he has discharged the burden of proving the exception under S. 105. [A.I.R. 1964 S.C. 1563; A.I.R. 1968 Del. 177, Foll.]: A.I.R. 1978 J.&K. 53: 1977 Kash.L.J. 94 (D.B.).

In view of S. 105, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code is on the accused. But the accused is not required to prove the facts beyond reasonable doubt; if on a review of the evidence the Court is left in doubt whether the circumstances bring the case within the general exception, the accused is entitled to an acquittal. All that may be necessary for the accused is to offer some explanation of the prosecution evidence, and if this appears to the Court to be reasonable, even though not beyond doubt and to be consistent with the innocence of the accused, he should be given the benefit of it. No such circumstances to bring the case of an accused within an exception shall be presumed unless he has introduced evidence on the point by cross-examination of the prosecution witnesses or by adducing defence evidence or by stating the circumstances in his examination under S. 342, Cr.P.Code, if such statement read with the circumstances brought out create a reasonable doubt that the plea may be true. The burden does not, in other words, extend to proving the defence affirmatively but the probability of the truth of the defence must be reasonably probable. This does not mean that mere statement of the accused is enough, but what is necessary, is that it must be reasonably probable: 1966 Cr.L.J. 841: 1966 Jab.L.J. 587: 1966 M.P.L.J. 877.

The burden of proving the existence of circumstances bringing the case within the "exception" or "proviso" is no doubt cast on the accused by S. 105, but this does not in any way absolve the prosecution of the burden laid on it by S. 102. The burden of proof so far as the entire "proceeding" is concerned, remains on the prosecution even though the burden of the "fact in issue" pleaded by the accused is cast upon him. Hence, it is manifest that even in cases to which S. 105 applies the prosecution has to prove the guilt of the accused: I.L.R. (1941) All. 843: 1941 All.L.J. 619: A.I.R. 1941 All. 402 (F.B.).

The last words of S. 105 show that the Court is to presume the absence of circumstances bringing the case of the accused within an exception. They imply that until and unless the accused discharges the burden of proving the existence of circumstances bringing the case within the exception, the Court is bound to hold the other way. As to the standard of proof required to discharge that burden, the authorities show that it is the same as in a civil case. The accused must vary the proof to a preponderance of probability in favour of the exception: (1981) 20 Del.L.T. 41 (S.N.). *See* also A.I.R. 1976 S.C. 960; A.I.R. 1980 S.C. 660: (1980) 2 S.C.C. 218: 1980 Cr.L.J. 459.

When the accused sets up a plea of general exception under the Penal Code, the

burden is upon him to establish that plea, although he is not required to establish it beyond reasonable doubt: 1976 Cr.L.J. 1416 (Gau.) (D.B.).

The burden to prove the existence of circumstances to bring a case within any of the exceptions, technically lies upon the accused person, as laid down in S. 105, Evidence Act. But the burden has not to be discharged in the same manner as by the prosecution in proving a charge against the accused. The burden can be discharged by the accused either by himself leading evidence or by merely placing reliance upon the admission of the prosecution witnesses or on the circumstances of the case proving or indicating in the affirmative the existence of such circumstances. On consideration of all such evidence or circumstances the burden would be discharged if the accused is able to establish the defence beyond any doubt. But even if the evidence or the circumstances do not reach that mark to prove the exception beyond doubt, accused would still be entitled to the benefit of the exception, if he satisfies the Court that there exists a reasonable possibility of the existence of the circumstances to bring the case within the exception: 1956 Cr.L.J. 1291: A.I.R. 1956 Bhopal 57.

See also the under-mentioned decision. No doubt, the prosecution has to prove the case beyond all reasonable doubt, and the benefit of any doubt must be given to the accused; but the proof and the possible doubt is related to the preparation of the offence, the circumstances in which it was committed, and the complicity of the accused. In other words, the benefit of the doubt which the law gives on the presumption of innocence is available only where the prosecution has not been able to connect the accused with the occurrence. It has nothing to do with the mental state of the accused. For that purpose alongwith the presumption of innocence the law has created another presumption *albeit* rebuttable, that every person shall be presumed to be sane: S. 105, Evidence Act places a burden upon the accused, which is that where the accused pleads insanity in opposition to the presumption created by the law, the burden of establishing his insanity is upon him. This burden the accused cannot discharge merely by creating a fleeting doubt about his sanity. He is not required to do it by evidence more cogent than a plaintiff or a defendant is required to give in order to establish an issue in a civil litigation. While the burden of proof may not go higher than that, merely creating a doubt about sanity is not that proof. The accused has to establish facts and circumstances from which the Court may reasonably infer that the accused was at the time of the commission of the offence by reason of insanity of mind incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. This burden cannot be discharged without establishing the facts required for an affirmative finding about insanity: 1956 Nag.L.J. 304: A.I.R. 1956 Nag. 187, overruled on another point in A.I.R. 1964 S.C. 1563.

The test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Indian Penal Code, but whether in setting up his defence he has established a reasonable doubt in the case of the prosecution and has thereby earned his right to an acquittal: I.L.R. 14 Rang. 666: A.I.R. 1937 Rang. 83 (F.B.).

Standard of proof required: A.I.R. 1957 Ori. 168: 1957 Cr.L.J. 875; A.I.R. 1957 Madh. Bh. 104: 1957 Cr.L.J. 370.

Burden of proof in criminal trial: 1967 Cr.L.J. 1654: A.I.R. 1967 Manipur 41.

If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence that the general exception would apply when the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception: I.L.R. 45 All. 329: A.I.R. 1923 All. 327 (2). *See* also 1941 All.L.J. 619: A.I.R. 1941 All. 402 (F.B.); I.L.R. 3 Lah. 144: A.I.R. 1922 Lah. 1; 1987 Raj.Cr.C. 460 (D.B.) [Even when the accused does not take the plea of any of the exceptions, it is Court's duty to examine whether the case comes within any of the exceptions of the Indian Penal Code.]

The burden of proof in a criminal trial is always on the prosecution, and it is only shifted on to the accused in so far as the latter may set up the existence of circumstances bringing his case within any of the exceptions. The mere fact that the defence theory is rejected will not prove the guilt of the accused: A.I.R. 1934 Oudh 485.

Even in a case to which S. 105 applies, an accused may rely upon an exception in his

defence and fail to prove it, and yet be entitled to acquittal, for the prosecution may have failed to prove all the necessary elements in the offence of which the accused has been charged or the accused may, by his statement, read with the other evidence on record, have raised a reasonable doubt in the mind of the Court and so have entitled himself to an acquittal: A.I.R. 1939 Sind 209. Once the prosecution is found to have established that an offence was committed by the accused the burden of proving the existence of circumstances bringing his case within any of the general exceptions in the Penal Code or within any special exception contained in any other part of that Code must lie on the accused and the Court has to presume the absence of such circumstances. Thus, the burden of proving that the accused had acted in exercise of the right of self-defence which is in the nature of an exception is on him. This burden can be discharged otherwise than by producing defence evidence but in those cases the version of the accused must be proved to have been established or in any case *prima facie* made out either by the prosecution evidence or by circumstances proved on behalf of the prosecution or elicited by the accused in his cross-examination of the witnesses for the prosecution. The accused need not be called upon to establish right of self-defence unless the prosecution has succeeded in proving a case. But in a case where it has succeeded in making out the main facts, the prosecution cannot be thrown out merely because the prosecution evidence is to be regarded as unreliable on a few points: (1943) 45 Punj.L.R. 393: A.I.R. 1944 Lah. 97; (1987) 1 Crimes 791: 1988 Cr.L.J. 223 (Gau.) (D.B.).

Under S. 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within an exception of S. 300 of the Penal Code is upon the accused and the Court shall presume the absence of such circumstances. There is nothing in the Evidence Act to suggest that as regards the standard of proof required for the prosecution and defence the numerical values of the two sets of probabilities ought to be the same or that they ought not to be the same though in practice it may well be that the standard of proof required to bring the case within one of the exceptions in the Penal Code is lower than the standard of proof required of the prosecution to establish its own case: 1952 Cr.L.J. 137: A.I.R. 1952 Sau 3. Per *Gurnam Singh J.*—Assuming that the burden of proving the exception is on the accused, he can discharge this burden by relying on prosecution evidence without producing any defence evidence and even without making his own statement claiming the benefit of the exception. If the Court comes to a conclusion from the prosecution evidence itself that the accused is entitled to the benefit of an exception it should give the accused that benefit even though he may not plead exception and rely on it. In case a benefit of an exception is claimed by an accused person the burden placed on him is comparatively very light than the burden placed on the prosecution to establish the guilt of an accused person. In a criminal trial the burden of establishing the guilt of the accused always lies on the prosecution and it never shifts, but when the accused has claimed the benefit of an exception his duty under S. 105, Evidence Act, is to introduce such evidence as will displace the presumption of the absence of the circumstances bringing the case within the exception claimed and it will be sufficient if the Court is satisfied that such circumstances may have existed. However, when such an exception is not pleaded but it appears from the prosecution evidence that there are reasonable grounds for holding that the case of the accused falls within an exception, the presumption enacted in S. 105, Evidence Act, does not arise. The burden of proving the guilt of the accused remains on the prosecution. If upon review of the evidence and the circumstances present on the record there is reasonable doubt as to whether the case falls within an exception the prosecution has failed to discharge that burden and the accused is entitled either to acquittal or to benefit of the exception as the case may be. Per *Passey, J.*—The burden of proving the charge levelled against an accused person lies upon the prosecution and it is the prosecution who has to prove every element that goes to make up the offence the commission whereof is attributed to the accused. That onus never shifts on to the accused. But the prosecution cannot be expected to foresee or anticipate the defence which the accused would take up and it cannot, therefore, be the duty of the prosecution to lead evidence so extensively and so comprehensively as to repel all possible defences by the accused. If the accused depends for his defence upon an exception

he has to prove it. He may not lead positive evidence to establish the exception or he may not even say that he is protected by a particular exception. It may be enough if he can upon a consideration of the evidence as a whole show that he is helped in invoking the exception, and if a reference to that evidence can create doubt in the mind of the Court whether the exception would come into play or not, the accused may be entitled to the benefit of that doubt. In the absence of any evidence, direct or circumstantial, leading to the necessary inference that the accused had acted under grave and sudden provocation the benefit of the *Exception* (1) to S. 300, I.P. Code, cannot be extended to him. Per *Chopra, J.* (on difference between *Gurnam Singh* and *Passey, JJ.*). It is correct that the accused is not bound to state the truth, nor it is necessary that the exception should be specifically pleaded; but at the same time it must be said that it is not a circumstance which is wholly irrelevant or one which should be altogether ignored while deciding the question. S. 105, Evidence Act places the burden of proving the existence of circumstances bringing his case within any of the exceptions upon the accused. The plea in support of which no evidence is led by the accused loses some of its force, however slight, if it is not raised by him even in his statement at the trial. By this is not meant that it is always necessary for the accused to take up the plea and lead evidence before he can be given the benefit of the exception. The law does not prevent an accused person from setting up an alternative or even inconsistent defence, *e.g.*, plea of *alibi* and a plea of self-defence. It is not necessary that the exception should be specifically pleaded, nor is it necessary that the accused should produce evidence to establish it. The burden that lies on the accused can be discharged if it is apparent from the evidence produced by the prosecution that an exception is applicable and the Court must give the benefit of the exception to the accused, even though the accused denies the commission of the alleged act *in toto*. There is a difference of degree of certainty required in cases where the burden of proving a fact is on the prosecution and those where the burden of proof is on the accused. The prosecution has to prove its case beyond reasonable doubt but when the burden of proof of a fact lies on the accused he is said to have discharged it by creating reasonable doubt regarding its existence. In other words, if the Court, upon a consideration of the evidence is left in reasonable doubt whether the circumstances bringing the case within the exception pleaded by the accused do exist or not, the accused can be given the benefit of the exception: I.L.R. (1953) Patiala 655: A.I.R. 1954 Pepsu 160. *See* also 25 Cut.L.T. 16: A.I.R. 1959 Ori. 141; 1960 All.L.J. 136: A.I.R. 1960 All. 223.

See however the undermentioned decision. The burden of proving that the accused committed the offence is on the prosecution. If there is any doubt left in the mind of the Court on this point, the accused is entitled to the benefit of the doubt and the prosecution fails. If the prosecution satisfies the Court that the accused committed the offence and the accused pleads an exception in defence, S. 105, Evidence Act casts the burden of proving the exception on him and enacts that the Courts shall presume the absence of circumstances which will bring his case within any of the exceptions. If the materials before the Court fail to satisfy the Court about existence of these circumstances but merely create a doubt whether such circumstances exist or not, the accused fails to discharge the burden and he must be convicted. The view that the Court is entitled to review the prosecution evidence as a whole and if even after the accused's explanation is rejected it finds that there is a doubt whether the accused has made out the circumstances which brought his case within the exception, he should be acquitted is not correct: 1956 Cr.L.J. 1234: A.I.R. 1956 Sau. 77. *See* also A.I.R. 1947 Bom. 38 (S.B.); A.I.R. 1952 Bom. 184; A.I.R. 1952 Sau. 3. However, *see* 1982 Cr.L.J. (N.O.C.) 201 (J.&K.).

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code or within any special exception (example, S. 499, Penal Code) or proviso contained in any other part of the Code, is upon him and the Court shall presume the absence of such circumstances. The burden that is cast on the accused in a criminal case by virtue of S. 105, no doubt, is not so onerous as the primary burden cast on the prosecution to prove the offence beyond reasonable doubt. It is sufficient if the accused who pleads an exception satisfies the Court of the probability of what he has been called upon to establish and if on the evidence it appears probable that the

defence set up is true he is entitled to a decision in his favour even though he may not have succeeded, if proving the truth of his version beyond reasonable doubt. But in a prosecution for libel, to prove that the case of the accused falls under any of the exceptions under S. 499, Penal Code, it is not sufficient if the accused is able to create a doubt that the statement may or may not be true: I.L.R. (1964) 2 Ker. 31: A.I.R. 1964 Ker. 277: 1965 M.L.J. (Cr.) 834.

What S. 105 provides is that the Court shall not presume the existence of facts, which may bring a case within the exceptions; that is, the initial or evidential burden of introducing the evidence to establish any such circumstances is on accused person. Such evidence may be introduced by the prosecution themselves or it may be introduced by the defence by cross-examination of the prosecution witnesses or by the statement of the accused or by defence evidence. Therefore, where such evidence has been introduced in any of the aforesaid ways and after consideration of that evidence the Court is of opinion that the accused person may rely on any of the exceptions, the burden of the accused under S. 105 is discharged: 1963 Ker.L.T. 538: 1964 M.L.J. (Cr.) 262.

Where a party claims an exception to the general provision of the law, the onus lies on him to prove that the exception applies: I.L.R. 12 Rang. 55: A.I.R. 1934 Rang. 90. *See* also A.I.R. 1958 S.C. 183.

It is for the accused to prove the facts essential for the purpose of bringing the case within any of the exceptions: 144 I.C. 420: A.I.R. 1933 Rang. 142. *See* also 165 I.C. 458: 1936 O.W.N. 1013; 1987 Cr.L.J. 1289 (Madh. Pra.).

There is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition and a case in which it is not so included: (1941) 43 Bom.L.R. 519: A.I.R. 1941 Bom. 273.

Offence under—Onus to prove exception is on accused: (1965) 2 M.L.J. 321: 1965 M.L.J. (Cr.) 719: (1965) 78 Mad.L.W. 110.

Presumption under—Nature of—It only operates initially—S. 105 makes possible both kinds of acquittal one by proving plea fully and another by raising genuine doubt in the case—Line of reasoning in Parbhoo's case—Evidence as a whole (including evidence in support of general exception) creating reasonable doubt in the mind of Court as to guilt of accused—He is entitled to acquittal.

The Majority decision in A.I.R. 1941 All. 402 (F.B.), is still good law. The accused person who pleads an exception is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused: Per Majority in A.I.R. 1970 All. 51: 1970 Cr.L.J. 132: 1969 All.L.J. 657 (F.B.).

Where a person accused of committing an offence sets up at his trial a plea that he is protected by the exceptions, general or special in the Penal Code or any other law defining the offence, the burden of proving the exception undoubtedly lies upon him. But this burden is only undertaken by the accused if the prosecution case establishes that in the absence of such a plea he would be guilty of the offence charged. Where the prosecution case did not by reliable evidence establish affirmatively that the accused had done any act which rendered him liable for the offence of murder and his responsibility, if any, arose only out of the plea raised by him, if the plea amounted to a confession of guilt the Court could convict him relying upon that plea, but if it amounted to admission of facts and raised a plea of justification the Court could not proceed to deal with the case as if the admission of facts which were not part of the prosecution case was true, and the evidence did not warrant the plea of justification: I.L.R. (1963) 1 Ker. 458: 1963 Ker.L.T. 450: (1963) 1 Ker.L.R. 468: A.I.R. 1964 Ker. 222.

Criminal trial—Nature and extent of onus of proof on prosecution and nature and extent of onus of proof on accused seeking to bring his case within exception: 1970 Cr.L.J. 83 (Andh. Pra.).

The law in India places the burden of proof upon the prosecution to bring the guilt home to the accused and does not admit of any exception. The presumption of innocence has to be dislodged by the prosecution by dealing evidence pointing to the guilt of the accused. Under S. 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within any of the general or special exceptions is placed on

the accused. It is the duty of the accused to introduce such evidence as will displace the presumption of the absence of the circumstances bringing its case within any exception, and that will suffice to satisfy the Court that such circumstances may have existed. Despite what is stated in S. 105, Evidence Act, the prosecution is not absolved from the burden laid on it by S. 102: 1959 Cr.L.J. 901: A.I.R. 1959 Punj. 332. Per *Dunkley, J.*—The phrase "burden of proof" is used in two distinct meanings in the Indian Evidence Act, *viz.*, the burden of establishing a case and the burden of introducing evidence. In a criminal trial the burden of proving everything essential to the establishment of the charge against the accused lies upon the prosecution, and that burden never changes. This principle is enacted in S. 101, and in this section the term "burden of proof", is used in the first of its meanings, namely, the burden of establishing a case. But it would clearly impose an impossible task on the prosecution if the prosecution were required to anticipate every possible defence of the accused and to establish that each such defence could not be made out, and of this task the prosecution is relieved by provisions of S. 105 and is closely allied section, S. 106. In S. 105 the phrase "burden of proof" is clearly used in its second sense, namely, the duty of introducing evidence. The way of the accused under S. 105 is to introduce such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception in the Penal Code, and will suffice to satisfy the Court that such circumstances may have existed. The burden of the issue as to the existence of such circumstances is then shifted to the prosecution, which has still to discharge the major burden of proving on the whole case the guilt of the accused beyond reasonable doubt. The conclusion, therefore, is that if the Court either is satisfied from the examination of the accused and the evidence adduced by him or from circumstances appearing from the prosecution evidence that the existence of circumstances bringing the case within exception or exceptions placed by the accused has been proved or upon a review of all the evidence is left in reasonable doubt whether such circumstances do exist or not, the accused, in the case of a general exception, is entitled to be acquitted, or, in the case of a special exception, can be convicted only of the minor offence: I.L.R. 14 Rang. 666: A.I.R. 1937 Rang. 83 (F.B.).

It is not always necessary that circumstances bringing case within general or special exception should be established by the evidence adduced on behalf of the accused. It is sufficient if upon a review of all the evidence on record, the Court is either satisfied as to the existence of the circumstances pleaded or considers the fact of their existence to be so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they existed: (1957) 1 An.W.R. 181.

Though the initial onus is upon the prosecution to prove the guilt of the accused, but when an accused pleads general exceptions, the burden of proof will be upon him. However, it is not necessary that in order to discharge the onus, he must adduce evidence from his own side. The accused, thus, is entitled to show that he comes within the purview of the general exceptions provided in Chapter IV of the Indian Penal Code relying on the basis of the evidence itself and/or the circumstances which have been brought on record showing the conduct of the accused prior thereto or after commission of the crime: (1991-1) 39 B.L.J.R. 397 (D.B.).

Even where an exception is not specifically pleaded by an accused person, he will be entitled to the benefit thereof, if upon the consideration of the evidence as a whole a reasonable doubt is created in the mind of the Court whether the accused is not entitled to the benefit of the exception: A.I.R. 1958 J.&K. 23.

Court can take into consideration even the facts proved which establish the defence if the accused has not raised that plea or defence: A.I.R. 1953 Nag. 211: 1954 Nag.L.J. 429; A.I.R. 1951 Kutch 11; I.L.R. (1953) 3 Raj. 567; 1959 Ker.L.T. 1264; A.I.R. 1960 Ker. 258; 1964 M.L.J. (Cr.) 262 (Ker.); 1970 All.Cr.R. 482; (1978) 1 Karn.L.J. 197; (1985) 1 An.W.R. 31.

The principle cannot be accepted that in every case the bare word of an accused person is sufficient to discharge the burden of proof of an exception. There must be some corroboration, direct or indirect, of the statement of the accused person: (1959) 61 Bom.L.R. 35: A.I.R. 1959 Bom. 463.

Provisos engrafted on main part of penal sections to the effect that under certain

conditions the offences, mentioned in the said penal portions, would not be deemed to have been committed—Onus with regard to such provisions is on the accused: 1953 Cr.L.J. 818: A.I.R. 1953 Cal. 401.

General exceptions pleaded by accused—Defence evidence failing to satisfy Court—Evidence as a whole creating reasonable doubt—Accused is entitled to acquittal: 1958 All.L.J. 511: A.I.R. 1959 All. 233.

In a murder trial the accused did not disclose the circumstances in which he murdered his wife either in his recorded confession or in the committal Court, but disclosed them for the first time in his statement before the Sessions Court. In an appeal, before the High Court against his conviction under S. 302, the Counsel for the accused relied on those circumstances for bringing his case under *Exception* 1 to S. 300, Penal Code. *Held*, that the mere fact that the accused disclosed the circumstances only before the Sessions Judge was not sufficient by itself in order to dismiss the same out of consideration as being an after thought. The Counsel for the accused is entitled to rely upon any circumstances which if accepted, would convert the offence into a lesser one, even if such circumstances had not been placed before the Court at an earlier stage. The question is whether such circumstances did exist, or not, though it was not disclosed at an earlier stage: (1957) 2 M.L.J. 9: I.L.R. (1957) Mad. 905: A.I.R. 1957 Mad. 541. Homicide—Exception—Onus. *See* A.I.R. 1957 Punj. 81; A.I.R. 1958 J.&K. 23.

Where an accused claims the benefit of an exception, the burden of proving that exception lies on him only if the prosecution case establishes that in the absence of such a plea he would be guilty. Where there is no reliable evidence to support prosecution case and the responsibility arose only out of the plea raised by accused, the Court could convict him only if the plea amounted to a confession of the guilt: (1970) 72 Punj.L.R. 181: 1970 Cr.L.J. 982: A.I.R. 1970 Punj. 301.

Criminal trial—Accused previous convicts—Prosecution not relieved of its duty to prove the case beyond reasonable doubt: 1969 Cr.L.J. 739: A.I.R. 1969 Goa 68.

Criminal trial—Accused not examining himself—Presumption cannot be drawn against him—Burden is on prosecution to prove its case: 1968 Cr.L.J. 1950: A.I.R. 1968 S.C. 1393.

Exceptions not pleaded in Court below cannot be allowed to be raised in appeal: I.L.R. 21 All. 121; I.L.R. 23 Cal. 604; 3 All.L.J. 652; I.L.R. 17 Bom. 573: 8 I.C. 259; (1903-4) 8 Cal.W.N. 74; I.L.R. 32 All. 451: 7 All.L.J. 438; 4 P.W.R. 1910 (Cr.).

2. Applicability.—Sub-Cl. 17(1), Rajasthan Food Grains Control Order, 1949, cannot be treated as an exception to sub-Cl. 17(2). Hence, S. 105, Evidence Act, has no application and the burden of proof is on the prosecution to prove that the foodgrains, in excess of that prescribed under sub-Cl. 17(1) had been in possession of the accused for more than a week. The burden of proof is always on the prosecution even in cases where it is within the special knowledge of the accused as to for what period he has been holding the possession of the foodgrains: 1956 Raj.L.W. 378: I.L.R. (1956) 6 Raj. 316: A.I.R. 1957 Raj. 178.

3. *Alibi*.—(*See* also Ss. 101-104, Note 24, *supra*). S. 105 is applicable to exceptions and not to *alibi* as *alibi* is not an exception under the Penal Code or any other law. *Alibi* is governed by S. 11 of the Evidence Act and the burden to prove an *alibi* is always on the accused and he must prove it to the satisfaction of the Court: (1981) 83 Punj.L.R. (Del.) 9: 1981 Cr.L.J. 667; (1972) 1 Cut.W.R. 464 (D.B.); 1979 W.L.N. (U.C.) 252 (D.B.); (1984) 58 Cut.L.T. 422; (1990) 1 Rec.Cr.R. 593 (Del.) (D.B.).

The burden of proving *alibi* undoubtedly lies on the accused setting up the defence. But even so, the burden of proving the case against the accused is on the prosecution irrespective of whether or not the accused had made out a plausible defence: 1956 Cr.L.J. 827: (S.) A.I.R. 1956 S.C. 460; (1974) 40 Cut.L.T. 650.

Accused pleading *alibi* must show that he was so far away at the time of occurrence that he could not have been present at the place of occurrence: (1987) 63 Cut.L.T. 501 (D.B.). *See* also (1991) 2 Pat.L.J.R. 358.

Where the *alibi* pleaded in a murder case was that the accused's blood and urine were being examined and he was being medically operated upon and, therefore, could not be present at the scene of murder when there was no evidence as to the time of such examination and operation when the hospital and the place of murder were connected by a pitched road on which busses plied at short

intervals, *held*, it could not be said that it was impossible for the accused to be present at the scene of murder when it was committed; plea of *alibi* not established: A.I.R. 1972 S.C. 109: 1972 Cr.L.J. 22.

4. Corruption cases.—(*See* also Ss. 101-104, Note 33, *supra*). Although the onus lies on the prosecution to prove the charge (under S. 5(2) of the Prevention of Corruption Act), yet where the entrustment is proved or admitted, it will be difficult for the prosecution to prove the actual mode or manner of misappropriation and in such a case the prosecution would have to rely largely on the truth or the falsity of the explanation given by the accused. It is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by S. 5 of the Evidence Act, as a result of which he succeeds not because he proves his case to the hilt but because probability of the version given by him throws doubt on the prosecution case and, therefore, the prosecution cannot be said to have established the charge beyond reasonable doubt. Once the accused gives reasonable and probable explanation, it is for the prosecution to prove affirmatively that the explanation is absolutely false. In a criminal trial, it is not at all obligatory on the accused to produce evidence in support of his defence and for the purpose of proving his version he can rely on the admissions made by the prosecution witnesses or on the documents filed by the prosecution. In these circumstances, the Court has to probe and consider the materials relied upon by the defence instead of raising an adverse inference against the accused, for not producing evidence in support of his defence, because the prosecution cannot derive any strength or support from the weakness of the defence case. [(1976) 1 Cut.W.R. 510, Reversed]: A.I.R. 1977 S.C. 170: (1976) 2 Kam.L.J. (Jr.) 65 (S.N.) 107: (1976) 2 S.C.W.R. 450.

Prevention of Corruption Act, S. 4—General burden to prove ingredients of offence under S. 161, Penal Code does not lie on prosecution—Creating reasonable doubt in mind of Court not sufficient—It is enough for accused to prove preponderance of probability: 1968 Cr.L.J. 150: A.I.R. 1968 Guj. 17.

5. Insanity.—(*See* also Ss. 101-104, Note 56, *supra*). When an accused raises a plea falling under S. 84, I.P.Code (plea of insanity), it being in the nature of an exception, the burden of proof is on him to establish the same as per S. 105 of the Evidence Act. Every person is presumed to know the law, and the natural consequence of his act; and as per S. 105 of the Evidence Act, the Court shall presume the absence of exception. In such a case, the prosecution is not bound to show that the accused at the relevant time was not insane. However, thereby the onus of prosecution to prove the prosecution case beyond the shadow of reasonable doubt would not be effected: 1994 Cr.L.J. 450 (Ker.) (D.B.).

Criminal trial—Plea of—Insanity—Onus: 1959 Cr.L.J. 718: A.I.R. 1959 Madh. Pra. 203; 1959 Cr.L.J. 844: A.I.R. 1959 Madh. Pra. 259; 1985 Cr.L.J. 499: (1984) 86 Bom.L.R. 462; (1979) 48 Cut.L.T. 567: I.L.R. (1979) 2 Cut. 261 (D.B.).

Criminal trial—Onus lies on accused to prove insanity—This burden is not as heavy as it is on prosecution to prove an offence: 1969 Cr.L.J. 623: A.I.R. 1969 Ori. 102; 1987 Cr.L.J. 1289: 1986 Cur.Cr.J. 167 (Madh. Pra.).

Plea of insanity—The general burden is on prosecution to prove beyond reasonable doubt not only the *actus reus lent* but also the *mens rea*. However, if the accused pleads insanity, the onus is on him to prove it: 1969 Cr.L.J. 259: A.I.R. 1969 S.C. 15; (1987) 2 Crimes 342: 1987 Cr.L.J. 1561: 1987 Cal.Cr.L.R. 1 (D.B.).

A plea of insanity or temporary insanity is to be generally taken by the defence and being a special plea the onus is upon the accused to prove that he was suffering from such insanity at the time of occurrence.

In a case where the evidence adduced by the prosecution showed that the accused was temporarily insane for a period of about one month prior to the occurrence and the witnesses narrated in one voice about his mental infirmity, the ends of justice required that the appellant ought to be examined by an expert in mental disorders: (1992) 2 Cal.L.T. (H.C.) 411: (1991) 2 Cal.H.N. 314: 1991 Cr.L.J. (N.O.C.) 32: (1990-91) 95 Cal.W.N. 1163: 1991 Cal.Cr.L.R. 304 (D.B.).

The initial burden of proving that the case of the accused comes within an exception is on him, but this onus may be discharged by producing evidence as to conduct of the accused shortly prior to, at the time of, and immediately after the commission of, the

offence and also by evidence showing his mental condition and his part history, etc., in order to show that he was of unsound mind at the time of commission of the offence so as to attract the application of the provision of S. 84, I.P.Code. If it is so clear from the evidence brought on the record, whether produced by the prosecution or by the defence, that the case of the accused comes within the general exception, the Court is fully justified to consider whether that evidence proves to the satisfaction of the Court, that the accused's case actually comes within that exception: (1975) 77 Punj.L.R. 676: 1975 Cr.L.J. 1605.

In a case where the accused plead insanity at the time of commission of the offence, the burden of proof of this plea is undoubtedly on the accused as laid down in law. Of course, this burden is not so stringent as the burden of proof on the prosecution in a criminal case. If by defence evidence or from the prosecution evidence itself the accused is able to raise a reasonable doubt as to his sanity at the time of the commission of the offence, the accused may be entitled to the benefit of S. 84, Penal Code: 1971 Cr.L.J. 869 (Assam) (D.B.).

Every person is presumed to be sane until the contrary is established and the burden is on the accused to prove that at the time of committing the offence he was by reason of unsoundness of mind incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law: (1973) 39 Cut.L.T. 1211 (D.B.). *See* also A.I.R. 1956 Nag. 187, cited under Note 1, *supra*.

In case of plea of insanity in a case of murder (*1*) the prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea*; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial, (*2*) there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S. 84 of the Penal Code: the accused may rebut it by placing before the Court all the relevant evidence—oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings; and (*3*) even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including *mens rea* of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged. [A.I.R. 1962 S.C. 605; A.I.R. 1955 Pat. 209; (1878) 4 Couper 70, Rel. on; A.I.R. 1956 Nag. 187, Overruled]: A.I.R. 1964 S.C. 1563: (1964) 7 S.C.R. 361; I.L.R. (1973) 23 Raj. 919: 1973 Raj.L.W. 535: 1973 W.L.N. 463.

Proof of insanity—Burden of proof lies on accused—Discharge of burden: (1964) 5 Guj.L.R. 474.

Insanity of the accused is a special defence and the burden to establish it lies upon him; such burden is certainly not as heavy as on the prosecution to prove the charge; the accused can discharge his burden either by leading evidence or from the prosecution evidence. However, before the question of the accused having discharged his burden is taken up, the Court has first to determine whether the prosecution has discharged its burden. The accused would be entitled to acquittal not only by proving insanity but also by creating a reasonable doubt by that evidence in the prosecution case: 1991 Cr.L.J. 2219: (1991-1) 11 Guj.L.H. 510 (D.B.).

Plea of insanity—Burden of proof—Nature and extent of proof: (1962) 2 Cr.L.J. 135 (Ker.).

Plea of insanity to be proved by the accused: 21 All.L.J. 776: 77 I.C. 236: A.I.R. 1924 All. 186 (2); A.I.R. 1935 Oudh 143; A.I.R. 1955 Pat. 209; A.I.R. 1957 Madh. Bh. 104; A.I.R. 1967 Mys. 68. Plea of insanity—Standard of proof required. *See* A.I.R. 1957 Ori. 168.

Where the accused pleads insanity, the burden though not as heavy as upon the prosecution in a criminal case, is upon the accused to prove that he was of unsound mind at the time of the commission of the offence and as such, incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law. [A.I.R. 1964 S.C. 1563; A.I.R. 1966 S.C. 1, Rel. on]: A.I.R. 1974 S.C. 216: (1974) 3 S.C.C. 299.

In order to find whether the accused was by reason of unsoundness of mind incapable of knowing the nature of the act, the Court may rely not only on defence evidence but

also on what is elicited from the prosecution witnesses as well as on circumstantial evidence consisting of the previous history of the accused and his subsequent conduct in the surrounding circumstances including absence of motive. Generally motivation for the crime with which he is charged assumes unusual importance in such a case when sanity of the accused is called in question: (1992) 2 Cal.L.T. (H.C.) 411: 1991 Cal.Cr.L.R. 304: (1990-91) 95 Cal.W.N. 1163: (1991) 2 Cal.H.N. 314: 1991 Cr.L.J. (N.O.C.) 32 (D.B.).

An insane person is *prima facie* incompetent to plead insanity and indeed the very plea, if taken, would establish his sanity. As for the failure of the accused to adduce evidence to prove insanity, though the burden is on the accused to prove the exception of which he claims the benefit, it is now well-accepted that even if he lets in no evidence of his own, his case can be spelled out from the circumstances appearing in the prosecution evidence: 1959 Ker.L.J. 1444: (1960) 1 Ker.L.R. 87: 1960 Ker.L.T. 157: 1960 Cr.L.J. 1086: A.I.R. 1960 Ker. 241.

The Court presumes absence of insanity in a criminal trial, this presumption, however, is rebuttable. The burden of proof of legal insanity is on the accused, though it is not as heavy as on the prosecution. The prosecution in discharging its burden in the face of the plea of legal insanity, has merely to prove the basic fact and rely upon the normal presumption of law that every one knows the law and the natural consequences of his act. To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the accused was labouring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing or if he did not know it, that he did not know he was doing what was wrong or contrary to law: 1994 Cr.L.J. 1897 (Raj.) (D.B.).

Insanity—Proof—Nature of: 1960 Cr.L.J. 480: A.I.R. 1960 Madh. Pra. 102.

Defence of insanity—Burden of proving existence of circumstances bringing case under S. 84 lies on accused and Court must presume absence of such circumstances—Mere lack of proof by prosecution of a motive for offence cannot be a substitute for positive proof required of the defence: 1967 Cr.L.J. 494: A.I.R. 1967 Ker. 92.

Burden of proof—Burden of proving offence lies on prosecution—Where necessary it has to prove intention—But where plea of insanity is invoked by accused it is for him to establish that fact: 1966 M.L.J. (Cr.) 561: A.I.R. 1966 S.C. 1.

The law presumes every person of the age of discretion to be sane unless the contrary is proved. It would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. The mere fact that no motive has been proved why the accused murdered his wife and child or, the fact that he made no attempt to run away when the door was broken open, would not indicate that he was insane or that he did not have the necessary *mens rea* for the commission of the offence: A.I.R. 1972 S.C. 2443: 1972 Cr.L.J. 1523.

Accused pleading insanity at time of act—Nature of burden of proof indicated: A.I.R. 1970 Goa 1.

There is no conflict between the prosecution's general burden—which never shifts—to prove all components of the offence and the special burden of the accused to make out the defence of his insanity; it is not sufficient for the prosecution to establish that the deceased's death was a consequence of the injuries inflicted by the accused but also that those injuries were caused with the intention or knowledge mentioned in S. 300 of the Indian Penal Code; it is only thereafter that the Court would consider the accused's plea of insanity. But even if the evidence of insanity is not sufficient to discharge the burden under S. 105 cast on the accused, but if it raises a reasonable doubt in the Court's mind about the existence of one or other essential ingredient of the offence, the accused is liable to be acquitted. [A.I.R. 1962 S.C. 605; A.I.R. 1964 S.C. 1563, Foll.]: A.I.R. 1971 Tripura 16: 1971 Cr.L.J. 407.

To establish a defence on the ground of insanity it must clearly be proved that at the time of committing an act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know that he was doing what was wrong or contrary to law. The crucial point of time at which unsoundness of mind should be established is the time when the crime is actually

committed. The mere fact that on former occasion the accused had been occasionally subject to insane delusions or have suffered from the derangement of the mind or that subsequently he had at times behaved like a mentally deficient person is *per se* insufficient to bring his case within the exception. It should, however, be noted that the antecedent and subsequent conduct of the person pleading insanity is admissible in evidence as relevant facts only for the purpose of showing the state of his mind at the time the act was committed. The Court is only concerned with the state of mind of the accused at the time of the act. Where the evidence adduced fails to satisfy the Court of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if upon a consideration of the evidence on both sides the Court is left in a state of reasonable doubt as to whether the accused is or not entitled to the benefit of the exception pleaded. Where father and sister of the accused deposed that the accused was suffering from mental derangement but evidence did not show that the accused at the time of committing the act suffered from such unsoundness of mind as to make him incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law and on the other hand the evidence ruled out the possibility of such unsoundness of mind, *held*, the accused was not entitled to the benefit of S. 84, I.P.Code: 1988 Cr.L.J. 387 (Cal.) (D.B.).

Where in a criminal trial, the accused, who had a previous history of lunacy, takes the plea of unsoundness of mind, *held*, burden shifts on prosecution to establish negatively that accused was not of unsound mind when he committed offence: 1983 Cr.L.J. 619: (1983) 1 Karn.L.J. 115; (1984) 2 Crimes 788 (All.).

Under S. 105, the accused person has to discharge the burden of proving the exception relied upon by him. Thus, in the background of the medical opinion that the accused was suffering from paranoid schizophrenia which is a form of paranopid psychosis and relying on the prosecution evidence itself about the general state of mind of the accused preceding the incident and immediately after the commission of the offence, it was *held* that the plea of insanity was available to the accused and he was entitled to the benefit of a reasonable doubt: (1992) 2 Cal.L.T. (H.C.) 411: (1990-91) 95 Cal.W.N. 1163: 1991 Cal.Cr.L.R. 304: (1991) 2 Cal.H.N. 314: 1991 Cr.L.J. (N.O.C.) 32.

Madness is a question of fact: (1965) 1 Cr.L.J. 138: A.I.R. 1965 Andh. Pra. 28.

Unsoundness of mind—Burden of proof—Lies on accused: A.I.R. 1961 S.C. 998; (1960-61) 65 Cal.W.N. 290. *See* also (1961) 1 Cr.L.J. 811 (Cal.); (1961) 2 Cr.L.J. 357: A.I.R. 1961 Pat. 355.

Murder—Accused charged with—Plea of unsoundness of mind set up—Burden lies heavily on him to prove unsoundness—He must prove that he was totally deprived of his understanding and memory—*Held*, accused failed to discharge burden of proof: I.L.R. (1962) Cut. 806: (1963) 1 Cr.L.J. 213: A.I.R. 1963 Ori. 33.

Exemption from criminal liability—Unsoundness of mind—When unsoundness is pleaded as a defence to a criminal charge, the burden of proof rests on the accused: 50 I.C. 991: (1918-19) 23 Cal.W.N. 621; (1940) 2 M.L.J. 1018 (plea of self-defence).

Behaviour antecedent, attendant and subsequent to the event may be relevant in finding the mental condition at the time of the event, but not those remote in time. If it comes to the notice of the Investigating Officer that the accused had a previous history of insanity, it is the duty of the Investigating Officer to investigate the mental condition of the accused and place the material before the Court.

Where the accused who had killed his child and injured his wife pleaded insanity and there was no evidence to show that the accused whose conduct was normal after the occurrence was suffering from manic depressive psychosis at the time of occurrence, *held*, the fact that the accused developed mental derangement about 10 months after occurrence was not sufficient to establish that the accused committed the act without knowing the nature of the act: 1989 Cr.L.J. 1372 (Ker.) (D.B.).

Where not only prior to the occurrence as also sometimes after it but also on the day of occurrence the accused showed symptoms of insanity and evidence on record was sufficient to lead to a doubt that the accused might be under a spell of madness when he shot an arrow at his father and that his

explanation that he committed such act being not in control of his discerning faculties due to insanity might possibly and probably be true, *held*, he was entitled to the benefit of S. 84, I.P.Code: 1989 Cr.L.J. 168 (Ori.) (D.B.); 1982 Cr.L.J. (N.O.C.) 29 (Gau.); 1982 Cr.L.J. (N.O.C.) 7 (Gau.).

Where the accused pleading insanity appeared at the trial as well as on being examined to be perfectly normal, no symptom of insanity were found by the psychiatrist in his report, and no witness testified to his unsoundness of mind when he committed the murder, and not even a certificate was produced to disprove the sanity of the mind, *held*, the accused had failed to discharge his burden cast on him under law to prove that he was having an "unsound mind" at the time of causing the death of his wife: 1994 Cr.L.J. 1173 (Ker.) (D.B.); 1988 Cr.L.J. 1828: (1987-88) 92 Cal.W.N. 918 (Cal.) (D.B.).

The burden of proving the ingredients of insanity rests on accused and he has to show beyond shadow of doubt that he was innocent, every minor mental aberration is not sufficient to discharge the onus. Where a person attempted to hide the body of deceased, it *prima facie* showed his knowledge about the consequences of the act done by him and mere statement that he had gone mad before the commitment of act and he was being treated by doctor, not supported by material fact, is not sufficient to prove insanity: 1994 Cr.L.J. (N.O.C.) 110: (1993) 75 Cut.L.T. 631 (D.B.).

The brutal and callous way in which a murder is committed, is not by itself, indicative of a insane mind: (1986) 1 Crimes 155: 1986 Cr.L.J. 27 (Ker.). Similarly, merely because a desperate offence was committed for a trifling thing, is not by itself, a pointer to insanity: (1983) 2 Crimes 166 (Cal.).

But where it was admitted by the prosecution that the accused was a lunatic and had caused the death of a child by throwing it into a pond, whether his conviction under S. 302 of the Indian Penal Code was justified. *See* 1981 Cr.L.J. 1205 (Gau.).

Where the accused raises plea of insanity, *held*, though the burden of proving such plea is not heavy, the Court should not be left with a doubt on such plea. Thus, where except for the evidence of the accused's wife, there was no other convincing evidence in support of his plea of insanity and as regards his subsequent conduct, the trial Court had observed that for a long period of seven months as the trial protracted the accused appeared in the Court but no abnormality was seen, *held*, the mere circumstance that without apparent motive he had committed atleast two murders and in all four ghastly murders, in itself does not lead to a reasonable inference that he suffered from insanity: 1990 Cr.L.J. 1861 (Madh. Pra.) (D.B.).

Where an accused tried for murdering his own innocent two month old son despite entreaties from his wife and mother pleaded insanity and adduced no evidence in support but there was material on record that he was obsessed before, during and after the murder with the idea that the son was a devil, dangerous to the accused, his wife and all the world, *held*, the inference was irresistible that the accused committed the murder while suffering from legal insanity; he had sufficiently discharged the requisite burden under S. 105: (1984) 2 Bom.C.R. 722: 1985 Cr.L.J. 449 (D.B.).

Where the convict murdered his wife and three children pleading insanity failed to prove it but from the material on record the Court opined that the convict was provoked to commit the crime on account of some mental imbalance or some acute disturbing factor, *held*, the sentence of life imprisonment could not be enhanced to that of death. [A.I.R. 1971 S.C. 1759, Foll.; 1985 Cr.L.J. 449: (1984) 2 Bom.C.R. 722 (D.B.), Disting.]: 1994 Cr.L.J. 3493 (S.C.).

The accused who was charged of committing murder in the course of committing theft, raised a defence of abnormality of mind, as impaired his mental responsibility for the act. Under S. 2(2) of the Homicide Act (English), 1957, it was for the defence to prove that he was not, for this reason, liable to be convicted of murder. While charging the jury, the Judge did not point out the difference between burden of proof on the defence and the burden of proof on the prosecution. *Held* that the burden of proof on the accused of the defence of diminished responsibility was not as heavy as the burden of proof on the prosecution and was the burden of showing preponderance of probability and that it was the duty of the Judge to direct the jury on the difference in the burden of proof, namely, that if the jury thought that

the balance of probability was in favour of the defence, its verdict should be culpable homicide and if it did not come to the conclusion that the balance of probability was in favour of the defence, it was its duty to return the verdict of murder: (1957) 2 All E.R. 737.

Plea of insantiy has to be proved. *See* 1991 Cr.L.J. 2375: (1990) 92 Bom.L.R. 441 (D.B.); 1987 Cr.L.J. 618 (Ori.) (D.B.).

6. Defamation.—(*See* also Ss. 101-104, Note 40, *supra*). It is true that by virtue of S. 105 of the Evidence Act, the Court is bound to presume the absence of circumstances which would bring the offence within and of the special exceptions contained in S. 499, Penal Code, and the burden would primarily rest on the accused to show that that exceptions applied. But it is well known that the burden cast on the accused in a criminal case, by virtue of S. 105 of the Evidence Act, is not so onerous as the primary burden cast on the prosecution to prove the offence beyond reasonable doubt. If, therefore, on a careful review of the circumstances under which the complaint was made and the other events which have come to light, it appears to the Court that one of the exceptions to S. 499, Penal Code, may possibly apply, the accused may be held to have discharged his burden: 25 Cut.L.T. 16: 1959 Cr.L.J. 1006: A.I.R. 1959 Ori. 141 (D.B.).

Burden of bringing the case under exception lies on accused—Nature and degree of proof required on the part of accused—Statement under S. 342, Cr.P.Code, can be taken into account—Requirements for invoking *Exception* 1 to S. 499, Penal Code—Public interest—Meaning of: 1963 Ker.L.T. 845.

General exceptions under Penal Code—Onus lies on accused—But this does not mean that the accused must lead evidence: I.L.R. 45 All. 329: A.I.R. 1923 All. 327 (2). *See* also (1927) 29 Bom.L.R. 713: A.I.R. 1927 Bom. 436; 98 I.C. 707: A.I.R. 1927 All. 119; A.I.R. 1939 Sind 209: I.L.R. (1940) Kar. 249.

Defamation—Imputation—Plea of exception—Burden of proof: 1958 M.P.L.J. 248.

Defamation—First exception to S. 499, Penal Code, 1860—Onus to bring case within exception is on accused: 1969 Cr.L.J. 1089: A.I.R. 1969 All. 423; A.I.R. 1970 Mys. 34.

Evidence and proof—Charge of defamation—Accused taking exception to charge under *Exception* 9—Degree of proof that has to be offered by accused: 1966 M.L.J. (Cr.) 435: A.I.R. 1966 S.C. 97.

Where in a defamation case under S. 500 of the Indian Penal Code no evidence was adduced by either side as to the presence or absence of good faith on the part of the accused, the presence whereof alone could entitle the accused to protection under the *Exceptions* 8 and 9 of S. 499 of the Code, *held*, the burden of proving good faith that lay on the accused not having been discharged, the accused was liable to conviction; acquittal set aside: (1984) 1 Bom.C.R. 194: 1984 Cr.L.J. 350.

7. Self-defence.—(*See* also Ss. 101-104, Note 98, *supra*). It is not for the accused to prove beyond reasonable doubt that he acted in self-defence; he has only to raise a probability in his favour of the same being true. He need not even set up the plea at all. [A.I.R. 1970 S.C. 1079 and 1976 Cr.L.J. 697 (S.C.), Rel. on]: 1976 Cr.L.J. 1921 (Gau.) (D.B.); (1972) 1 Cut.W.R. 600 (D.B.). *See* also 1982 Cr.L.J. 173 (Ker.) (D.B.); 1982 Cr.L.J. (N.O.C.) 201 (J.&K.) (D.B.).

It is not sufficient for the accused merely to establish that the right of private defence had commenced. He must further establish that the right had not ended: (1992) 2 Ker.L.T. 667 (D.B.).

Proof of right of private defence: 1 C.L.R. 62. An accused setting up a plea of self-defence in answer to a charge of murder has the burden on him to prove it. In the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence although the accused is shown to have had severe injuries on his person after the crime: A.I.R. 1941 Mad. 280: (1940) 2 M.L.J. 1018; (1991-92) 96 Cal.W.N. 560.

It is no doubt true that in a criminal trial the burden of proof never shifts to the accused but where the accused plead right of self-defence by alleging their possession of the land in dispute, in fairness it is their duty to call the Patwari to prove their actual possession of the land: 1953 All.L.J. 62.

There appears in some quarters to be the opinion that where an accused person has admitted participation in a fight, in which one of the other party, is killed or injured, but pleads that he acted in the exercise of the right of self-defence, it lies heavily upon him under all circumstances to prove under

S. 105 the facts necessary to establish his plea. It must be remembered that in the vast majority of such cases in this country the accused persons are usually the only persons who could appear as witness in their own self-defence and they are barred from doing so by the law of procedure. The Courts, therefore, must be prepared to take their statements into consideration. In a case where the prosecution evidence is wholly unreliable and there is no other evidence to suggest that part of their statements in which they put forward the plea of self-defence is not correct, the Court has no other alternative but to accept their statements and act upon them: (1941) 43 Punj.L.R. 144: A.I.R. 1941 Lah. 333.

The principle that the prosecution must prove the guilt of the prisoner is no less a part of the law of this country as that of England. And, any attempt to whittle it down will no more be entertained here than in England. But whereas in India, defence of exception of private defence or grave and sudden provocation would come within the statutory exception in S. 105 of the Evidence Act, in England, it would come under no such exception and the burden it would appear, would lie on the prosecution to prove the absence of circumstances justifying such a defence if it is to prove the *mens rea* requisite for the offence. S. 105 of the Evidence Act squarely places the burden upon the accused and says that the Court shall presume the absence of circumstances attracting the exception. But the burden, it is well settled is not as heavy as that which rests on the prosecution of having to prove its case beyond reasonable doubt; it is no heavier than that which rests on a party in a civil proceeding. Reasonable doubt need not be excluded, preponderance of probability is enough. Logically, however, it is not enough if the evidence discloses a possible defence or self-defence or creates reasonable doubt in the mind of the Judge whether the act was done in self-defence. *Held*, the accused who had admitted acts of causing grievous hurt and death had failed to establish his plea of private defence and even if the true test was that it be enough if accused would succeed in creating a reasonable doubt in the mind of the Court as to whether or not he was entitled to the benefit of the exception of private defence the accused had not succeeded in creating any such doubt: I.L.R. (1967) 1 Ker. 640 (D.B.).

Right to private defence of property—Onus to prove is on accused—Nature of proof required—Making of *prima facie* case of exception—Meaning of: (1964) 2 Cr.L.J. 696: A.I.R. 1964 Ori. 262. *See* also 11 C.L.R. 232; 1904 All.W.N. 113; A.I.R. 1930 Oudh 408.

Right of private defence of—Burden of proof: (1961) 1 Cr.L.J. 813 (Guj.).

The burden of proving the guilt always remains on the prosecution. S. 105 merely provides that the Court shall not presume the existence of facts which might bring the case within the exceptions enumerated in the Indian Penal Code or which amount to justification. That means that if no such evidence is on record, the accused runs the risk of being convicted, if the evidence against him led by the prosecution is believed. If, however, some evidence is introduced which makes out a *prima facie* case of the accused having acted in exercise of right of private defence, then the burden on the accused is discharged: 1961 M.P.L.J. (Notes) 85.

Ss. 96 to 106 of the Penal Code which confer and define the limits of the right of private defence constitute a general exception to the offences defined in the Code. The burden which rests on the accused to prove the exception is not of the same rigour as the burden of the prosecution to prove the charge beyond a reasonable doubt. It is enough for the accused to show, as in a civil case, that the preponderance of probabilities is in favour of his plea: A.I.R. 1968 S.C. 702; A.I.R. 1974 S.C. 1570. *See* also A.I.R. 1976 S.C. 960; A.I.R. 1980 S.C. 660: (1980) 2 S.C.C. 218: 1980 Cr.L.J. 459.

Plea of self-defence—Burden lies on accused to prove circumstances to establish his case—To discharge burden it is sufficient if he makes out a *prima facie* case—Prosecution evidence leaving accused's guilt in doubt—Court must give benefit of doubt to accused and acquit him even though he does not prove beyond reasonable doubt the existence of such circumstances: (1964) 1 M.L.J. 41: A.I.R. 1964 Mad. 418; (1993) 75 Cut.L.T. 539 (D.B.)

In criminal cases the general rule is that the accused person must always be presumed to be innocent and the onus of proving everything essential to the establishment of the offence is on the prosecution. S. 105 is, however, an important qualification of this rule.

The burden of establishing right of self-defence is no doubt upon the accused and the Court has to begin with the presumption regarding the absence of such circumstances but if this presumption is sufficiently rebutted then even if the defence with regard to the right of self-defence is not established to the hilt, it at least creates reasonable doubt as regards the guilt of the accused, all that may be necessary for the accused is to offer a reasonable explanation which may be true, then even though the Judges or the jury, as the case may be, is not convinced that it is true, the accused is entitled to an acquittal: 1959 M.P.L.J. (Notes) 145.

The standard of proof necessary on the part of the prosecution to establish the guilt of the accused beyond all reasonable doubts is not what is required of the accused persons to establish their plea under any of the general exceptions of the Indian Penal Code. But if the Court, after review of the entire evidence on record, finds that plea is a plausible theory and if the Court entertains a reasonable doubt in its mind as to the guilt of the accused, the accused is certainly entitled to the benefit even though the accused person has not been able to fully establish his plea of self-defence or any other plea under the general exceptions of the Indian Penal Code: (1958) 24 Cut.L.T. 321.

Plea of self-defence—Burden of proof: 1960 Cr.L.J. 1472: A.I.R. 1960 Mys. 294.

Right of self-defence—Need not be specifically pleaded: 1965 All.L.J. 977: 1966 Cr.L.J. 503: A.I.R. 1966 All. 244. Plea of self-defence need not be taken at the first opportunity, *i.e.*, in the report lodged with the Police; such a plea can be taken even at the time of cross-examination suggesting that the injured attacked him and seriously belaboured him: I.L.R. (1986) Him. Pra. 549.

The burden to make out a plea of self-defence rests on the accused. But the burden is not as heavy as it is on the prosecution to prove the charge. The accused is not required to prove his defence to the hilt. He can discharge the burden lying on him by showing a preponderance of probabilities in his favour: 1984 Raj.L.W. 473 (D.B.); A.I.R. 1980 S.C. 1341; A.I.R. 1975 S.C. 2161: 1975 Cr.L.J. 1865: (1975) 4 S.C.C. 254; A.I.R. 1971 Raj. 68.

It cannot be laid down as invariable proposition of law that as soon as it is found that the accused had received injuries the plea of private defence would stand *prima facie* established and the burden would shift on to the prosecution to prove that the injuries were caused to the accused in self-defence by the complainant party. For instance, where two parties come armed with a determination to measure their strength and to settle a dispute by force of arms and in the ensuing fight both sides receive injuries, no question of private defence arises: A.I.R. 1974 S.C. 1550. However, *see* 1990 Cr.L.J. 1510 (S.C.).

Where an accused pleads a right of private defence or any other exception to which he is entitled in law, a mere plausible defence in support of the plea is not enough for his acquittal. But even if he fails to establish the plea beyond doubt, it is still open to the Court to take the plea alongwith the prosecution evidence and then come to a decision whether the prosecution has succeeded in proving its case beyond reasonable doubt or not and if on a consideration of the evidence as a whole (including the evidence in support of the plea of exception) a reasonable doubt is created in the mind of the Court as to the guilt of the accused, he would be entitled to acquittal. [A.I.R. 1962 S.C. 605; A.I.R. 1941 Pat. 175; 1935 A.C. 462, Rel. on]: I.L.R. 43 Pat. 453: (1964) 1 Cr.L.J. 346: A.I.R. 1964 Pat. 138.

That the case is covered by *Exception* 2 to S. 300—Burden is on accused to prove: (1965) 31 Cut.L.T. 265.

Plea of private defence—Accused pleading *alibi*—Plea if available: (1961) 1 Cr.L.J. 403: A.I.R. 1961 Mys. 74.

Accused need not be called upon to establish right of self-defence unless the prosecution has succeeded in proving a case. *See* A.I.R. 1944 Lah. 97, cited under Note 1, *supra*.

When a case of right of private defence appears or the right of private defence is taken at the stage of investigation or trial, it is the obligation of the prosecution to negative the circumstances and destroy the defence plea to sustain the conviction of the accused. Even if the defence plea is demolished by the prosecution yet the accused may establish his case by producing material or witness in support of his case and then it will be for the Court to consider which version is acceptable: (1987) 1 Crimes 791: 1988 Cr.L.J. 223 (Gau.) (D.B.).

The special burden is on the accused to prove the existence of circumstances bringing his case within any of the general exceptions in the Penal Code. It is open to the accused to adduce evidence for establishing those circumstances, but even if he fails to do that he can still show from the evidence adduced by the prosecution itself that the circumstances were such which brought his case within one of the general exception laid down in the Penal Code. In other words, the accused can point out to the Court the proper materials, justifying his action and raising a reasonable doubt with regard to the truth of the prosecution case. *Held*, on facts, that the accused had sufficiently made out that they had a right of private defence and they did not exceed it in causing grievous hurt to either deceased and simple hurt to another person. The facts and circumstances justified the inference that the deceased had caused multiple injuries to one of the accused that the manner of occurrence as alleged by the prosecution was not true and that there was a considerable doubt about the guilt of the accused: 1967 Cr.L.J. 102: A.I.R. 1966 Pat. 464.

It is important to note that the burden of the accused to prove his case of private defence is not as onerous as that of the prosecution; whereas the prosecution has to prove the prosecution case beyond the shadow of reasonable doubt, the accused need discharge his burden by preponderance of probability. For sustaining such a plea, it is not necessary that the accused should have a specific plea of private defence nor is it necessary for him to adduce independent evidence if he can sustain his case of private defence by relying on the very evidence tendered by the prosecution. Where the occurrence took place within the court-yard of the deceased which was in his possession and the accused inflicted injuries on the deceased after committing criminal trespass, *held*, as the accused was the aggressor he was not entitled to the plea of right of private defence: 1994 Cr.L.J. 1738 (Ker.) (D.B.).

If a case of private defence irresistibly raises its head from the prosecution evidence only, the prosecution fails, even though the accused has remained absolutely mute and dumb and jargon that the burden of proof in such a case lies upon the accused would become mere logomachy. Nor can it be ruled as a strait-jacket formula that once a plea of private defence appears to require consideration, the burden is on the prosecution to prove that the accused exceeded his right or that the burden on the accused to prove that he did not so exceed. The question of burden on onus then loses all significance and it is for the Court to decide, on the materials on record, whether produced by the prosecution or the defence, as to whether the right of private defence has been exceeded or not: (1991-92) 96 Cal.W.N. 560.

Accused advanced plea of complete denial—Plea of right of private defence neither taken in statement under S. 342, Cr.P.Code nor raised in argument in lower Court—No material on record to indicate apprehension of grievous hurt or death by act of public servant. *Held*, there could be no right of private defence of property or person—Burden lies on accused to bring case under section: 1967 Cr.L.J. 97: A.I.R. 1967 Ori. 1.

Where the prosecution failed to prove its case regarding the genesis, the manner and the place of occurrence by cogent and reliable evidence beyond the shadow of reasonable doubt, and the prosecution had suppressed the truth, *held*, on facts, that the prosecuting party clearly being aggressors, the accused had discharged their burden by preponderance of probability under S. 105; the burden on the accused to prove their pleas of self-defence is not as onerous as the prosecution's burden to prove the charge: (1990-2) 38 B.L.J.R. (N.O.C.) 24 (D.B.).

It is well settled that the burden on the accused to establish the plea of self-defence under S. 105 is not so onerous as is cast on the prosecution by S. 101 to prove its case beyond reasonable doubt; the accused is required to establish his plea of self-defence by a mere preponderance of probability. Thus, where it was shown by the accused by such evidence that the deceased, within striking distance, was poised for imminent attack with a spear when the accused fired the fatal gunshot on the deceased, *held*, the plea of self-defence stood established: A.I.R. 1976 S.C. 966: (1976) 2 S.C.C. 798.

Accused claiming to have assaulted deceased in exercise of right of private defence—Burden to prove claim is on accused (Per *R. S. Bindra, Addl, J. C.*): 1967 Cr.L.J. 184: A.I.R. 1967 Goa 11 (F.B.).

Plea of self-defence—Accused found to have killed another—Onus is on him to establish that killing was justified—It is, however, open to an accused person at any stage of trial to request the Court to examine the evidence and ascertain for itself whether it is consistent with a plea of self-defence: 1960 All. Cr. R. 399: 1960 All.L.J. 782: A.I.R. 1961 All. 38.

Murder case—Explanation by accused before trial Court but not before committing Magistrate that there was assault by deceased's party and that under apprehension of grievous hurt or death he had fired pistol-shot at deceased—If entire material in case spell out case of private defence, Court would acquit accused notwithstanding accused said nothing in defence, adduced no evidence and did not, even put forward, plea of self-defence—But when accused wants Court to believe a positive case set up by him such as *alibi* or a general exception, his failure to set up that case when opportunity to do so was afforded earlier is certainly a piece of conduct which can be taken into account in deciding whether his case is true or is only an after thought: I.L.R. (1967) 1 Ker. 640.

Where the prosecution evidence itself showed that the accused, performing his public duty, was obstructed and attacked by a crowd and apprehended danger to his life, *held*, the accused could not be called upon to prove his plea of self-defence: (1989) 1 Bom.C.R. 434: 1989 Mah.L.J. 823.

Murder trial—Prosecution failing to establish its case—Plea of self defence by accused—Failure of accused to establish it—Effect: 1983 Cr.L.J. 532 (Ori.).

Where the deceased was killed in an incident occurring at about 11.30 A.M. by a *gupti* and the accused having stabbed the deceased took up the plea of self-defence and it was found that he had sustained only very superficial simple injuries whose depth was incapable of being measured and there was no explanation as to why he did not go to the hospital for 2 hours and 45 minutes after the incident, *held*, the accused had failed to discharge the burden of proving self-defence; the injuries sustained by him were not suffered by him in the occurrence: 1990 Cr.L.J. 2751: (1990) 41 Del.L.T. 468 (D.B.).

Injury causing death caused with intention to cause death—Offence comes under S. 302, unless accused brings the case under one of the exceptions—Right of private defence, plea of—Burden is on accused—Plea not taken—Prosecution evidence showing that act was probably committed in exercise of right of private defence—Prosecution would be taken to have failed to make out case against accused beyond reasonable doubt: 1968 Cr.L.J. 1362 (Ker.).

Where the accused being beaten with a stick stabbed the assailant in his heart resulting in his death, *held*, the accused exercised his right of private defence but exceeded its limit; it was a case under S. 304 of the Indian Penal Code: A.I.R. 1979 S.C. 1179: 1979 Cr.L.J. 706.

Where both sides, after a violent dispute at night over diversion of irrigation water, immediately thereafter proceeded to the Police Station, one side on a tractor and the other side on foot and their reports were lodged but no arrests were then made by the Police which without investigating the report of the accused, prosecuted them and took no action against the other party and the injuries on the bodies of the accused were found on trial to be neither self-inflicted nor otherwise explained away, *held*, the accused's plea of self-defence could not be rejected; their conviction set aside: 1989 Cr.L.J. 2205 (Madh. Pra.).

In a fight between two parties, the fact that injuries on deceased persons were more in number and serious in nature in comparison to those on the accused, *held*, clearly showed that the accused had used more force than was necessary or exceeded their right of private defence: A.I.R. 1968 Mys. 33: 1968 Cr.L.J. 194.

Where the plea of self-defence was held to have been proved by the accused. *See* (1992-1) 40 B.L.J.R. 673 (D.B.).

8. Free-fight.—In case of free-fight, there is no right of private defence to either party: 35 Cut.L.T. 255: 1970 Cr.L.J. 114 (D.B.).

Where in the case of a general fight it could not be said which party was to blame and which party was blameless, it would not be proper consistently with justice to convict the members of either party by relying on S. 105: I.L.R. 19 Luck. 25: A.I.R. 1943 Oudh 272.

The Court should consider the probabilities of the case and take a comprehensive

view of the evidence especially where there was a sudden fight between the accused and the deceased and both were armed and there was no direct evidence as to who was the aggressor: (1950) 3 Sau.L.R. 174 (D.B.).

Where in a fracas it was established that both the sides received injuries and one of the accused had a gun and the deceased was killed by a gunshot wound, even assuming that the gun was deliberately aimed and fired at the deceased, it by itself would not entail any conviction under S. 302, I.P. Code unless the Court gets a true picture of the story and reaches the conclusion that the accused had no right of private defence of body so as to cause death. Such a view does not amount to throwing of the onus of proving the general exception under Chapter IV, I.P. Code on the prosecution contrary to S. 105 of the Evidence Act. The view is based on the theory that the Court must always get a true picture of the fracas. If after distinguishing the chaff from the grain the essential thread of the prosecution case is proved, a conviction would follow. If on the other hand, despite utmost care and scrutiny it is difficult to find out the truth and the defence version cannot be discarded as being reasonably true, the accused is entitled to benefit of doubt: I.L.R. (1969) Cut. 53: 1970 Cr.L.J. 931.

9. Provocation.—To come within *Exception* I to S. 300, I.P.Code, not only the provocation must be shown to be sudden, but also that the accused lost self-control as a result thereof: 1982 Cr.L.J. 975 (P.&H.) (D.B.).

There must be act of provocation, grave and sudden loss of self-control and retaliation proportional to provocation—There must not be time for passion to cool down—Deceased abusing accused filthily and then charging accused with having committed unnatural offence with a pigeon—Accused, *held*, entitled to protection under S. 300, *Exception* 1: 1963 M.P.L.J. 592: (1963) 2 Cr.L.J. 631: A.I.R. 1963 Madh. Pra. 364.

The fact that the accused must have been subjected to grave and sudden provocation because the deceased abused him cannot be assumed from the nature of the incident. The burden lies upon the accused to make out a case so as to fall in any of the exceptions: 1955 Madh. Bh. L.J. (H.C.R.) 1199 (D.B.).

The accused need not specifically plead that his case falls under any of the exceptions to S. 300, I.P.Code so as to bring the offence under S. 304, I.P.Code. If there is material available in the case to bring the offence under any of the exceptions to S. 300, I.P.Code, even if the accused had not taken such a defence, the case should be brought under the exception of S. 300 which may be attracted by the evidence on record.

Where accused had controlled himself on various occasions when he was provoked by filthy abuses, *held*, it cannot be said that on the day of occurrence when he attacked the deceased, there could have been no such grave and sudden provocation: I.L.R. (1978) Karn. 140: (1977) 2 Karn.L.J. 412.

Accused charged with murder pleading grave and sudden provocation—Burden to prove existence of such provocation is on accused—Failure to discharge burden—Court can draw its own conclusion regarding existence of provocative circumstances from evidence on record: 30 Cut.L.T. 1: I.L.R. (1964) Cut. 137.

It is for the accused who claims benefit of *Exception* 4 of S. 300 to prove circumstances specified in it which would attract the exception: 1967 Cr.L.J. 895: A.I.R. 1967 Madh. Pra. 167. Burden of bringing the case within exception is discharged when reasonable doubt is created in the mind of the Court from the evidence on record: 1984 Cr.L.J. 440 (Andh. Pra.) (D.B.)

Mere wordy quarrel can be said to be so sudden and grave provocation as to cause loss of self-control and fire at the deceased: 1982 Cr.L.J. 975 (P.&H.) (D.B.).

Criminal trial—Grave and sudden provocation—Burden of proof: 1969 Cr.L.J. 129: A.I.R. 1969 All. 61. *See* also L.B.R. (1893-1900) 257.

10. Miscellaneous.—Accused charged under S. 66(*b*) of Bombay Prohibition Act, 1949—Burden is on prosecution to establish that what the accused consumed was prohibited liquor, *i.e.*, liquor which was not liquid medicinal or toilet preparation containing alcohol—Accused need not establish that he consumed such preparation. *See* (1955) 1 S.C.R. 613: A.I.R. 1955 S.C. 123. Per *Collister, J.* The onus is certainly on the Crown to prove all the facts which constitute the elements of the offence, and if there is any reasonable doubt left in the mind of the Court as to whether these facts have been established

106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(*a*) When a person does an act, with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(*b*) *A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

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the accused person is entitled to the benefit thereof; but this general onus is subject by statute, to the special onus which S. 105 imposes on the accused person, and when the Legislature has enacted specific provisions in the Evidence Act as to what amounts to proof or disproof, the Court will not be justified in falling back upon the general principle that the Crown must prove the prisoner's guilt: 1941 All.L.J. 619: A.I.R. 1941 All. 402: I.L.R. (1941) All. 843 (F.B.).

Criminal trial—*Mens rea*—Law relating to contempt of Court—Is a special law within S. 41—General exceptions in Ch. IV apply—Burden of proof—*Mens rea* not an ingredient of offence of contempt: 1968 Ker.L.J. 197: I.L.R. (1968) 1 Ker. 384.

Homicide—Exception—Onus: A.I.R. 1957 Punj. 81: 1957 Cr.L.J. 532.

Fact of marriage: 1939 All.W.R. (H.C.) 811: A.I.R. 1940 All. 62. That game is a mere game of skill, *see* 13 Cr.L.J. 270: 23 I.C. 484; as to possession of excess quantity of liquor, *see* 2 I.C. 543; shifting burden of proof, Rat. 820: I.L.R. 4 Cal. 124.

Illicit possession of opium—Accused taking delivery of registered parcel found to contain large quantity of opium—Knowledge of contents—Inference of unlawful possession: 1960 Cr.L.J. 1126: A.I.R. 1960 Ori. 139.

Misdirection—Omission to refer to statutory presumption under S. 105, Evidence Act and to explain ingredients of S. 80, Penal Code—Verdict of Jury vitiated: (1962) 1 Cr.L.J. 521: A.I.R. 1962 S.C. 605.

Defence of justification in answer to charge of deliberate wrongful Act—Burden of proof: 1960 Cr.L.J. 332: A.I.R. 1960 Cal. 151.

Section 106—Synopsis.

1. Scope and applicability—General.
2. Applicability in criminal cases.
3. Person includes juristic person.
4. Corruption cases.
5. In case of violation of order passed under Essential Commodities Act.
6. Food adulteration.
7. Custom cases.
8. Accident cases.
9. Damages.
10. *Mesne profits*.
11. Land acquisition cases.
12. Landlord and tenant.
13. Election matter.
14. Suit for specific performance.
15. Income.
16. Employer and employee.
17. Principal and agent.
18. Tax laws.
19. Citizenship.
20. Miscellaneous.

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1. Scope and applicability—General.—Section applies only to parties to the suit: (1932-33) 37 Cal.W.N. 657: A.I.R. 1933 P.C. 87: 64 M.L.J. 413 (P.C.); 38 P.L.R. 427. *See* I.L.R. 14 Rang. 666: A.I.R. 1937 Rang. 83 (F.B.). S. 106 cannot be utilised to help persons who are representatives of other parties and who step into their shoes: A.I.R. 1930 Mad. 251.

S. 106 is an exception to S. 101, but standard of proof for a plea based on special knowledge is not so high as in the case of prosecution: 1977 Cr.L.J. 1751 (Cal.) (D.B.).

S. 106 is applicable to both civil and criminal cases; however, in criminal cases it should be applied with great care and caution: A.I.R. 1948 Cal. 58.

The place of knowledge does not affect the situation of the burden of proof. The proof may be difficult where the matter is peculiarly within the defendant's knowledge, but that does not vary the rule of law that the plaintiff must prove that which is the foundation of his right: (1868) 9 Suth. W.R. (Civ.) 190 (F.B.).

Where several persons have the means of knowledge of a particular fact, it cannot be said that it is specially within the knowledge of one of them: I.L.R. 12 All. 301 (F.B.).

S. 106 contemplates facts which in their nature are such as to be within the knowledge of the accused and of nobody else, and has no application to cases, where the fact in question, having regard to its nature, is such as to be capable of being known not only by the accused but also by others—If they happened to be present when it took place. It cannot be invoked to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. Section obviously refers to cases where the defence of the accused depends on his proving a certain fact, that is, cases where his guilt is established on the evidence produced by the prosecution unless he is able to prove some other facts especially within his knowledge which would render the evidence for the prosecution nugatory : A.I.R. 1936 All. 833 : 1936 All.L.J. 1124.

An order or notification, containing a recital, technically correct on the face of it, raises a presumption of fact under S. 114, *Illus*. (*e*). This presumption, however, is one of fact. It is an optional presumption. It can be displaced by circumstances indicating that the power lodged in an authority or official has not been exercised in accordance with the law. The original or stable onus laid down by S. 101 and S. 102 cannot be shifted by the use of S. 106, although the particular onus of proving facts and circumstances lying especially within the knowledge of the official who formed the opinion which resulted in the notification rests upon that official. The recital, if it is not defective, may obviate the need to look further. But, there may be circumstances in the case which impel the Court to look beyond it. And, at that stage, S. 106 can be invoked by the party assailing an order or notification. It is most unsafe in such cases for the official or authority concerned to rest content with non-disclosure of facts especially within his or its knowledge by relying on the sufficiency of a recital. Such an attitude may itself justify further judicial scrutiny: A.I.R. 1977 S.C. 183: (1977) 1 S.C.C. 133: (1977) 1 S.C.R. 763: (1977) 90 Mad.L.W. (S.N.) 17.

S. 106 is an exception to general rule that burden of proof lies on the prosecution: (1986) 1 Rec.Cr.R. 142 (Del.).

The principle underlying S. 106, which is an exception to the general rule governing burden of proof—applies only to such matters of defence which are supposed to be especially within the knowledge of the defendant-respondent. It cannot apply when the fact is such as to be capable of being known also by persons other than the respondent: A.I.R. 1975 S.C. 667.

A party personally knowing the facts and circumstances of his case is bound to give evidence on his own behalf and submit to cross-examination and his non-appearance as a witness would be a strong circumstance which will go to discredit the truth of his case: 1966 All.L.J. 904.

A party's failure to go into the witness-box raises a strong presumption against the truth of his or her case. The fact of a party being a *pardanashin* lady is not a sufficient cause for not getting into the box in as much as she could get herself examined on commission: 187 I.C. 317: A.I.R. 1940 Oudh 266.

The true object to be achieved by a Court of Justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicion attaching to it. Thus, where the plaintiff has personally executed a deed of assignment which he seeks to be set aside on the ground of its being a *benami* deed, he cannot keep himself away from the witness-box and if he does so he takes the heavy risk of the Court accepting the allegations made by the defendant: 1954 B.L.J.R. 82: A.I.R. 1954 Pat. 280.

It is the duty of a party who has certain facts relating to his case within his personal knowledge to appear before the Court at a very early stage of the case as a witness and to give evidence relating to cross-examination by the other side: (1931) 33 Punj.L.R. 906: A.I.R. 1933 Lah. 243.

Where a party does not go into the witness-box to support his allegations regarding facts which are within its special knowledge there arises a strong presumption against him: 138 I.C. 525: (1931) 33 Punj.L.R. 207. *See* also Notes under S. 114.

Section should be confined to those cases, where a fact is especially within the knowledge of any person: A.I.R. 1959 All. 598. The burden of proving facts peculiarly within the knowledge of any person is on that person.

See 9 W.R. 190: 1 P.L.J. 168; I.L.R. 47 Mad. 800: 20 I.C. 600: 6 Bur.L.T. 129. *See* also I.L.R. 2 Rang. 549: A.I.R. 1925 Rang. 143; A.I.R. 1942 Nag. 39; 1939 Mad.W.N. 883: A.I.R. 1940 Mad. 1; I.L.R. 63 Cal. 1146: A.I.R. 1936 Cal. 493 (Knowledge of plaintiff's right in design and user by defendant in trade-mark suit.); A.I.R. 1959 Assam 98.

Onus—Discharge—Preponderance of probability is enough: 1966 Cr.L.J. 1357: A.I.R. 1966 S.C. 1762.

Non-production of documentary evidence—Presumption: A.I.R. 1967 Cal. 390.

Party having material evidence within his knowledge—Failure to place it before Court is fatal to his case—Inference: 1969 Ker.L.R. 842: I.L.R. (1970) 2 Ker. 109.

Matter within defendant's knowledge—Burden of proving the fact is on the defendant: (1966) 1 An.W.R. 227.

Illus. (*b*) to S. 106 has obvious reference to a very special type of case, namely, to offences under Ss. 112 and 113, Railways Act. It does not exhaust the full content of the section nor does it curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the fact cannot be said to "especially" within the knowledge of the accused: A.I.R. 1956 S.C. 404: 1956 Cr.L.J. 794.

Intention to defraud Railway Administration on part of accused—Burden of proof—S. 106, not applicable: (1965) 1 Cr.L.J. 545: I.L.R. (1964) 16 Assam 196: A.I.R. 1965 Assam 38.

2. Applicability in criminal cases.—Language of S. 106 and particularly the word "especially" used therein connotes that the facts must in their nature be such as could be within the knowledge of the accused and possibly of no one else. S. 106 cannot come into play where facts concerned are such as are capable of being known by others also. If it were possible by due diligence and proper investigation to find out the facts even though it may be very difficult to do so, it cannot relieve the prosecution from the obligation of establishing the ingredients of an offence alleged. This section cannot be used to shift the onus of establishing an essential ingredient of the offence on accused: 1968 Cr.L.J. 1065: A.I.R. 1968 Guj. 163.

S. 106 is an exception to S. 101 which lays down the general rule about the burden of proof which is that the prosecution is to prove its case against the accused beyond reasonable doubt by evidence—direct or circumstantial—establishing reasonable probability about the commission of the offence; once the Court thinks that the case on evidence is acceptable against the accused and the accused takes up a plea based on facts within his special knowledge, it is for him to prove that plea for which the onus lies on him though the standard of proof for the accused would not be so high as in the case of prosecution: 1977 Cr.L.J. 1751 (Cal.) (D.B.).

General burden of proof of guilt which lies on the prosecution or on authority in the position of the prosecution never shifts—Prosecution cannot rely on S. 106 except in very exceptional cases and to a very limited extent: 1972 Mah.L.J. 20: (1970) 72 Bom.L.R. 575.

S. 106 cannot be pressed into service to relieve prosecution of its burden of proving a criminal charge: (1988) 2 Ori.L.R. 603 (D.B.).

Neither an application of S. 103 nor of S. 106 of the Evidence Act could absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a *prima facie* case, that the question arises of considering facts of which the burden of proof may lie upon the accused. Though the burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certainly lies upon him, but the quantum of evidence by which he may succeed in discharging his burden of creating a reasonable belief, that circumstance absolving him from criminal liability may have existed, is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt: A.I.R. 1974 S.C. 778: (1974) 4 S.C.C. 193: 1974 Cr.L.J. 664.

S. 106 can be resorted to in a criminal trial only when the evidence led by the prosecution, if believed, will sustain conviction; unless that has been done, no burden of proving anything would lie on the accused; any fallacy in explaining their intention for having assembled at the orchard at night could

not absolve the prosecution from its primary obligation to prove the charge beyond reasonable doubt. [A.I.R. 1974 S.C. 778, Rel. on]: (1986) 34 B.L.J.R. 759: (1987) 2 Crimes 136: 1987 Cr.L.J. 1391.

Criminal case—Benefit of doubt—Accused is entitled to benefit of doubt if his version may reasonably be true though he might have failed to establish its truth—Onus on accused is not as heavy as it is on prosecution: (1967) 33 Cut.L.T. 1088.

Burden of proof—Criminal trial: 1967 Cr.L.J. 1654: A.I.R. 1967 Manipur 41.

The normal rule is that the onus is always on the prosecution to establish the guilt of the accused beyond reasonable doubt. This section does not affect this rule in any manner that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. It cannot be invoked to make up the defect of the prosecution to produce evidence of fact and circumstances leading to the guilt of the accused. Prosecution must establish all elements of the offence. Positive facts must always be proved by the prosecution. This rule has, however, no application to negative facts. It is not for the prosecution to anticipate and eliminate all possible defence of circumstances which may exonerate an accused. When a person does not act with some intention other than the character and the circumstances of the act suggest, it is not for the prosecution to eliminate all other possible intentions. If the accused had a different intention, that is a fact especially within his knowledge which he must prove: 1968 Cr.L.J. 848: 33 Cut.L.T. 60: I.L.R. (1967) Cut. 951; A.I.R. 1936 P.C. 169; A.I.R. 1940 Mad. 1.

In all criminal cases it is incumbent on the prosecution to establish positive facts giving jurisdiction to a Court and this burden it can discharge in a case of prohibition offence by proving circumstances from which it can be inferred that the accused drank intoxicant within the Court's jurisdiction. S. 106 can be resorted to appropriate cases in the course of a criminal trial as implied by *Illus.* (*b*). But it cannot be invoked to make good the lacuna in proving essential facts and more emphatically for establishing facts necessary to give jurisdiction to the Court. Ordinarily, there is very little scope for the application of S. 106, Indian Evidence Act, to criminal cases where onus of proof is always on the prosecution and the section cannot be invoked to shift the onus on the accused: 6 Sau.L.R. 327: A.I.R. 1954 Sau. 31. *See* also A.I.R. 1957 Raj. 178 [Burden of proof is always on prosecution].

Prosecution has to establish *prima facie* case in the first instance; it is not enough to establish facts which give rise to suspicion and then by reason of S. 106, to throw the onus on the accused to prove his innocence: A.I.R. 1959 S.C. 1390; A.I.R. 1944 Lah. 339 (D.B.).

The absence of explanation or a false explanation is no doubt a circumstance that is sometimes relied upon to bring home the guilt to the accused in a case depending on circumstantial evidence, on the ground that the facts proving his innocence must be within his special knowledge and that the burden of at least offering a reasonable explanation is on him on the principle of S. 106, Evidence Act. But this would be so only in cases where the other circumstances proved are so sufficiently strong against him as to point to him as very probably the culprit and therefore, calling for his explanation. If in such a situation the accused gives an explanation which may reasonably be true in the proved circumstances, the accused gets the benefit of doubt though he may not prove the truth of the explanation. But to infer the guilt of the accused from the absence of a reasonable explanation (or a false explanation) where the other circumstances are not by themselves enough to call for his explanation, would be to relieve the prosecution of its burden: A.I.R. 1951 Ori. 53: I.L.R. (1950) Cut. 509.

The ordinary rule which applies to criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in S. 106 of the Evidence Act. Even where there are facts specially within the knowledge which could throw a light upon his guilt or innocence as the case may be, the accused is not bound to allege or to prove them. But in a criminal trial where the guilt of the accused is to be established by circumstantial evidence, where the accused does not throw any light at all upon facts which ought to be specially within his knowledge and which could support any theory or hypothesis compatible with his innocence, the Court can also take into consideration his failure to adduce any

explanation in finding him guilty: (1960) 1 M.L.J. 118: I.L.R. (1960) Mad. 157: 1960 M.L.J. (Cr.) 133; (1976) 17 Guj.L.R. 699.

An accused person is always entitled to hold his tongue; but when the only alternative theory to his guilt is a remote possibility, which, if correct, he is in a position to explain, the absence of an explanation must be considered in determining whether the possibility should be disregarded or taken into account: 43 I.C. 605: 19 Cr.L.J. 189.

S. 106 was never intended to be used to place upon the accused the burden of proving their innocence. S. 106 is not a proviso to the rule that the burden of proving the guilt of the accused is upon the prosecution but on the contrary, the section is subject to that rule. The burden of proving a particular fact or a particular defence is a different matter. S. 106 does not enable the Judge to say to the jury that the accused must explain this and that he must satisfy him on this point or that or be found guilty: A.I.R. 1939 Sind 209: I.L.R. (1940) Kar. 249.

The burden of proof referred to in S. 106 is that of introducing evidence merely. This section does not cast any burden on an accused person to prove that no crime was committed by proving facts specially within his knowledge; nor does it warrant the conclusion that if anything is unexplained which the Court thinks the accused could explain, he ought, therefore, to be found guilty: I.L.R. 14 Rang. 666: A.I.R. 1937 Rang. 83 (F.B.).

S. 106 does not affect the onus of proof in a criminal trial. S. 106 does not cast any burden on an accused person to prove that no crime was committed by proving facts lying specially within his knowledge. The section does not warrant a direction that, if anything is unexplained, which the jury think the accused could explain, they not only may, but must find him guilty: I.L.R. (1951) 1 Cal. 204 (D.B.).

See the under-mentioned decision. S. 106 cannot be invoked to make up for the inability of the prosecution to produce evidence of circumstances necessary to prove the guilt of the accused. But where the facts proved by the evidence give rise to a reasonable inference of guilt unless the same is rebutted, and such inference can be negatived by proof of some fact which in its nature can only be within the special knowledge of the accused, S. 106 can be applied and its effect be considered while weighing the evidence: I.L.R. (1953) Mys. 298: A.I.R. 1953 Mys. 31.

If the knowledge of certain facts is as much available to the prosecution on exercise of due diligence as to the accused, the facts cannot be said to be specially within the knowledge of the accused: A.I.R. 1964 Ori. 46: (1964) 1 Cr.L.J. 339.

S. 106 is intended to meet certain exceptional cases in which it would be impossible or extremely difficult for the prosecution to prove the fact which is especially within the knowledge of the accused and the knowledge of that fact is not available to the prosecution. However, S. 106 cannot be utilised to cast the burden on the accused to prove his innocence by relieving the prosecution of its burden of proof: 1988 Cr.L.J. 481 (Gau.).

The ordinary rule that applies to criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by this rule of evidence. The section cannot be used to make up for the inability of the prosecution to produce evidence of circumstances necessary to prove the guilt of the accused. It is only in cases where the facts proved by the evidence give rise to a reasonable inference of guilt unless the same is rebutted and such inference can be negatived by proof of some facts which in its nature can only be within the special knowledge of the accused. Where the accused contravened R. 5 by cremating dead body in a place within a hundred yards of dwelling houses and wells, the burden of proving that the place was not "provided, registered or licensed" under R. 5 was not upon the accused but upon the prosecution. S. 106 did not modify the ordinary rule of burden of proof in criminal trials: I.L.R. (1964) 1 Ker. 177: 1964 Ker.L.J. 353: A.I.R. 1965 Ker. 73.

Although S. 106 should be applied with great care and caution in criminal cases, it cannot be said that it has no application to criminal cases. Where the accused is prosecuted for disobeying the provisions of S. 291(2), Calcutta Municipal Act, on the allegation that he has effected alteration in the water pipe of his house by persons who are not plumbers licensed by the Municipality, it is for the accused to disclose the name of the person he employed or to give some explanation for such non-disclosure. Otherwise, it

can be reasonably presumed that he employed somebody who did not possess a license: 48 Cr.L.J. 999: A.I.R. 1948 Cal. 58.

Duty of accused—Onus of proof: 1960 M.L.J. (Cr.) 133: (1960) 1 M.L.J. 118: A.I.R. 1960 Mad. 218.

S. 106 is an exception to S. 101. The latter with its *Illus.* (*a*), lays down the general rule that in a criminal case the burden of proof is on the prosecution and S. 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. It means facts that are pre-eminently or exceptionally within his knowledge. *Illus.* (*b*) to S. 106 has obvious reference to a very special type of case, namely, to offences under Ss. 112 and 113, Railways Act. It is true that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. S. 106 must be considered in a commonsense way. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts. In a prosecution launched two and half years after the alleged offence for obtaining certain sums from the Government as T.A. without travel, a booking clerk, as a prosecution witness, proved that no second class tickets were issued on relevant dates for the relevant places. But he also proved that tickets were not always issued and the passengers could pay fares on the trains and also could sometimes purchase a ticket for lower class and pay the difference to the guard of the train. There was no proof that one or the other of these courses was not followed on the relevant dates by the accused, although prosecution had registers and books, both of Railway and of the Department in which the accused worked and they could have proved it. Instead of doing it they proved that no second class tickets were issued and relying on *Illus.* (*b*) to S. 106 contended that the burden of proving that the accused, did pay the second class fares was on him. *Held* that the relevant and material information was as much within the especial knowledge of the prosecution as in that of the accused and the prosecution could not rely upon *Illus.* (*b*) to S. 106: 1956 S.C.R. 199: A.I.R. 1956 S.C. 404

Though S. 106 cannot shift the onus of proving the offence from prosecution to the accused, but where the deceased dies due to manual strangulation inside the house when her in-laws alone were present there, *held*, in the absence of any other explanation, the only possible inference was that they had participated in the act and if any one of them claims contrary, under S. 106 the burden of proving that fact is upon him since that was within his special knowledge: 1993 Cr.L.J. 3029 (Mad.) (D.B.).

Where the entire chain of circumstances, completely established, was consistent with the convict's guilt and wholly inconsistent with his innocence and was incapable of being explained on any other reasonable hypothesis, and since the murders were committed and the dead bodies of his wife and 3 children were found in his house where he also attempted to commit suicide, *held*, it was obligatory upon him under S. 106 to explain how all this had happened which was within his special knowledge; he failed to discharge his burden; conviction could not be set aside: 1994 Cr.L.J. 3493 (Bom.) (D.B.).

Where accused was alleged to have killed deceased and though he was seen by good number of people in the vicinity and he was taken into custody at a place some distance away from the spot still he pleaded that he was not at all present at the spot and subsequently he stated that some persons murdered the deceased but the accused neither filed a complaint in police station nor took any steps to unfold his own version of the incident which did not even remotedly fit into the circumstances, *held*, when so much evidence had been led about he and the deceased having been together till the last point of time when she must have been done to death and when how she died could have been within his exclusive knowledge and when the version given by him does not in any way even remotedly fit into the circumstances and appears to be incredible, then, these circumstances brought on record do lead to the conclusion and the only conclusion that it was the accused and the accused alone who committed the murder of the deceased: 1994 Cr.L.J. 3798 (Karn.) (D.B.).

In case of dowry death, the person in whose care the victim was entrusted must necessarily account for the crime as he is supposed to have special knowledge about the

crime: 1989 Cr.L.J. (N.O.C.) 13: (1989) 1 Rec.Cr.R. 18 (P.&H.) (D.B.).

Where dowry death took place in the house of deceased's in-laws, *held*, onus was on the inmates of the house to explain circumstances leading to death: 1993 Cr.L.J. 1635: (1993) 2 S.C.C. 684: 1993 S.C.C. (Cr.) 655. Where in a prosecution for death in the Police custody, it was established that the deceased was taken into custody, *held*, onus was on the accused persons to show as to how the deceased went out of their custody: A.I.R. 1993 S.C. 2119: 1993 Cr.L.J. 2092.

Employing girl as prostitute—Onus is on accused to show absence of intention: 71 I.C. 232: A.I.R. 1922 Cal. 539. The presumption under S. 106 is very weak as compared to the presumption of innocence when the trial is one for murder. If an accused after a case has been proved against him withholds evidence in disproof, inference unfavourable to him may be drawn: 19 Cr.L.J. 81: (1916-17) 21 Cal.W.N. 1152.

Where prosecution failed to discharge the burden that the offence was committed by the accused and it sought to rely on the fact that accused gave false information to witnesses regarding the cause of death, *held*, the false information given by the accused would have the effect of being simply taken-in-aid to lend assurance to the prosecution story and could never form basis for drawing of inference that the accused and accused alone were guilty of the offence. It is only when the evidence led by the prosecution, if believed, will sustain a conviction or atleast makes out a *prima facie* case, that the question of accused discharging the burden under S. 106 arises. Therefore, there should be at least a *prima facie* case made out by the evidence let-in by the prosecution to take the false information given by the accused in-aid to lend assurance to the prosecution story: 1992 Cr.L.J. 1339: (1991) 2 An.L.T. 49 (N.R.C.) (D.B.).

The prosecution must establish, in a case of dacoity that the accused had conceived design for committing dacoity. It can only be established by proof of circumstances from which the intention can be inferred. Witnesses cannot give direct evidence as to the intention of the accused; and, if the legitimate inference from the circumstances which are established is that the intention of the accused was to commit dacoity, it is for them to prove that their intention was different. *Illus.* (*a*) of S. 106 makes this quite clear: 1960 B.L.J.R. 511: 1960 Cr.L.J. 1650: A.I.R. 1960 Pat. 582.

Prosecution proving that intention of crowd was to commit dacoity—Accused not proving contrary intention—Prosecution version can be accepted—Contrary suggestion by defence Counsel and not by accused cannot be accepted: 1968 Cr.L.J 996 (Guj.).

Where the accused and his companions had assembled at night for committing a dacoity, *held*, the burden lay on the prosecution to prove that the accused intended to commit dacoity and nothing else; it is not for the accused to show that their intention was different from that of committing dacoity. [A.I.R. 1943 Pat. 82, Expl.]: (1986) 34 B.L.J.R. 759: (1987) 2 Crimes 136: 1987 Cr.L.J. 1391.

When the prosecution alleges that the accused, a medical practitioner, did not have the academic credentials which he openly pretended to have, *held*, the burden of proving that he, in fact, possesses such degrees is on the accused and not on the prosecution to prove that he did not possess such degrees. It would be a simple task for the accused, if he actually holds those degrees, to prove it by production of the diploma or degree or any such document. The maximum which the prosecution can be expected to prove in such cases is to show that the accused used those degrees openly and to the knowledge of the public so as to make them believe that he is the holder of such degrees and the further fact that the enquiry revealed that the accused did not possess such degrees: 1989 Cr.L.J. 2025 (Ker.).

In a prosecution of a postman for having dishonestly mis-appropriated the amount entrusted to him for disbursement under a money order, payable to a student *M*, the accused admitted not having delivered the amount in question to the payee *M*. The story set up by him was that though he did not really pay the amount to *M*, and *M* did not append his signature on the money order form in his presence, he gave the amount of the money order at the house of *M* to a boy whom he did not know from before. The boy took the money order form and the money inside a room, and he later came back with the money order form duly signed and told the accused that the money had been paid to *M*. *M* denied receipt of the amount. He also denied his signatures on the money order form. Two other students, one of whom lived in the same room with *M* and the other in another room of the same tenement, were examined but they denied that they received or handed over to *M* the money order form or its amount. The accused did not produce the boy though whom he professed to have sent

the money order form and its amount into *M*'s room nor any other evidence in support of his statement. *Held* that the prosecution having proved, and the accused having admitted that the payment was not made to nor the money order signed by *M* or by the only two other students who lived in the same tenements, it was for the accused to prove who that boy was through whom the accused professes to have made the payment and obtained the signatures of *M*. The only possible boys known were produced by the prosecution. Who, the other particular boy referred to by the accused, was, could only be known to the accused. That was a fact which was especially within the knowledge of the accused, and burden of proving that fact, therefore, was upon the accused, within the purview of S. 106, Evidence Act: A.I.R. 1957 All. 381: 1957 Cr.L.J. 620.

Prosecution of Post Master for offence of forgery for having signed money order receipt as payee—Accused pleading *alibi*, *viz.*, he was not in village on date of signature—*Held*, S. 106 was not attracted and accused could not be asked to prove as to who signed the receipt and who were witnesses to it—Charge of forgery was, however, proved on other evidence: (1967) 1 Mys.L.J. 548: 1967 M.L.J. (Cr.) 501: A.I.R. 1967 Mys. 210.

Postmaster delaying entries in relevant registers regarding money received for remittance by money order—Proper inference arising from his conduct is that he has committed misappropriation and it is for him to establish his innocence: I.L.R. (1964) Cut. 57: (1964) 1 Cr.L.J. 688: A.I.R. 1964 Ori.152.

Criminal breach of trust by public servant—Misappropriation of money—What prosecution has to prove—Proof of manner in which money was misappropriated is not necessary—Burden of proof: I.L.R. (1963) Cut. 877.

Misappropriation and criminal breach of trust—Criminal breach of trust by public servant—Burden of proof—Burden rests on prosecution—S. 106, Evidence Act, 1872, does not affect prosecutions—Initial onus of proving guilt of accused: I.L.R. (1963) Cut. 197: (1964) 1 Cr.L.J. 339: A.I.R. 1964 Ori. 46.

Onus—Shifting of—Offence under S. 409, I.P. Code: 1967 Cr.L.J. 1168: A.I.R. 1967 Ori. 135.

Where it was established by unimpeachable prosecution evidence that the accused, Sub-Treasury Officer, in connivance with other employees had embezzled huge amounts by encashing fake demand drafts of the Reserve Bank of India and falsified accounts by making payments thereof to admittedly fictitious payees, and the accused did not disclose the names of the persons identifying the payees at the time of encashment of the fake drafts nor examined them in defence nor explained the shortages in cash balance clearly within his special knowledge under S. 106, *held*, the prosecution had clearly discharged its burden beyond all reasonable doubts: (1992) 3 S.C.C. 30: (1992) 3 Rec.Cr.R. 130.

The proved facts of the case were that the 1st respondent was handed over the money and he put it in the iron safe. The keys of the safe remained with him all through and, when he returned the next morning, the safe was found to be unlocked. *Held*, that it was within the special knowledge of the 1st respondent whether he had locked the safe or not, and that being the position, it was for him to prove that he had locked the safe: A.I.R. 1957 All. 363.

The accused was charged that he attempted to obtain from a person named *H*, for himself a gratification as a reward for inducing, by exercise of personal influence, a public servant, namely, the Magistrate, to show favour to *H* in connection with a criminal offence, the trial of which was pending before the Magistrate. The accused was alternatively charged with attempting to cheat *H* thereby attempting dishonestly to obtain money from him by representing that he was able to induce the Magistrate to show favour to *H*. The accused was convicted on the second alternative charge. The trial Judge held that whether or not the accused could induce the Magistrate to show favour to *H*, was a fact which was specially within the knowledge of the accused and that under S. 107 of the Singapore Evidence Ordinance (corresponding to S. 106, Indian Evidence Act and S. 106, Ceylon Evidence Ordinance) the onus was on the accused to prove that the accused could induce the Magistrate to show favour to *H*. *Held*, that under S. 107 of the Singapore Evidence Ordinance (corresponding to S. 106, Indian Evidence Act and S. 106, Ceylong Evidence Ordinance) the onus was on the accused to prove that the accused could induce the Magistrate to show favour to *H*. *Held*, that under S. 107 no burden was placed on the accused to establish that there had been no deceit. S. 107 did not cast burden on the accused to prove that no crime has been committed. The burden was on the prosecution to prove, affirmatively that there had been deceit. It should have been made to appear sufficiently on proved facts that the

accused had no reason to believe that he could have influenced the Magistrate. There being no evidence against the accused on the principle ingredient of the charge, namely, deceit, the case came within the range of those criminal cases in which Board of the Judicial Commissioner of the Privy Council interfered: (1958) 2 W.L.R. 599.

Offence under Explosives Act, S. 5(3)(*a*)—Explosion in licensed premises and death of minors—Failure to prove that the minors were actually employed in the manufacture of explosives or that explosives were manufactured at all on the day of occurrence—*Held* that it was for the prosecution to prove all the ingredients of the offence and S. 106 did not absolve it from proving its case: 1968 M.L.J. (Cr.) 730: A.I.R. 1968 S.C. 1273.

Where a person is charged with having been a member of an association declared unlawful by Government under the Criminal Law Amendment Act, the burden of proof is not on the accused to prove that he discontinued his membership. It is for the prosecution to prove that he continued to be a member even subsequent to the notification by Government. The Act imposes no obligation on the member to do anything specific to terminate the membership and so there is no question of there being anything especially within the knowledge of the accused: I.L.R. 55 Bom. 484: A.I.R. 1931 Bom. 129. As to burden of proof in the case of material alteration of documents, *see* I.L.R. 25 All. 580 (F.B.); I.L.R. 7 Mad. 302; I.L.R. 9 Mad. 399; I.L.R. 12 Mad. 239; I.L.R. 7 Cal. 616; I.L.R. 12 Cal. 313; I.L.R. 7 Bom. 418.

Charge against accused under S. 66(1)(*b*) of Bombay Prohibition Act (XXV of 1949) must be proved by establishing that the accused consumed liquor in prohibited areas —Prosecution cannot absolve of that obligation by resorting to S. 106: A.I.R. 1970 Guj. 131: 1970 Cr.L.J. 956: (1970) 11 Guj.L.R. 573.

Offence under Prohibition Act for consuming liquor—Burden of proof—State of drunkenness established by prosecution—Accused not submitting any explanation—He must be held guilty of offence: A.I.R. 1970 Assam 49: 1970 Cr.L.J. 563.

Prohibition cases—Proof as to place where offence committed—Onus: (1962) 3 Guj.L.R. 409: (1963) 2 Cr.L.J. 273: A.I.R. 1963 Guj. 234.

Illicit liquor recovered from box the key of which was with wife—Prosecution not proving that possession of liquor from wife was on behalf of accused—Conviction of accused is not sustainable: 1961 Ker.L.T. 584.

Where a person accused of lurking house-trespass by night pleads in defence that he had a specific intention in entering the house, *i.e.*, to carry on a love intrigue in secret and not intimidate, insult or annoy, the onus of proof is on him: 49 I.C. 103: I.L.R. 40 All. 221; I.L.R. 37 All. 395: 29 I.C. 67. *See* also I.L.R. 22 Cal. 164; I.L.R. 23 All. 124; I.L.R. 14 Rang. 666: A.I.R 1937 Rang. 83 (F.B.).

Intention or knowledge—Burden of proof—Accused firing pistol at close range resulting in superficial injuries due to defective ammunition—Knowledge—Burden of proof: A.I.R. 1958 All. 677: 1958 Cr.L.J. 1112.

3. Person includes juristic person.—Juridical persons are not exception—It is within special knowledge of Corporation, which of its officers acted in fraudulent manner: I.L.R. (1966) 1 Cal. 216. *See* also A.I.R. 1946 Pat. 184.

4. Corruption cases.—(*See* also Ss. 101-104, Note 33 and S. 105, Note 4, *supra*). Where the accused, a public servant, is found to be in possession of disproportionate assets, the burden is on him to satisfactorily account for his possession of such assets. However, the accused is not bound to prove his innocence beyond all reasonable doubt. All that he needs to do is to bring out a preponderance of probability: A.I.R. 1981 S.C. 1186: (1981) 3 S.C.C. 199: 1981 Cr.L.J. 884.

Question as to how the Government servant came into possession of property out of proportion to his admitted income—Onus. *See* A.I.R. 1954 Hyd. 28: I.L.R. (1953) Hyd. 648; A.I.R. 1960 S.C. 7.

5. In case of violation of order passed under Essential Commodities Act.—(*See* also Ss. 101-104, Note 45, *supra*). Where the cement seized was found to be levy cement which was in violation of Cl. 14(2), Orissa Cement Control (Amendment) Order, 1982, *held*, burden was on the accused to prove that cement was purchased in open market: (1989) 1 Crimes 84: 1989 Cr.L.J. (N.O.C.) 83 (Ori.).

A person transported what purported to be "broken rice" and a permit granted under

Cl. 3 of the Southern States (Regulation of Export of Rice) Order, 1964 which was found upon seizure and confiscation under S. 6-A of the Essential Commodities Act, 1955 to be an admixture of whole and broken rice, *held*, since the broken rice in the admixture, which should have been, in the common sense view, far less than the minimum of 50 per cent, and since the Miller had all along contended that "wholly broken" rice was being exported under the permit, the composition of rice was within their special knowledge; the seizure and confiscation was justified. [(1975) 2 A.P.L.J. 229, Reversed]: A.I.R. 1976 S.C. 1845: (1976) 3 S.C.C. 301: 1976 Cr.L.J. 1387.

Indirect evidence or circumstantial evidence, leading to irresistible inference of guilt is sufficient for a conviction even in murder cases, and much more so in less grave offences, like violation of emergency orders of State. Where an accused taking a permit for steel and iron for a specific purpose and undertaking to use the materials for the purpose and that purpose alone, and to return the permit in case the purpose had ceased to exist, had not admittedly utilised the materials for the purpose specified, *held*, the fact that the prosecution could not find out where the materials were and how they had been disposed of or used would not enable the accused to escape liability and punishment for the contravention of the permit. The accused had this special knowledge and hence would be liable under S. 106, Indian Evidence Act to be convicted for the contravention unless he proved that he had utilised the materials for the purpose granted. Courts should never fail to apply S. 106 of the Evidence Act to cases of special knowledge and burden of proof like this: (1951) 2 M.L.J. 199: A.I.R. 1952 Mad. 152.

Where the Rajasthan Milk (Export Control) Order, 1984 issued by the State Government was challenged as having been issued without the prior concurrence of the Central Government, *held*, such concurrence, if any, was within the special knowledge of the State Government and, thus, burden was on it to produce the same before the Court: A.I.R. 1986 Raj. 116: (1985) 1 W.L.N. 43.

6. Food adulteration.—(*See* also Ss. 101-104, Note 14(*e*), *supra*). Where in a trial for an offence under the Prevention of Food Adulteration Act, 1954 for selling sub-standard maida, the accused during the trial for the first time raised a plea that maida kept in his shop was not for human consumption but only for pasting purposes, *held*, the said fact being within the special knowledge of the accused, it was for him only to prove said plea which he failed to prove: 1992 Cr.L.J. 3930 (Mad.).

7. Custom cases.—(*See* also Ss. 101-104, Note 35, *supra*). Cases under the Sea Customs Act—Joint trial of accused persons for offences of smuggling goods under four enactments—Prosecution not relying on burden of proof being on accused under section but letting in evidence—Joint trial is not prejudicial to accused—Accused's case that they had no hand in smuggling—Burden is on accused to prove that fact: (1965) 1 Cr.L.J. 515 (Manipur).

Sea Customs Act, 1878, S. 167(8)—Burden of proof in respect of goods imported: (1964) 2 Cr.L.J. 507: A.I.R. 1964 Assam 121.

In proceedings for imposing penalties under S. 167(8) of the Customs Act, to which S. 178-A thereof does not apply, the burden of proving that the goods are smuggled goods is on the Department. However, it is not required to prove its case within mathematical precision to a demonstrable degree. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. The broad effect of the application of the basic principle underlying S. 106, Evidence Act to cases under S. 167(8) of the Customs Act is that the Department would be deemed to have discharged its burden if it adduced only so much evidence as is sufficient to raise a presumption in its favour with regard to the existence of the facts sought to be proved. [A.I.R. 1966 S.C. 1867; A.I.R. 1972 S.C. 2136, Rel. on; A.I.R. 1961 S.C. 264, Disting.]: A.I.R. 1974 S.C. 859: (1974) 2 S.C.C. 544.

Proceedings under—Nature of—Contravention of order of prohibition—Onus—Department should prove importation of goods contrary to order—Plea of *bona fide* purchase—Rejection of, not sufficient to discharge burden: (1962) 1 Cr.L.J. 269: A.I.R. 1962 Assam 39.

Where on search by Excise Officials, the accused opened with his own key an iron safe and recovered from its secret chamber a bundle containing gold biscuits with foreign

markings, admitted to have been brought from abroad and his having no import permit, but his plea was that some unknown person had delivered the gold to him, *held*, the accused knew but did not disclose name of the person who had given him the gold; he also knew that the gold was smuggled; he must have known whether the person who delivered the gold to him had brought it with or without permit; there is no reason why the prosecution cannot call into aid the combined effect of presumption under Ss. 106 and 114 of the Evidence Act; the charge under S. 135(*b*)(*ii*) of the Customs Act, 1962 stood clearly proved: A.I.R. 1980 S.C. 793: (1980) 2 S.C.C. 262: (1983) 13 E.L.T. 1631. *See* also A.I.R. 1975 S.C. 2083: (1983) 13 E.L.T. 1558; A.I.R. 1975 S.C. 182: (1983) 13 E.L.T. 1603: 1975 Cr.L.J. 240: (1975) 3 S.C.C. 495.

Smuggled gold—Burden of proof—Burden when shifts. *See* I.L.R. (1979) Bom. 329.

Foreign Exchange Regulation Act, 1947, S. 8—Burden is on petitioner to prove his allegation that gold had been in his possession inside India even before customs barrier came to exist: (1963) 1 Cr.L.J. 203: A.I.R. 1963 Manipur 1.

8. Accident cases.—(*See* also Ss. 101-104, Note 16, *supra*). Ordinarily, a plaintiff or a claimant must prove every pie of his claim to the hilt and the burden lies squarely on him to plead and prove his claim but S. 106 provides an exception to the general rule. Where plaintiff claimed a higher amount than the one prescribed under S. 95(2)(*a*) of the Motor Vehicles Act, 1939 as compensation and the amount of policy was not disclosed by any of the parties, *held*, it was the duty of the Insurance Company to disclose the amount of the insurance policy and bring on record the policy itself. [A.I.R. 1971 Mad. 143 (F.B.), Disting.; A.I.R. 1971 S.C. 1624, Rel. on]: A.I.R. 1980 All. 397: 1980 All.W.C. 427 (D.B.).

Where in a motor accident case the plea of Insurance Company was that its liability was limited only to the amount on the "Act only" policy, but neither the policy nor any other evidence was produced to support the contention, *held*, the duty and the burden to prove the same was on the Insurance Company. [A.I.R. 1971 Mad. 143, Disting.; 1977 Acc.C.J. 501 (P.&H.); A.I.R. 1984 P.&H. 223, Rel. on]: A.I.R. 1986 Del. 403.

Where a vehicle was wrongly described as a truck and not tanker in the proposal and the insurer sought to avoid its liability under the policy on that count but did not examine the Agent despite contention that misdescription was to the agent's knowledge, *held*, S. 106 was attracted; the burden lay on the insurer to prove that the agent had no such knowledge: A.I.R. 1984 N.O.C. 100 (P.&H.).

The normal rule that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*, *i.e.*, the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Where a car is driven by a person other than the owner, the presumption is raised that the driver of the car is the servant or agent of the owner. Where driver of a scooter caused an accident and the insurance company sought to disown its liability on the ground that the driver was not holding a driving licence, *held*, the burden to establish that driver was not holding a licence to drive a vehicle was on the Insurance Company. The Court held that a mere averment to that effect in the written statement and a mere suggestion to a party in that behalf in cross-examination is not sufficient to discharge the said duty: (1985) 26 Guj.L.R. 1242: (1985) 5 Guj.L.H. 263.

Claim for compensation under Motor Vehicles Act—Burden of proof—Shifting of onus: A.I.R. 1969 Del. 183.

Where in a motor accident case, the plaintiff sitting in the bus received injuries when said bus collided with a truck coming from opposite side, *held*, the factors that led to the accident were in the special knowledge of the two drivers. The circumstances, therefore, called for an explanation from them and if they failed to place the relevant facts before the Court, adverse inference must be drawn against them: A.I.R. 1974 Madh. Pra. 68: 1974 M.P.L.J. 16 (D.B.).

Negligence—Rash and negligent driving—Proof—*Res ipsa loquitur*—Bus turning

turtle—Fact speaks for itself—Best evidence against negligence would be of driver himself—Omission to examine him—Effect: (1965) 67 Punj.L.R. 1064.

(English) Road Traffic Act, 1930, Ss. 11(1) and 49(*b*)—Dangerous driving—Plea that accused was in a state of automation—Burden of proof. *See* (1958) 2 W.L.R. 76.

Where in a case under S. 304-A, I.P. Code, the evidence of the witnesses who saw the accident was to the effect that a lorry with a large number of persons on it ran over a little girl but there was no evidence on the record though evidence could be available as to who was the person who was driving the lorry at the relevant moment, S. 106 does not entitle the Court to say that the fact as to who was driving the lorry at that time was within the special knowledge of the accused and that the burden of proving that fact was upon him. The ordinary rule that applies to criminal trials that the onus lies on the prosecution to prove the guilt of an accused is not in any way modified by the provisions contained in S. 106. This section on the other hand is to be taken alongwith the provisions of that general rule: A.I.R. 1949 Cal. 235: 50 Cr.L.J. 456.

9. Damages.—(*See* also Ss. 101-104, Note 36, *supra*). Where the plaintiffs filed a suit for realisation of certain sum from the defendants for damages caused to his premises owing to carrying out of underground mining operation in an unscientific manner by the defendants, *held*, as the defendants had special knowledge as to whether it had carried out the mining operation scientifically or not, the burden to prove the same was on the defendants: (1992-1) 40 B.L.J.R. 267.

The responsibility of the Railway Administration in respect of goods booked under Railway risk is that of a bailee. The administration must, therefore, take as much care of the goods while under its control, as a man of ordinary prudence would take of such goods and would be liable for the loss, destruction, etc., if it happens by its default or negligence. It is not for the plaintiff, in the first instance to prove, when loss or destruction occurs as to how it happened. He has, no doubt, to satisfy that the defendant-administration was negligent; but the duty of showing how the consignment was dealt with during transit lies on the Railway Administration as matter within its special knowledge and when that has not been done to the satisfaction of the Court, it is entitled to presume negligence on the Part of Railway Administration: 1966 Mad.W.N. 196: (1966) 79 Mad.L.W. 237: (1966) 2 M.L.J. 16: A.I.R. 1966 Mad. 381.

In case of discrepancy between the entry of the goods despatched as recorded on the Railways Receipt and the goods actually found on opening of the wagon, *held*, *prima facie* duty is cast on the Railway Administration to explain it; the Railway Receipts could not be prepared or issued if the goods mentioned therein were not factually produced and weighed; non-examination of the consignor in the circumstances did not absolve the Railway Administration of its burden to prove the discrepancy which is in its special knowledge: A.I.R. 1973 Mad. 331: (1973) 86 Mad.L.W. 135 (D.B.).

The Railway Administration's general responsibility, prior to 1961, for loss, destruction or deterioration of animals and goods carried by it was, subject to other statutory provisions, that of a bailee; there are, however, two exceptions under S. 74-A and S. 74-C of the Railways Act, 1890; the Administration is not liable if as per the consignor's recorded note, the goods were not properly packed; and if goods are carried at the owner's risk, the Administration shall not be liable except on proof of negligence on its part; thus, the burden to prove negligence in both such cases would lie on the consignor and not on the Administration. [A.I.R. 1917 P.C. 173, Foll.; A.I.R. 1951 Assam 173, Not Foll.; A.I.R. 1950 Cal. 394; A.I.R. 1960 Mad. 149; A.I.R. 1970 Pat. 182, Disting.]: A.I.R. 1971 Cal. 515: (1970-71) 75 Cal.W.N. 634 (D.B.).

Where the requisite notice under S. 78-B of the Railways Act, 1890 was issued to various authorities including the Chief Commercial Superintendent and the General Manager by a letter repudiated the claim the wording of which clearly revealed that this letter was issued only after receiving the correspondence addressed by the claimant, *held*, it must be presumed that the notice must have reached the appropriate authorities under the General Manager required to deal with the claim; the onus would lie on the Railways, and not on the claimant, to prove as to when the notice was served; it is the Railways which have special knowledge of the same: A.I.R. 1971 Assam 41: 1970 Assam L.R. 41.

Plaintiff exercising his option to sue defendant Railway Administration—Failure to discharge onus under S. 80 of the Railways Act—Plaintiff cannot take advantage of S. 106, Evidence Act: A.I.R. 1960 Ori.100.

Suit against Railways for damages for short delivery of goods—No *prima facie* proof of negligence or misconduct on the part of the Railway adduced by the plaintiff—No duty lies on the Railway Administration to call material witnesses to prove facts which may be within its special knowledge: 1964 Raj.L.W. 212.

Goods carried by Railway at owner's risk-Damage to goods in transit—Suit for damages—Evidence to show how goods are dealt with in course of transit—Burden of proof: A.I.R. 1964 Punj. 147.

Applicability—Consignment booked at owner's risk rate—Damages to goods in transit—Responsibility of Railway—Negligence on the part of Railway Administration or its servant must be proved—Disclosure as to how consignment was dealt with in course of transit—Railway is not bound to disclose where Cls. (*a*) and (*b*) of S. 74-D are not applicable—No disclosure sought for by plaintiff—Adverse inference cannot be drawn against Railway: A.I.R. 1970 Pat. 182: 1969 Pat.L.J.R. 399: 1969 B.L.J.R. 871 (D.B.).

Goods booked under Railway risk—Liability of Railway Administration—Loss of goods—Onus of proof: A.I.R. 1957 Cal. 190.

When goods are carried at the Railway risk, the special facts and circumstances under which the consignment was handled are only known to the Railway Administration, and, therefore, it is for them to place that material before the Court for forming its opinion on the question whether it had taken as much care of the goods as is required of them. Non-production of record by Railway Administration justifies the raising of an adverse inference against them: A.I.R. 1971 Madh. Pra. 131: 1970 M.P.L.J. 758. *See* also A.I.R. 1957 Nag. 59.

Facts within the knowledge of Railway Administration—Railway Administration must prove such facts: A.I.R. 1967 Del. 153.

Negligence—Consignor claiming damages alleging misconduct or negligence on the part of Railway—Railway not adducing evidence negativing misconduct or negligence—*Held*, negligence was established by inference: 1964 All.L.J. 802: A.I.R. 1965 All. 246.

Goods sufficiently packed and carried at owner's risk rate delivered short—Consignor should under S. 74-C, prove negligence or misconduct on the part of Railway or its servants—Railway should under S. 74-D disclose how the goods were dealt with while in its custody—If no such disclosure is made, consignor can ask Court to infer that such disclosure, if made, would have proved negligence or misconduct of Railway or its servants: 1966 All.W.R. (H.C.) 651.

Burden of proof of parties under—Not overridden by S. 74-D of the Railways Act, 1890: A.I.R. 1967 Guj. 130.

Where there is a loss of a portion of the contents of a package in a transit, according to the normal rule embodied in S. 106 of the Evidence Act, it is only the Railway Company which could have special knowledge of the manner in which the goods got missed in transit. The consignor can have no knowledge about this: A.I.R. 1951 All. 438: 1951 All.L.J. 350.

Where cotton unloaded on the platform was not removed to the shed and was damaged by fire within the transit period and the Railways denied negligence by ascribing it to sheer accident and pleaded having taken fire-extinguishing measures when fire had almost spread to all the bales, *held*, the three essential ingredients of the maxim *res ipsa loquitur* were satisfied, and read with S. 114(*g*), the Railways were liable for the loss; for the liability rested on them to prove that they were not negligent; the facts being within their special knowledge, the burden of proof lay upon them: (1977) 90 Mad.L.W. 438.

Short delivery and loss of goods in transit. It is true that in a suit for damages for loss of goods in transit it is for the plaintiff to prove that the loss occurred due to the negligence or want of skill of the defendant carrier. But it is the duty of the carrier to show how the consignment was dealt with during transit as that is a matter within the special knowledge of the defendant or its servants and agents. The defendant must first adduce evidence disclosing its treatment of the goods and the plaintiff may rely on that evidence in addition to any tendered by him to show that the loss had occurred by reason of the

defendant's default or negligence or that the loss could not have occurred but for such default or negligence. If the defendant does not adduce all the evidence at its command the plaintiff may, in proper case, ask the Court to make a presumption under S. 114(*g*) and to come to the conclusion that the evidence which has been withheld would have gone against the defendant: A.I.R. 1964 Cal. 362.

Insurance of goods sent by Railway—Policy covering risk of theft—Risk was to last only for three days after arrival of train at destination and no liability for loss would attach unless notice was given within 10 days of said risk to company—Assured not able to show date of arrival—*Held*: (*i*) Onus of proving as to when train arrived at destination lay on assured, (*ii*) (Per *Tarkeshwar Nath, J*). Stipulation of giving notice was essential condition and assured must prove that it was complied with before saddling company with liability for loss: A.I.R. 1966 Pat. 69.

Loss of goods in transit—Certain fact cannot be said to be blameworthy or has fallen into error of law: (1963-64) 68 Cal.W.N. 532.

Res ipsa loquitur—Applicability of maxim—Burden of proof of negligence: A.I.R. 1962 Cal. 544.

The burden of proving exact date of a mortgage transaction entered into orally being not peculiarly within his knowledge does not lie on the mortgagee: 115 I.C. 451: A.I.R. 1929 All. 209. Though in cases alleging negligence against a public body, the burden of proving negligence lies on the plaintiff yet the provisions of S. 106 must be borne in mind. The fact that the burden of proving negligence may be on the plaintiff does not necessarily preclude the burden of proving any particular fact being upon the defendant public body: A.I.R. 1940 Sind 254. Bailment—Hire of elephant for term of one year—Death of elephant before expiry of period of hire—Claim to damage—Negligence of bailee—Burden of proof. *See* A.I.R. 1937 Mad. 411: (1937) 2 M.L.J. 329.

Where in a suit by the insurer, subrogating the assured, there was admission by the common carrier in the written statement that goods delivered to it were lost because of an accident, *held*, it is for the carrier to establish absence of negligence; all facts relating thereto are in the special knowledge of the carrier; S. 106 is clearly attracted: A.I.R. 1993 Cal. 26.

When the goods are solely under the control of the bailee, the fact as to when loss, destruction or deterioration occurred is a matter specially within his knowledge and therefore, the burden of proving that the loss occurred at a particular time and not subsequently must be on him: 1932 All.L.J. 798: A.I.R. 1932 All. 584.

When fire breaks out in the premises under the control of the bailee, as between the parties to the case, bailee alone will be in a position to explain the cause of the fire. It is a fact specially within his knowledge and, therefore, under S. 106 of the Evidence Act, burden of proving of that fact will be upon him. Similarly, burden of proving that he had taken all reasonable precautions which an ordinary man of prudence would take is also on him. Plaintiff may show that the bailee has failed to place before the Court all materials available to him under S. 106 of the Evidence Act and ask the Court to presume that if produced, such documents may go against the bailee. He may also show that on the materials produced, it could be seen that the bailee has not taken as much care as is required under law: A.I.R. 1983 Ker. 154: 1983 Ker.L.T. 562: I.L.R. (1983) 1 Ker. 751 (D.B.).

Damage to goods by fire—Lack of sufficient care by bailee—Burden of proof: (1963-64) 68 Cal.W.N. 544: A.I.R. 1964 Cal. 374.

If no risk-note is signed by a consignor of goods sending them by Railway, then under S. 106, Evidence Act, it is for the bailee (*i.e.*, Railway) to whom the goods have been entrusted for delivery to prove that the loss caused was not through its negligence, as the matter lies especially within its knowledge and it is not possible for the consignor to prove what occurred during the transit to cause the loss: I.L.R. (1956) Hyd. 34: A.I.R. 1956 Hyd. 193.

Where goods have been entrusted to a carrier for being booked and he fails to book them and they are lost, he is in special knowledge and is bound to explain their missing under S. 106 of the Evidence Act and when he fails to explain, the presumption under S. 106 of the Evidence Act can be applied against him: (1951) 1 M.L.J. 53: A.I.R. 1952 Mad. 322.

Where an instrument hired by a person was for all practical purposes in his exclusive possession, it is for him to explain how it

came to be damaged. It is for him to establish that it was a case of ordinary wear and tear and not of carelessness or negligence in any degree: 184 I.C. 36: A.I.R. 1939 Sind 245.

Where *A* hires temporarily a bicycle from *B* and alleges that he has lost it, the burden of proof of showing that the bicycle hired was lost is on *A* as it is a fact which is purely within the knowledge of *A* and as *B* cannot be expected to know which bicycle is lost and under what circumstances: A.I.R. 1957 Mys. 55: I.L.R. (1956) Mys. 281.

Collapse of building—Loss of life—Suit for damages—Question of negligence—Onus of proof: A.I.R. 1960 Punj. 300.

The proved facts of the case were that the 1st respondent was handed over the money and he put it in the iron safe. The keys of the safe remained with him all through and, when he returned the next morning, the safe was found to be unlocked.

Held, that it was within the special knowledge of the 1st respondent whether he had locked the safe or not, and that being the position, it was for him to prove that he had locked the safe. Further, the presumption of negligence would arise from the proved facts of the case and it was for the 1st respondent to rebut that presumption: 1958 All.W.R. (H.C.) 367: (S.) A.I.R. 1957 All. 363.

Both parties giving evidence—Question of onus—Bailor and bailee: A.I.R. 1956 Assam 188.

10. *Mesne profits*.—(*See* also Ss. 101-104, Note 72, *supra*). The burden of proof, as a matter of law, in an application for ascertainment of *mesne profits* as in any other case, lies on the plaintiff who substantially asserts that he is entitled to *mesne profits*. The burden of proof as a matter of adducing evidence (onus of proof) shifts from one party to the other depending upon the weight of evidence adduced. If so the burden of proof lies on the plaintiff who seeks to claim *mesne profits*. The onus of proving the amounts actually received lies on the defendant as that matter is within his knowledge. But even in case of profits that the defendant might have received, though initially the onus might lie on the plaintiff, it may shift to the defendant if the former has adduced some evidence, direct or circumstantial, raising a presumption in his favour. But the question of burden of proof becomes immaterial if both parties have adduced evidence and the Court is called upon to ascertain profits on the basis of the evidence so adduced: A.I.R. 1959 Andh. Pra. 64: (1958) 1 An.W.R. 427.

Where the plaintiff says that he is entitled to *mesne profits* at a particular rate, it would mean profits which a person in occupation might with ordinary diligence have received. But profits actually received also are within the contemplation of *mesne profits* and the burden of proving profits actually received is upon the person who has been in possession of the property. It is fair to presume that the person in possession may by ordinary diligence get rent according to the prevailing rates. Therefore, the plaintiff would be entitled to get the *mesne profits* calculated or arrived at on the basis of the prevailing rates or on the basis of what the person in occupation had actually received: 1961 An.L.T. 205: A.I.R. 1961 Andh. Pra. 428.

In a suit for *mesne profits*, if the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge. On his laying before the Court sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that more might have been received: I.L.R. 57 Mad. 49: A.I.R. 1933 Mad. 825: 66 M.L.J. 263. *See* also I.L.R. 21 Pat. 735.

In a suit for *mesne profits*, the burden of proof depends on the nature of the claims made by the plaintiff. If the plaintiff limits his claim to the actual profits which the defendant is said to have received, obviously, in such a case, as the defendant is the person who had special knowledge of the actual receipt of profits received by him, the burden would lie on him to prove the actual receipts made by him by virtue of the provisions of S. 106. If, on the other hand, the plaintiff wants to make the defendant liable for profits which the defendant ought to have received by the use of ordinary diligence, it cannot be said that it is a matter within the special knowledge of the defendant and the burden of proof would rest on the plaintiff to prove the probable receipts in respect of the disputed property: (1949-50) 54 Cal.W.N. 355: A.I.R. 1950 Cal. 87.

Mesne profits—Determination—Burden of proof—Improvement by trespasser—Waste

by trespasser: A.I.R. 1966 Ker. 286.

Suit by one co-owner against another who is in exclusive possession of joint property for his share of *mesne profits*—Burden of proving quantum of *mesne profits* actually realised by defendant lies on defendant: I.L.R. (1953) Mys. 244: A.I.R. 1953 Mys. 139.

For computing *mesne profits* recoverable from the landlord for the period he kept his tenant deprived of the enjoyment and possession of the demised premises, the rent payable by the tenant therefor is ordinarily a good measure; but if the landlord had earned more by the use of the premises, *held*, the burden would lie on him, because of its being within the landlord's special knowledge, to prove the same; it is only after such proof that the onus would shift to the tenant to rebut it: A.I.R. 1972 Del. 11.

11. Land acquisition cases.—(*See* also Ss. 101-104, Note 63, *supra*). Where Government acquired impugned lands and it was contended that there was no urgency which required an action under S. 17(1) of the Land Acquisition Act, 1894, *held*, the initial burden of proof to show urgency was on the Government. But after it was discharged it was then for the petitioner to show that urgency did not exist. [A.I.R. 1977 S.C. 183, Foll.]: A.I.R. 1979 Del. 84 (D.B.).

Grant Land Acquisition Officer having access to all relevant documentary evidence, not for a moment doubting that there was grant of minerals—Question of such grant not traversed before District Judge—It must be assumed that Land Acquisition Officer was fully aware that question of grant to minerals was not controverted: (1967) 1 Mys.L.J. 159.

Proof of contents of document—Person with knowledge must be examined—Land acquisition—Higher rate claimed—Onus of proof on claimant: A.I.R. 1969 Guj. 270.

Land acquisition proceedings—Affidavits—Proposed acquisition impugned as in colourable exercise of power—Respondent is required to disclose relevant material: (1966-67) 71 Cal.W.N. 499.

Non-statement of claim pursuant to notice under S. 9, Land Acquisition Act—Burden is on claimant to prove sufficient cause for omission: A.I.R. 1969 Andh. Pra. 124.

12. Landlord and tenant.—(*See* also Ss. 101-104, Note 43, *supra*). The initial burden of proof on the landlord when he makes a petition for permission to file a proceeding against the tenant for eviction, is to aver and to prove that the relationship of landlord and tenant exists between the parties and that the tenant is in occupation of the premises of the landlord, and also that the tenant is in possession of means to find alternative accommodation. He may make such averment according to such knowledge and belief as he may have entertained in this respect. But there may be honest cases in which landlords would not really know anything about the means of the tenant. In such cases, the landlords may truthfully say that they do not know if the tenant is in possession of the means to find alternative accommodation. The income of the tenant is a fact which is especially within his knowledge. The burden of proving the same is, therefore, on him. If therefore, neither the landlord nor the tenant adduced any evidence as to the income of the tenant, it is the tenant whose defence will fail and the landlord would obtain a permission for filing an eviction petition against him in view of S. 102 of the Evidence Act. [A.I.R. 1974 Del. 219, Rel. on]: A.I.R. 1974 Del. 221: 1974 Ren.C.R. 288.

The landlord in his application under S. 19 of the Slum Areas (Improvement and Clearance) Act, 1956 has to aver that the tenant against whom he seeks to institute proceedings for eviction is one to whom alternative accommodation, within his means, would be available if he were evicted. The burden then shifts to the tenant, and it is for him to adduce positive and satisfactory evidence regarding his income which is especially within his knowledge: A.I.R. 1973 Del. 71: (1972) 74 Punj.L.R. 253: 1972 Ren.C.R. 764.

For the determination of the means of a tenant for finding alternative accommodation if he be evicted from a shop let to him by the landlord not only the actual income earned by the tenant could be taken into account but also such other contribution or other payments of money made to the tenant by other members of the family or any other person which go to constitute his total means which would be available to him for finding out alternative accommodation if he may be evicted from the shop let out to him. It is not necessary that a person who may augment the means of the tenant must be a co-tenant. If a tenant does not show that income of all family members was not being pooled for

meeting family expenses then tenant's means would be income of all. If members contribute definite sum then only such sum can be added to tenant's income. But such a presumption cannot be drawn when tenancy is of a commercial premises and tenant is individually doing business.

The landlord can shift the onus on the tenant by merely saying that he does not know what the income of the tenant is or he may say that according to his information the tenant's income reaches a certain figure. The burden resting on the tenant has to be discharged by a proper statement of the means by the tenant. When the tenant filed her own affidavit and that of the person employed her and her husband also filed an affidavit then looking to the nature of the business of a petty shop-keeper it cannot be expected that accounts would be maintained. It would be unrealistic for the competent authority to expect production of account books for such petty traders, particularly when such particulars can be taken from the fact stated in the affidavits: (1977) 13 Del.L.T. (S.N.) 15 (D.B.).

A landlord seeking his tenant's eviction for default, shall have initially to lead evidence of default; once he *prima facie* shows that the defendant is a defaulter, the onus to prove payment would be on the defendant for the simple reason that payment of rent is specifically within his special knowledge and the burden to prove it would be upon him. But the question of onus would shift to the background when the parties have led evidence: 1981 B.L.J.R. 649.

Where landlord files a suit for eviction on the ground of non-payment of rent and the tenant comes forward with the allegations that the rent was paid but no receipt was issued with no explanation whatsoever, for not sending the rent by money order, *held*, in such a situation, the oral testimony of the tenant in regard to the payment of rent cannot be deemed to be worth reliance at all. [(1993) 1 J.T. (S.C.) 162: 1993 A.I.R. S.C.W. 743 and (1989) 1 All. Ren.C. 540, Rel. on]: A.I.R. 1994 All. 59.

In an eviction proceedings tenant contended that he used the shop for whole-sale business and there was no non-user of the shop, *held*, the question that the shop had not been used without reasonable cause was within the special knowledge of the tenant and thus, the burden was on him to prove the same. [A.I.R. 1967 S.C. (Notes) 406; (1979) 1 Ren.C.J. 86, Rel. on]: 1982 Raj.L.W. 274.

The exact date of sub-tenancy is a fact which can be within the exclusive knowledge of the sub-tenant only. Thus, the onus of proving the date of the sub-tenancy must, therefore, be upon sub-tenant only: A.I.R. 1981 Bom. 446.

Where appellant-tenant was sought to be evicted on the ground that he had sub-let the shop in dispute without the consent of plaintiff-landlord and the tenant pleaded the existence of joint-tenancy, but he failed to produce any evidence in that regard, *held*, once it was found that the other person was not tenant in shop in dispute in joint capacity and was in possession thereof, it was for the appellant, within whose knowledge the specific facts and the evidence was, to show the capacity in which the other person was occupying the impugned shop. The best evidence being available with the appellant and he having not produced the same, adverse inference had to be drawn against him: A.I.R. 1995 Raj. 167.

Landlord alleging creation of illegal sub-tenancy by the tenant and placing material showing it *prima facie*—Tenant and sub-tenant denying creation of sub-tenancy—Burden shifts on tenant to show by material within his knowledge how alleged sub-tenant occupied premises—Tenant leading no evidence—Landlord entitled to decree for eviction on ground of illegally sub-letting—Lower appellate Court wrongly placing burden on landlord to prove sub-tenancy—There is error justifying interference in second appeal: 1963 M.P.L.J. (Notes) 269.

In a suit for eviction landlord alleged that the tenant had sub-let the premises to a firm, *held*, the question as to whether the occupier were parting with some money for the use of the disputed premises or not, was a fact which was within the special knowledge of the tenant and the occupier, the burden was on them to bring the facts before the Court. [1965 Cur.L.J. 341 (Punj.); 1975 Ren.C.J. 651 (Punj.); A.I.R. 1974 S.C. 280 and 1976 Ren.C.J. 87 (Punj.), Disting.]: A.I.R. 1978 P.&H. 186: (1978) 80 Punj.L.R. 275.

In an ejectment proceedings on the basis of sub-tenancy, and the claim of the defendant sub-tenants that they were the tenants of the predecessor-in-interest of the landlord was also negatived, *held*, an inference could be drawn that the defendants were occupying the premises as sub-tenants and the burden was on the tenant to prove relationship between him and the persons occupying the premises. [1963 M.P.L.J. (Notes) 269; A.I.R.

1956 Madh. Pra. 121; 1961 M.P.L.J. (Notes) 233, Rel. on]: A.I.R. 1972 Madh. Pra. 209: 1972 M.P.L.J. 91: 1972 Jab.L.J. 121.

In an eviction proceeding on the ground of sub-letting under S. 10(2)(*ii*)(*a*) of the T.N. Buildings (Lease and Rent Control) Act, 1960, *held*, their relationship being in the special knowledge of either of them, the burden would lie upon them that they are not related as tenant and sub-tenant and not upon the landlord; on a complete stranger being found carrying on separate business on the demised premises without any satisfactory explanation for his presence, an inference of his being a sub-tenant is justified: (1986) 99 Mad.L.W. 1064.

Transfer of right in lease or sub-letting—Burden of proof—Transfer of possession by tenant to third person—Presumption: I.L.R. (1969) 2 Ker. 575.

Tenant claiming exemption from eviction under special statute—Burden lies on him to bring himself within the exception—Landlord and tenant—Tenant claiming exemption from eviction under Kerala Land Reforms Act (I of 1964)—He has to show that he is a Kudikidappukaran within the meaning of that Act—Burden cannot be placed on landlord to show that value of building is such that Act does not apply on the ground that he has special knowledge of its value: 1969 Ker.L.R. 712: 1969 Ker.L.T. 524.

13. Election matter.—(*See* also Ss. 101-104, Note 44, *supra*). Though an election petition may not be akin in all respects to a criminal trial, but the burden of proof nevertheless lies on the election petitioner to prove each and every ingredient of the electoral misconduct; even if such an ingredient is pre-eminently within the knowledge of the returned candidate, it will not relieve the election petitioner of his primary burden though the quantum of proof may be affected; the petitioner has to adduce at least *prima facie* evidence: A.I.R. 1975 S.C. 667; A.I.R. 1985 N.O.C. 44 (Del.).

Election disputes—Allegation of corrupt practice—Nature of proof required—Burden of proof: A.I.R. 1964 Ori. 8. Corrupt practice under—Representation of the People Act, 1951, S. 123(4)—Burden of proof: I.L.R. (1964) 14 Raj. 107: A.I.R. 1964 Raj. 184.

Election—Charge that election expenses did not show certain expenditure—Onus: (1960) 1 M.L.J. 100: A.I.R. 1960 Mad. 170.

14. Suit for specific performance.—(*See* also Ss. 101-104, Note 32, *supra*). In a suit for specific performance of a contract, *held*, the facts of his being ready and willing to perform his part of the contract, being within the special knowledge of the plaintiff, he must plead and prove them, and though the non-denial of said plea by the defendant may be taken into consideration in appraising the evidence, but that does not absolve the plaintiff from adducing evidence of his being so ready and willing: (1993-1) 108 Mad.L.W. 219 (D.B.).

15. Income.—In a suit for maintenance, the plaintiff is not supposed to prove a thing which, under the circumstances, is impossible for the plaintiff to prove, especially when the facts regarding the income are within the special knowledge of the defendant-husband. When the question regarding the proof of the income is to be determined, in such circumstances the plaintiff can only give the figure on guesswork and not the exact figure: A.I.R. 1985 Guj. 187: (1985-1) 26 Guj.L.R. 374: (1985) 2 Hindu L.R. 29; (1990) 3 Crimes 268 (Cal.).

In a proceeding for maintenance *pendente lite* under S. 24 of the Hindu Marriage Act, 1955, *held*, the onus is upon the husband to disclose his income but where he failed to do so and also did not specifically deny the amount alleged by the wife to be his income, the Court would have to go by such alleged income: A.I.R. 1988 Cal. 98: (1988) 1 Hindu L.R. 677 (D.B.).

In a proceeding for grant of *interim* alimony under S. 24 of the Hindu Marriage Act, 1955, *held*, the onus lies on the husband to disclose his income which is especially within his knowledge: A.I.R. 1994 N.O.C. 61 (Raj.); (1980) 17 Del.L.T. 63 (D.B.).

Where the wife by an application to the Court required the husband to produce documentary evidence like title deeds of his properties, pass books of his bank accounts, profit and loss accounts of business concerns wherein he had pecuniary interest but the husband declined to prove on the abstract doctrine of the burden of proof lying on the wife but produced only his income-tax returns, *held*, the facts sought to be proved by the wife were within the husband's special knowledge; the husband had to prove his sources of income and assets; the presumption clearly goes against him that the documents if produced would have gone against him: (1994-1) 14 Guj.L.H. 78.

Where the debtor-defendant claimed protection under Maharashtra Debt Relief Act, on the ground that he was a genuine worker but he failed to give any particulars about his income, *held*, it was obligatory on the part of the debtor-defendant to set out the details of

his income on such particulars which were within the knowledge of the debtor-defendant himself: (1983) 1 Bom.C.R. 345.

16. Employer and employee.—(*See* also Ss. 101-104, Notes 50 and 62, *supra*). Breach of contract of employment by employer—Salary payable to employee—Existence of mitigating circumstances—Burden of proof: 1969 Lab.I.C. 1324: A.I.R. 1969 Bom. 373.

Where in a suit by an employee for a declaration that the orders of suspension and dismissal were illegal and *ultra vires*, the defence is that the orders were proper and justified inasmuch as plaintiff was guilty of misconduct, the circumstances justifying the dismissal are within the special knowledge of the defendant on whom therefore, lies the onus to establish the justification and accordingly it is for the defendant to give evidence on the issue relating to the question at the first instance: 1956 B.L.J.R. 59: A.I.R. 1957 Pat. 145.

Where the State Government did not prove that the charge-sheet and suspension order were based on the preliminary enquiry held by authorised persons, *held*, such charge-sheet and order stood vitiated: A.I.R. 1981 Raj. 298: 1981 Raj.L.W. 355 (D.B.).

Where the deceased-employee met with an accident and died while discharging his duties, *held*, only the employer through its concerned employees could have personal knowledge about the accident and, thus, the burden would be on the employer to point out as to how and under what circumstances death of the deceased occurred: (1986) 6 Guj.L.H. 27: (1985) 26 Guj.L.R. 1315 (D.B.).

Whether an establishment at the material time had employed twenty or more persons is certainly within special knowledge of the employer, and the initial onus is on him and as such he should be asked to discharge the same: 1975 Lab.I.C. 1162 (Cal.) (D.B.).

17. Principal and agent.—Presumptions—Implied authority of agent—Extent of—Agent having authority to take delivery of goods and to sell them at any price he chooses—Presumption as to implied authority—Limitation on implied authority of agent—Burden of proof—Non-production of agent as witness—Adverse presumption against principal when can be raised: A.I.R. 1965 All. 34.

Scope of agent's authority to bind principal—Presumption—Onus on Principal to prove limited authority of agent—Landlord appointing Tahsildar to manage agricultural lands—Tahsildar letting out lands on bhag for proper cultivation—Transaction within scope of Tahsildar's authority—Implied holding out by landlord—Landlord bound by Tahsildar's acts—Landlord and tenant: I.L.R. (1962) Cut. 564: A.I.R. 1962 Ori. 164.

Where an agreement, executed by the Sub-Divisional Controller on behalf of the State in matters of relief *ex facie* not disclosing his authority therefor, was impugned as invalid for non-compliance of the mandatory requirements of Art. 299(1) of the Constitution by the State as he was authorised only to execute documents relating to Food and Supplies by the District Magistrate and not relief matters, *held*, the State did not produce the order of the District Magistrate and as such an adverse inference had to be drawn against the State when the plaintiff had by evidence of the Sub-Divisional Controller and his Head Clerk established that he indeed was empowered to and had been executing agreements pertaining to relief matters under the authority of the District Magistrate: A.I.R. 1977 Cal. 7 (D.B.).

Where the question is whether plaintiff is authorised by the Managing Committee of an institution to institute a suit on its behalf, and the proof of the minutes of the meeting of the Managing Committee constituting such due authority is available, it is sufficient to discharge any burden on the plaintiff under S. 106: 65 I.A. 106: I.L.R. (1938) Lah. 63: A.I.R. 1938 P.C. 73: (1938) 1 M.L.J. 359 (P.C.).

18. Tax laws.—(*See* also Ss. 101-104, Note 25, *supra*). Where S. 23-A inserted by amendment in 1981 in the Punjab Agricultural Produce Markets Act, 1961, primarily provided that the Market Committee can retain the fee levied and collected by it from a licencee in excess of that leviable under S. 23 of that Act, if the burden of such fee was passed on by the licensee to the next purchaser of the agricultural produce, *held*, it merely codified the well known principle of the general law embodied in S. 106; the licensees alone had the special knowledge and necessary records and data about myriad of their dealings with agricultural producers and next purchasers; the Market Committee could not possibly go on a wild goose chase to find out the details of the realisation and refund of the excess fee; S. 23-A clearly provides against unjust enrichment of the licensees: A.I.R. 1984

P.&H. 120: 1984 Rev.L.R. 91: (1984) 96 Punj.L.R. 625 (D.B.).

Where a company sought refund of octroi duty paid to the Municipality on the ground that it was brought within the Municipal limit for a temporary period for being taken out later, *held*, the burden of proof was on the Company to show that the said goods were not sold to the consumers within the Municipal limits and were sent out for sale or distribution outside that area, as those were the facts which were in the special knowledge of the Company: A.I.R. 1991 S.C. 454.

Assessment of income-tax—Burden to explain receipts. *See* A.I.R. 1957 All. 746. Item whether assessable—Onus. *See* A.I.R. 1957 Nag. 73.

In cases of concealment of income and tax evasion, the modus of concealment being obviously within the special knowledge of the assessee, *held*, the onus should be placed on him and he alone can reasonably discharge the same: 1982 Tax.L.R. 983 (P.&H.) (F.B.).

Once the assessee explains the credit entry and brings in evidence to show that the entry related to a third party, and that credit was that of that party, the burden would shift to the Income-tax Officer to prove that this is not true. For instance, it would be open to the Income-tax Officer in such a case to establish that the entry was not real but was pseudonymous. The mere fact that the third party making the deposit in a firm happens to be the wife of the assessee-partner does not *ipso facto* make the assessee come into the knowledge of the source from which the money was realised. Under law, in the absence of specific proof of that knowledge, it cannot be assumed that the assessee has the knowledge in question within the meaning of S. 106 of the Evidence Act. In order to rely on this section, it must be established first that the person has special knowledge of that fact, having regard to the circumstances of the case. Where the accounts of the firm had been accepted and acted upon by the Department and no serious challenge had been made to their genuineness or that they were kept regularly in the course of business the accounts are relevant and afford *prima facie* proof of the entries and the correctness thereof under S. 34 of the Evidence Act, so that where a deposit is found to have been made by a third party in the accounts of the firm, the entry is *prima facie* proof that that amount in question was deposited by the person in whose name the deposit stands. They require the firm or the individual partners to go further and adduce proof of the sources from which the deposits in question appearing in the accounts in the name of third parties were derived by them, would be placing a burden on the firm as well as the partners, which is not required or justified by law. The fact that somebody else made a similar deposit on the same day is totally irrelevant in deciding upon the nature of the deposit made by a person and cannot be a "material" at all on which the Department could base its decision: 59 I.T.R. 632: A.I.R. 1968 Assam 1.

Sales tax assessment is dependent on the satisfaction of the Commissioner based on the material placed before him by the dealer at his own instance or at the instance of the Commissioner and in cases where the Commissioner is unable to make a proper assessment on the basis of such material or where the required material is not furnished as required by the Act, he is permitted to assess the dealer to the best of his judgment. Consequently, if a dealer does not want a best judgment assessment, or claims exemption under one or the other of the clauses of the Act or the Constitution, he must place all the relevant facts before the Sales tax authorities to enable them to determine if any exemption from liability can validly be claimed by him. Under S. 106 of the Evidence Act, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him: 1961 M.P.L.J. 804: 1961 M.P.C. 582: A.I.R. 1962 Madh. Pra. 225.

Madras General Sales Tax Act, 1959, S. 3—Assessability at single point and non-assessability at other points—Burden of proof: (1965) 16 S.T.C. 441 (Mad.).

19. Citizenship.—(*See* also S. 101-104, Note 29, *supra*). S. 3, Pakistan Citizenship Act, 1951, providing that person who was born in 1914 in territory which subsequently became part of Pakistan and who after 14th August, 1947 has not been a permanent resident outside Pakistan would be deemed to be citizen of Pakistan—Petitioner born in territory included in 1914 in territory subsequently included in Pakistan—Fact as to where he had been residing permanently since 14th August, 1947, is within his special knowledge and it is for him to prove his permanent residence by cogent evidence: A.I.R. 1966 Pat. 272.

Where the petitioner contended that he was an Indian citizen and not a Pakistani national and that he went to Pakistan only in 1951, *held*, the fact as to when he went to Pakistan was a matter peculiarly within his knowledge and, thus, the burden was on the petitioner to prove said statement: A.I.R. 1974 S.C. 28: (1974) S.C.C. 469.

20. Miscellaneous.—Ordinarily it is for the plaintiff to prove that his suit is within time. This is more so in a case when time begins to run from the date of the plaintiff's knowledge of a particular event and since the knowledge of that event can only be within the knowledge of the plaintiff and no one else, S. 106, Evidence Act applies and the onus should be upon him: I.L.R. (1953) Patiala 87: A.I.R. 1953 Pepsu 74.

"Facts" within special knowledge of vendor—Onus is upon him to prove them: 1967 Cr.L.J. 1261: A.I.R. 1967 All. 491.

Infringement of Patent—Defendant to prove his process of manufacture was different—Matter is especially within his knowledge: A.I.R. 1969 Bom. 255. *See* also Ss. 101-104, Note 103, *supra*.

Will duly registered—No presumption about genuineness—The onus to prove it is on propounder, if there are any suspicious circumstances, to explain them: A.I.R. 1969 Assam 118. *See* also Ss. 101-104, Note 107, *supra*.

Board of Directors empowered to make loans by means of resolution—Whether there was such resolution—Burden is on company and not on lender: A.I.R. 1967 Cal. 75.

Companies Act, 1913, S. 235—Appraisement of evidence—Nature of proof required—Burden of proof: I.L.R. (1961) 11 Raj. 1022: A.I.R. 1962 Raj. 118.

Where the fact to be ascertained or proved is the state of mind of the defendant who purchased the shares held by the plaintiff in a company which shares were sold to recover the debt due from the plaintiff to the company, that is, whether prior to the sale, he has knowledge of the wrongful character of the transaction, this being within the special knowledge of the defendant, the burden of proving the innocent state of his own mind is on him. Assuming that the initial onus is on the plaintiff to lead some evidence, the burden of proof is shifted to the defendant where he has admitted in the written statement that he had some knowledge anterior to the sale. In determining whether the onus has shifted to the defendant, the evidence to be taken into account is the entire evidence tendered on behalf of the plaintiff alone. Very slight evidence, if at all, is necessary to shift the burden on the defendant. It is imperative for the defendant to tender his evidence as to the quantum of his knowledge of the transaction resulting in the sale of shares and to prove that he was an innocent purchaser: A.I.R. 1959 Cal. 715.

Where plaintiff contended that receipt for a certain amount was executed for the payment towards old debts, *held*, the burden rested on the plaintiff to prove the existence of those old debts: A.I.R. 1971 Madh. Pra. 124.

Article recovered from place in possession of joint family—Presumption of possession by head of family—Onus of proof: (1961) 1 Cr.L.J. 533: A.I.R. 1961 Mad. 162.

Upon the death of the father, his entire property was mutated in the name of his son who continued to be in its possession and also acted as *karta*. He sold one of the old properties to construct another floor on the house at Lucknow and the sale of the old property was impugned by the son's mother and sons as being not for legal necessity, and the vendee pleaded that to his knowledge the vendor was the sole owner of the Lucknow house. *Held*, the vendee being a total stranger to the family, obviously his "knowledge" could only be a belief arising from what he was told by the vendor. Thus, it could not be said that the manner of acquisition of the house at Lucknow was within his exclusive knowledge; the vendee's failure to plead in his written statement about the Lucknow house being a coparcenary property or deposing about it being owned by the vendor could not be used as an argument against the vendee: A.I.R. 1981 S.C. 2128: 1982 Hindu L.R. 10: 1981 All.L.J. 1172.

Partition—Suit for partition of joint family property—Mere mention of arbitration agreement and award does not bar the suit—Burden to plead necessary facts in support of bar set up is on the defendant: A.I.R. 1969 Madh. Pra. 7. *See* also Ss. 101-104, Note 60, *supra*.

Failure to observe terms as to accounts in licence issued in prescribed form—Onus is on licencee to prove that he was prevented

by reasonable cause to maintain accounts correctly: 1968 Cr.L.J. 76: A.I.R. 1968 Pat. 37. *See* also Ss. 101-104, Note 17, *supra*.

Burden of proof—Fact specially within knowledge—Where a person has taken elephant on hire the burden of proving the number of days for which the elephant had worked is on him, since the fact is peculiarly within his knowledge: 1963 Ker.L.J. 1079.

Where the charge-sheet under R. 6, Passport Rules, had been furnished to the accused at Kanpur, where he was found to be residing and was being tried for the contravention of R. 3 of Passport Rules, the Kanpur Court shall have jurisdiction to proceed with the trial unless the matter contained in the Challan is positively disproved by the accused under S. 106, Evidence Act: 1963 All.W.R. (H.C.) 571: 1963 All.Cr. R. 297: A.I.R. 1965 All. 158.

Excepted cargo—What constitutes—Burden to prove that cargo was actually carried on the deck: A.I.R. 1960 Bom. 416.

No counter-affidavit—Effect: A.I.R. 1957 Manipur 1.

Negotiable instrument — Failure to honour—Intention to cheat—When can be inferred: A.I.R. 1957 All. 246: 1957 Cr.L.J. 438.

In order to avail the immunity under S. 131 of the Negotiable Instruments Act, the onus of proving that it has acted in good faith and without negligence in the process of collection lies on the collecting banker. Where sufficient connection between opening of the account and collection of cheque, which would prove negligence on the part of the collecting banker, could not be established, *held*, the collecting banker was not barred from claiming protection under S. 131: (1992) 1 M.L.J. 636 (D.B.).

Where the Government had cancelled a contract for supply and consolidation of shingle because of its breach by the contractor who sued it for the price of work executed by him, *held*, the burden lay on the State to plead and prove, because of S. 106, as to when was the contract cancelled to the contractor's knowledge; that would be time for reckoning whether or not the suit was barred by limitation; the time would therefore run from the expiry of two months from the service of notice under S. 80 of the Code of Civil Procedure on the State: A.I.R. 1976 J.&K. 93 (D.B.).

Where the defendant was given a contract on the basis of public auction for recovery of Tehbazari but he failed to pay part of contracted money although he recovered the said dues from various persons occupying the land, *held*, as the defendant was the person who was specifically aware of the real facts, the onus was upon him to prove the benefits received by him. [1956 All.L.J. 715, Appr.; A.I.R. 1970 S.C. 729, Rel. on]: A.I.R. 1980 All. 143.

Defendant intermixing his articles with those of plaintiff—Proportion of intermixture—Burden of proof: I.L.R. 13 Pat. 762: 15 Pat.L.T. 702: A.I.R. 1934 Pat. 492.

Height of building—Burden is on applicant to show that the building is of the required height: A.I.R. 1959 Madh. Pra. 349.

Whether gas had been supplied to the appellant's premises, being within the special knowledge of the respondent company, within the meaning of S. 106, on withholding of such information by non-production of the Log Book, an adverse presumption can be drawn under S. 114, *Illus.* (*g*). The provisions of S. 106 are designed to meet certain exceptional cases in which it would be impossible for the plaintiff to prove certain facts which are in the special knowledge of the defendant: (1991) 2 Cal.L.T. (H.C.) 227.

Petitioner submitting acknowledgment—Duly signed and sealed by respondent with allegation that he sent an appeal—Respondent denying receipt of appeal, should prove what was received in registered packet—Presentation of appeal presumed: 1982 M.P.W.N. 457.

Where the plaintiff seeking a permanent injunction to restrain the defendants from interfering in his possession of a plot allegedly held by him as a lessee under the Custodian and adduced in evidence what purported to be only an extract of *shajra sakni* which was not prepared by any revenue officer and was purportedly issued by the Rehabilitation Department without any indication as to who had prepared its original or as to whom it originally belonged or how it came to be vested in the Custodian, *held*, the plaintiff having not brought on record the best evidence in the shape of the Custodian's record, he cannot be said to have discharged his burden: A.I.R. 1988 Del. 177: (1987) 33 Del.L.T. 363.

107. Burden of proving death of person known to have been alive within thirty years.—When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. Burden of proving that person is alive who has not been heard of for seven years.—[1][Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [2][shifted to] the person who affirms it.

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1. Substituted by Act 18 of 1872, S. 9, for "When".

2. Substituted, *ibid.*, for "on".

Sections 107 and 108—Synopsis.

1. Scope.
2. Applicability.
3. Presumption of continuance of life.
4. Presumption of death.
5. Presumption regarding time or date of death.
6. Presumption regarding death of judgment-debtor—Burden of proof.
7. Presumption in case of absconder.
8. "Persons who would have naturally heard of him".
9. Common catastrophe.
10. Hindu and Mahomedan law rules.
11. No custom can whittle down or reduce period laid down in section 108.
12. Illustrative cases.

1. Scope.—S. 107 deals with the presumption of continuance of life and S. 108 deals with the presumption of death. Both the presumptions under Ss. 107 and 108 come into play after a suit is instituted. These sections deal with the procedure to be followed when in such a suit a question is raised before a Court as to whether a person is alive or dead. In either case, the presumption is always rebuttable. The presumption embodied in S. 108 is by way of proviso to S. 107. If the two sections are read together it would be evident that it would be erroneous to seek to apply both Ss. 107 and 108 to one and the same case and at the same time: A.I.R. 1970 Andh. Pra. 246.

The propositions regarding the scope of presumptions under S. 108 are: *firstly*, the occasion for drawing the presumption of a person's death if he was unheard of for seven years or more; *secondly*, the presumption is rebuttable; *thirdly*, there can be no presumption whether the person died during or at the end of that period; and, *lastly*, the time of his death is to be proved like any other fact. The presumption being a matter of procedure can arise only when the dispute is brought before the Court and not at any earlier point: (1972) 1 Cut.W.R. 299.

S. 108 is a proviso to S. 107. These two sections are based on the principle that once it is shown that a man was alive within a certain period, continuance of his being alive shall be presumed. The presumption is rebuttable. These two sections deal with the burden of proof in such a case: A.I.R. 1976 Gau. 15 (D.B.).

A combined reading of Ss. 107 and 108 shows that it is only upon proof that the person has not been heard of for seven years by those who would have naturally heard of him if he had been alive that the burden of proving that he is alive would shift to the party which so affirms: (1993) 1 M.L.J. 339.

Ss. 107 and 108, if carefully analysed and considered, provide that where a person is shown to be alive within thirty years, the burden to prove his death would lie on the person asserting his death; and when a person is not heard of for seven years by the persons who would have naturally heard of him, the burden of proving that he was alive would lie on the person affirming it, and no presumptions of death and life can be raised unless the existence of the necessary facts therefor are proved on record: (1993) 1 M.L.J. 328; 1985 All.W.C. (Rev.) 47.

S. 108 is an exception to S. 107. If a case comes within the four corners of S. 108 it is taken out of the purview of S. 107. S. 108 merely deals with the procedure to be followed, when a question is raised before a Court as to whether a person is alive or dead.

That section does not lay down any presumption as to how long the person concerned must be deemed to have been alive or at what time he died. The relevant point of time at which the presumption under S. 108 is available is when the factum of the death of the person concerned becomes material and not the date of the suit. Where the material point of time was the date of adoption, *viz.*, 15th August, 1955 and it was established that the person to whom the adoption was made was not heard of by person who should have heard of him if he was alive, for seven years prior to 15th August, 1955, then the presumption under S. 108 would be that he was dead on or before 15th August, 1955: A.I.R. 1963 Mys. 115.

A close reading of Ss. 107 and 108 together will go to show that they deal with the burden of proof for establishing as to whether a person is alive or not if certain pre-conditions exist. If a man was alive within thirty years of the date when the controversy arise as to whether he is dead or alive, then the person would be presumed to be alive unless the contrary is proved. On the other hand, if a person has not been heard of for seven years or more by those persons who should naturally hear of him, the burden that he is alive would be on the person who claims that such a person is alive. The presumptions which arise under Ss. 107 and 108, however, are both rebuttable. The provisions of Ss. 107 and 108 merely provide a rule of evidence and do not raise a presumption in respect of death of a person at a certain time or on a particular date. Under these provisions it must be proved that the presumption mentioned therein extends merely to the fact of death after the period of seven years but it does not raise any presumption about the time of the death at any particular period, *i.e.* there is no presumption that the death of the concerned person took place after the expiry of seven years from the date when he was not heard of or at any other particular period of time. If the question was as to when a particular person died it must be proved by that person who asserts it. It may also be kept in mind that if S. 108 is applicable to the facts of a particular case S. 107 can have no application at all. The two sections are, therefore, mutually exclusive to each other. Ss. 107 and 108 both cannot apply to a particular case at the same time.

However, S. 108 is not the only provision to be applicable and presumption from natural course of human conduct can also be raised and if there were circumstances, it could be presumed that the person had died even during the period of seven years after a particular date: 1980 All.W.C. 53: (1980) 8 All.L.R. 276; 1979 All.W.C. 454. Even independent of S. 108, the Court can draw inference of death and presume the death of a person under S. 114, if circumstances of a case justify such inference: A.I.R. 1988 N.O.C. 76: (1988) 1 Ker.L.T. 45.

Under Ss. 107 and 108 of the Evidence Act, the burden is on the person who asserts that the man is dead or alive, to prove that he is dead or alive, as required by the sections. Where there is no proof that the husband has not been heard of for seven years by those, who would have naturally heard of him if he was alive, it should be held that the woman has not discharged the burden that lay on her to prove that the husband was dead in order to enable her to attain to the position of a widow: (1959) 2 M.L.J. 186: I.L.R. (1959) Mad. 807: A.I.R. 1959 Mad. 526.

Unless it has been established that the whereabouts of a person are not known and he has not been heard of for the past seven years before the date of the suit, the presumption would be that he is alive: I.L.R. (1953) Hyd. 202: A.I.R. 1953 Hyd. 187.

The principle of S. 107, Evidence Act (person known to have been alive within 30 years—Presumption that he is still alive) is that when once a state of things is shown to exist, there is in law a presumption of its continuance for a period for which such state of things ordinarily lasts. S. 107 of the Evidence Act is merely a deduction from this presumption.

The presumption under S. 108 (presumption that person not heard of for seven years is dead) is as to the fact of death at the time the question is raised and not at any particular antecedent time. There is no presumption also as to the cause and circumstances of the death: A.I.R. 1960 Mad. 430.

The only presumption under S. 108 is that a person not heard of for seven years by those who would naturally have heard about him if he was alive, is dead; the burden of proving that he was alive shifts to the party who asserts that person to be alive; the

presumption under S. 107 that a person shown to be alive within thirty years is alive and the burden to prove that he is dead lies on the party which says so. Since there is no presumption of the date of death of such a person, the burden lies on the party asserting death of such person to prove the date of death: A.I.R. 1986 Him. Pra. 6: I.L.R. (1985) Him. Pra. 193: 1986 Sim.L.C. 4.

Presumption—Benefit under the provision not available where the plea is neither raised nor proved: (1968) 70 Punj.L.R. 1046: 1968 Cur. L.J. 268.

Where in order to succeed in a suit it is necessary, for a person to establish that a particular person was dead at a particular time, he has to prove the factum of his death at the same time by affirmative evidence either direct or circumstantial: A.I.R. 1932 All. 365: 1932 All.L.J. 175; A.I.R. 1934 Oudh 298: I.L.R. 10 Luck. 92 (F.B.).

Where the plaintiff sought to set aside the judgment in the earlier proceedings on the ground that he was alive not only at that time but also continued to be alive even during the later proceedings, *held*, the burden was upon the plaintiff to prove that he was alive and the question of applicability of Ss. 107 and 108 could not arise: (1991-1) 107 Mad.L.W. 45.

Where respondent husband filed a petition on 11-11-1976 for declaring his marriage with appellant as void on the ground that her previous husband was alive on 24-5-1970, *i.e.*, the date when respondent married the appellant and the appellant admitted that her previous husband was alive in 1960, when she obtained a decree for judicial separation against him but had left for Indonesia after 14 months of marriage and was not heard of since then, *held*, as the appellant was admittedly deserted by her previous husband, therefore, it was not natural that he would have corresponded with her or her father if he had been alive. Further, the presumption under S. 108 about the death of previous husband of appellant even if raised would be restricted to the date of the filing of the petition by the respondent, that is November 11, 1976, and shall not relate back to May 24, 1970. Thus, respondent's marriage with the appellant was a nullity. [A.I.R. 1926 P.C. 9; A.I.R. 1962 Ori. 3; A.I.R. 1967 S.C. 1134, Foll.; A.I.R. 1963 Mys. 115, Dissent.; A.I.R. 1946 Mad. 65, Disting.]: A.I.R. 1980 P.&H. 274: 1981 Hindu L.R. 301.

2. Applicability.—S. 107 does not apply to petition for a declaration of nullity of marriage under the Indian Divorce Act. The Divorce Act governs such proceedings, and S. 19(1) indicates in plain language that a decree for nullity can only be given on proof of the fact that the former husband or wife was living at the time of the second marriage. There is no room left in such cases for the application of S. 107, Evidence Act and it has therefore, to be ignored: (1945) 58 Mad.L.W. 529: (1945) 2 M.L.J. 389: A.I.R. 1946 Mad. 65: I.L.R. (1946) Mad. 416.

Applicability of S. 108 to proceedings under Divorce Act, 1869. *See* (1974) 76 Bom.L.R. 127.

3. Presumption of continuance of life.—Any presumption of continuance of life is a presumption of fact and not of law and where no statute lays down another rule, the rule whether a person is to be presumed dead is, subject to one exception, also a question of fact and is not subject to a presumption of law. The exception is where due enquiries had been made for an individual and he had not been traced as a result of them, there is a presumption of law that if he had not been heard of during seven years by persons who would have been likely to have heard of him if he had been alive, he had died at some time within seven years.

In 1909 the husband married *A*, an orphan, with no known parents or other relations. *A* was then 18. Between October, 1909 and 1915 the husband was sentenced to terms of imprisonment. In 1915 he saw *A* on two occasions. In 1917 *A* was known to be in Yorkshire. From October, 1917 until 23rd April, 1933, the husband was continuously in prison. During that time he did not hear of *A*. On 15th May, 1933, the husband went through a ceremony of marriage with *B*. There was no evidence that in 1917 she was not normal in health with normal expectation of life. The husband prayed for a decree of nullity of his marriage with *B* on the ground that at the time of the ceremony in 1933 *A* was still alive and that his marriage with her was still subsisting. In her answer, *B* also prayed for similar decree. *Held* that it was for the husband or *B* to prove facts from which a cessation of the marriage in 1909

could be inferred. There was no presumption of law in his case, either of the continuance of life of *A* or of her having died. Inference from the known facts was *A* was alive when the ceremony of marriage with *B* took place and, therefore, the marriage, between the husband and *B* was null. *Held* further that the presumption of law had no application to the facts of the case, because the husband would not have been likely to have heard of his first wife during the period between 1917 and his proposed marriage in 1933: (1955) 3 All E.R. 721.

Where mother of a person filed an application for compensation in 1968 alleging that he died in a railway accident which occurred in 1966, *held*, as that person was admittedly alive within thirty years, so under S. 107 the burden was upon the claimant to prove that he was dead. But as S. 107 is subject to the proviso embodied in S. 108, if the claimant proves that he had not been heard of for seven years by those who would naturally have heard of him, the burden will shift on other side. But in the instant case no such evidence was adduced by the claimant and therefore, no presumption could be raised about that person's death: A.I.R. 1976 Gau. 15 (D.B.).

4. Presumption of death.—The two propositions regarding the presumption as to the death of a person unheard of for seven years are: (*1*) ordinarily, he shall be presumed to be dead on expiry of seven years, not earlier; (2) S. 108 is not exhaustive. The Court may raise a suitable presumption regarding the date of presumed death depending upon the attendant circumstances and other reliable material on record; but there is no rule of universal applicability; but the first proposition operates subject to the second proposition. [A.I.R. 1934 Oudh 298, Dissent. from]: A.I.R. 1993 Bom. 64.

Where a person has not been heard of for much more than seven years by those who would naturally have heard of him, had he been alive, the presumption under S. 108 of the Evidence Act will be that he is dead. The burden will be on the other side to rebut the presumption: (1964) 1 Cr.L.J. 367: (1963-64) 68 Cal.W.N. 654; (1983) 24 Guj.L.R. 359; (1993) 2 Hindu L.R. 428 (P.&H.); I.L.R. 33 Cal. 173 (P.C.); I.L.R. 34 All. 36 (S.B.).

The presumption of death under S. 108 can be raised when the question of the person being alive or dead is raised in a Court proceeding, earliest at the time when the proceedings are instituted: A.I.R. 1986 Him. Pra. 6: I.L.R. (1985) Him. Pra. 193: 1986 Sim.L.C. 4.

No presumptions as to death of a person arises under S. 108 if the question arises just two years after the date of disappearance: A.I.R. 1984 S.C. 1234: (1984) 97 Mad.L.W. 181.

Where the petitioner claimed family pension on 24-11-1988 on the ground that her husband was traceless from the duty since 1-10-1987, *held*, no presumption could be raised that he was dead as the period of seven years had not elapsed: (1992-1) 40 B.L.J.R. 33: (1990-2) 38 B.L.J.R. 1310.

The date of death of the person has to be proved as a fact by a person asserting the same or by one who wants to rely on it. The presumption of death does not validate an actual bigamous marriage entered into, on reliance upon the presumption of death provided by the Indian Evidence Act: (1990) 1 Hindu L.R. 113 (P.&H.).

The entry of mafrur does not connote "deceased" and because a person has not been heard of for many years, it does not mean that the death can be presumed to have occurred at a convenient time for the computation of the twelve years. The Court can, however, presume that death occurred seven years prior to the date of dispute: 13 R.D. 385.

Although there is no presumption of the exact date of death, S. 108 provides that when the question is whether a person is alive or dead and it has been proved that he has not been heard of as alive by those who would naturally have heard of him, if he had been alive, the burden of proving that he is alive is shifted to the person who affirms that. This presumption of death or fictional death tantamounts to physical death in the eye of law: (1987) 1 Cal.L.J. 278.

Presumption of death—Tantamounts to physical death for giving the widow a right to suit—Failure to observe obsequies connected with widowhood, no bar to claim partition, if she is otherwise proved to be a widow: A.I.R. 1967 Ori. 70.

Date of death not a matter of presumption but of evidence: A.I.R. 1967 Ori. 70.

Person not heard of for more than seven years after he disappeared from his place of residence must be presumed to be dead: (1967) 1 S.C.R. 153: A.I.R. 1967 S.C. 1134.

Presumption of death: 1956 All E.R. 603.

Where from the circumstances and evidence on record in the case it is clear that a person in question had disappeared forty years before and had not been heard of since then, it is to be presumed that he is dead and the burden of proving that he is alive would be upon him who affirms it: I.L.R. (1959) 9 Raj. 276.

If a person, continuously absent from home for a period of seven years and is unheard of by persons who would have naturally received intelligence from him, he is presumed to be dead. It is a rebuttable presumption. The burden of proving that he is alive is shifted to the person who affirm that he is not dead. The presumption extends to the fact of death at the expiration of seven years. There is, however, no presumption that the death took place after the end of the period of seven years or at any time earlier within that period. It has to be proved as a fact: (1981) 20 Del.L.T. 46 (S.N.) (D.B.).

S. 108 is only a rule of procedure to be followed when the question arises before a Court whether a person is alive or dead. This presumption cannot be used to request the Registrar of Deaths and Births to make an entry in the Register that the person concerned is dead: A.I.R. 1989 Mad. 248: (1989-1) 103 Mad.L.W. 306.

Where a question arises as to whether a person can be presumed to be dead under S. 108, the documents in proceedings in revenue Courts which have to be entered and maintained by the Revenue Officers in such matter as part of their official acts would be admissible in evidence: A.I.R. 1947 Oudh 174.

The settlor and the first *shebait* of a Hindu religious endowment, about 80 years old, left his house on 24th June, 1959 and his whereabouts became unknown thereafter and on 2nd August, 1965, a suit was filed by one of his sons against the other two sons and a daughter of the settlor, the latter claiming that the settlor was alive and before leaving he had given her a power of attorney, and she had since been looking after the debuttor properties, and seven years not having lapsed, no presumption of the settlor's death could be drawn and the suit was bad for non-joinder of a necessary party. *Held*, presumption of death did not arise on the date of institution of the suit but on 24th June, 1966. However, presumption of death under S. 108 is not rigid; death may be proved before the end of seven years, if the unheard of person is shown to have been exposed some specific peril of death. Since the suit was heard in 1977 and the settlor was still unheard of, the burden lay on the defendant that he was alive; because of his advanced age, he is presumed to be dead: A.I.R. 1977 Cal. 473.

Death—Presumption of—Inheritance depending on proof of person surviving female—Onus—Date of death. *See* 19 M.L.J. 502: 2 I.C. 977. *See* also 11 I.C. 202; I.L.R. (1939) Kar. 509: A.I.R. 1939 Sind 234.

Where in a proceeding for declaring her marriage with the respondent-husband as nullity on the ground that he was already married at the time he married her, the respondent stated that he last heard of first wife two years before his marriage with the petitioner and that the present proceedings were filed by the petitioner after six years of impugned marriage and neither he nor his brother heard of first wife, *held*, as on his own showing the first wife had gone in keeping of another person, the respondent and his brother could not be said to be the persons who would, in the normal course, have heard of her. Evidence of such persons that they did not hear of first wife did not give rise to any presumption under S. 108. Secondly, at the time of marriage with the petitioner, the first wife was not heard of by the respondent and his brother only for two years. Thus, no presumption under S. 108 could be raised: A.I.R. 1972 Madh. Pra. 57: 1971 M.P.L.J. 1014: 1971 Jab.L.J. 957 (D.B.).

5. Presumption regarding time or date of death.—S. 107 and 108 of the Evidence Act only deal with the procedure to be followed when a question is raised before a Court as to whether a person is alive or dead and that they do not lay down any presumption as to whether a person was alive or dead on any particular date before the institution of the suit in which question is raised. Neither of those sections warrant a presumption to be drawn as to whether a person was alive or dead at a particular time before the date of suit. The fact whether he was alive or dead on a particular date or at a particular time is a matter of proof, and if there is no admission as regards that matter by the opposite party it has to be proved affirmatively by the

person who claims to establish in the suit the right dependent upon the existence or death of the person on the particular date or at the particular time.

No presumption can be drawn under Ss. 107 and 108 of the Evidence Act as to whether a person was dead or alive on any particular date or at any particular time before the date of the suit in which that question is raised: 1957 Ker.L.J. 1028: 1958 Ker.L.T. 8.

S. 108 has its origins in English Law which lays down: If a person has not been heard of for seven years, there is a presumption of law that he is dead. But at what time within that period he died is not a matter of presumption but of evidence. The onus of proving that the death took place at any particular time within those seven years who asserts the right to the establishment whereof the date is essential. Following these words it is constantly assumed, perhaps not unnaturally—that where the period of disappearance exceeds seven years; death which may not be presumed during those seven years may be presumed to have occurred at the close of seven years; that is not so; the entire period of being unheard of is one and continuous; the true rule may be stated more accurately by saying the period of disappearance should be not "less than seven years"; the date of death has, thus, to be proved like any other fact by the person upon whom the burden of proof lies. [(1870) 5 Ch. A. 139; (1939) 3 All E.R. 895; (1953) 2 All E.R. 1113; A.I.R. 1926 P.C. 9, Rel. on; A.I.R. 1956 Trav.-Co. 129; 1958 Ker.L.T. 8, Appr.; A.I.R. 1968 Raj. 48, Dissent.]: A.I.R. 1971 Ker. 85: 1970 Ker.L.T. 976 (F.B.).

There is no presumption as to death at any particular time: A.I.R. 1928 Oudh 13; (1965) 78 Mad.L.W. 624. *See* also 165 I.C. 586. It depends upon the circumstances of each case whether a Court would not make a presumption that a person last heard of within seven years is alive, even assuming that a Court may make such presumption: I.L.R. 37 Mad. 440: 23 M.L.J. 443.

Presumption of death—Time of death—Onus: 1956 All.W.R. 603.

Both the presumptions under Ss. 107 and 108 come into play after a suit is instituted. The presumption of life prevails until displaced by the proof of actual death or proof of facts raising the presumption of death, and in the latter case presumption of death prevails till actual existence of life is proved. While initially the presumption of life extends over the whole period of 30 years, when the same is displaced, the presumption of death extends over the whole period of "unheard of": A.I.R. 1962 Ori. 3; (1993) 2 M.L.J. 283.

The time or date of death of a person who has not been heard of for seven years and whose death is presumed under S. 108, is not a matter of presumption, but of evidence. Neither S. 107 nor S. 114 of Act justifies such a presumption. The burden of proving that death occurred at a particular point of time is on the party who alleges the same: 21 Mys.L.J. 150 and 186. When a person has not been heard of for seven years, there is a presumption that he is dead. There is no further presumption authorised by the Evidence Act: L.R. 3 All. 393 (Rev.); A.I.R. 1930 All. 427; 1941 O.A. (Supp.) 906: 1941 All.W.R. (Rev.) 1125; I.L.R. 6 Luck. 407: A.I.R. 1931 Oudh 40 (not heard of for 40 years).

All that S. 108 of the Evidence Act warrants is that when a person is shown to have been not heard of for seven years there is a presumption of the fact of his death. Regarding the actual time of death there is no presumption available under that section. The time of death has to be affirmatively proved by the person who alleges that death occurred at a particular time and who seeks to enforce rights or consequences that flow from the fact of the death at the particular time alleged by him. Where the defendant alleges that the judgment-debtor had died before the execution sale in 1115 and that therefore, the execution sale, is not valid, the validity of the execution sale, is a consequence of the judgment-debtor's death before 1115. The burden is, therefore, upon the defendant to prove that the judgment-debtor had died before 1115. The burden is not discharged by showing that he had not been heard of between 1108 and 1120: I.L.R. (1957) Ker. 53: A.I.R. 1957 Ker. 45. Per *Koshi, C.J.*—Under the English law of evidence though there is no presumption of law as to the continuance of life, an inference of fact is very often drawn with respect to the continuance of life and the presumption is sometimes extended even beyond the period recognised by Statute Law in India. When it is remembered that

S. 107, Evidence Act enacts only a rebuttable presumption of law, the absence of a statutory provision in English law enacting a presumption as to the continuance of life and fixing a time-limit for it, does not really make the English law in substance any the different from the Indian law. The difference is only to the extent that in India there is a rebuttable presumption of law as to the continuance of life while English law permits a presumption of fact to be made with respect, to it. Presumptions of fact are, of course, always rebuttable: A.I.R. 1956 Trav.-Co. 129: I.L.R. (1955) Trav.-Co. 1100.

The section raises a presumption of death at the end of a continuous absence of seven years and not at the time when the question is raised or the suit is instituted. The party on whom the burden of proving the life of the absentee lies cannot get rid of that burden of admitting the absentee's death at some subsequent time: 8 I.C. 55 (All.); I.L.R. 35 Cal. 25; I.L.R. 37 Cal. 103; I.L.R. 33 Cal. 173 (P.C.).

All that one can presume under S. 108 is that the person concerned is dead, but one cannot fix the time of the person's death under the provisions of the said section. S. 108, however, is not exhaustive on the question of presumptions as regards death of a person. The Court may, in the circumstances of each case, make a suitable presumption even regarding the time of death of the person concerned: 1963 All.W.R. (H.C.) 554: 1963 All.L.J. 851: A.I.R. 1964 All. 310.

Presumption under section—Operative only after institution of suit—Presumption of death—When arises—Date of death, not a matter of presumption—Onus to prove death: A.I.R. 1961 Ori. 210.

Presumption as to when a person died—Presumption arises only when question whether person is alive or dead is in issue—*held*, on facts, that the presumption under S. 108 arises only when the question as to whether a man is alive or dead is in issue, in other words, there is no presumption, so long as there is no dispute about a man being alive, that a man died after a particular time after his disappearance. In the present case no question arose before the High Court when it was dealing with the appeal, whether the plaintiff (lunatic) was alive or dead. If really it was petitioner's case that he was dead, he should have raised that question before the appeal was disposed of. The preliminary decree passed by the High Court was, therefore, valid.

If the question is raised before the Court at a particular point of time, and more than seven years had elapsed by that time from the time when a man was last heard of, the presumption will be that he had died before the date when the question was raised. That is not the same thing as saying that when such a question is raised long after the seven years period is over there is a further presumption that he had died at any particular time during that period or at the end of seven years from the date of disappearance. The presumption under S. 108 would only be as to the fact of death at the time the question is raised and not at any particular antecedent time: (1964) 1 M.L.J. 246: I.L.R. (1963) Mad. 993: A.I.R. 1963 Mad. 385.

Nø presumption as to the death of a person at a particular time—Person relying on fact bound to establish it by evidence—No presumption that a person died leaving no heirs: 33 M.L.J. 295: 42 I.C. 241; *see* 38 P.R. 1918: 45 I.C. 70; 21 O.C. 143: 46 I.C. 808; A.I.R. 1930 All. 427.

The initial burden to prove that the person who was shown to be alive within 30 years is dead, is on the person who asserts that he is dead. But his burden is discharged on his establishing that the person has not been heard of for seven years. To prove that death took place at any particular time within seven years, lies upon the person who claims right to the establishment of which that is essential. [(1988) 2 Ker.L.T. 537 Not foll.]: (1990) 1 Ker.L.T. 452: (1990) 1 Ker.L.J. 395: I.L.R. (1990) 3 Ker. 496.

Relevant point of time at which the presumption under this section is available is when the factum of death of the person becomes material, and not at any particular antecedent time: (1991) 2 Ker.L.T. 373.

S. 108 simply changes the burden of proof or lays it upon a particular party. It does not prove death; it is a presumption which is rebuttable. Though it raises the presumption that the person concerned was dead on the date of the suit, the date of death must be proved like any other fact: 1966 Kash.L.J. 389: A.I.R. 1967 J.&K. 81.

The only presumption which is enacted by this section is that the party is dead at the time of suit, but there is no presumption as to

the precise time of his death: (1930) 32 Punj.L.R. 704: A.I.R. 1931 Lah. 582 (F.B.); 11 C.L.J. 580; 6 I.C. 244; I.L.R. 8 All. 614; I.L.R. 23 Bom. 296; I.L.R. 35 Cal. 25; I.L.R. 54 Cal. 186; A.I.R. 1944 Pesh. 29; 100 I.C. 833: A.I.R. 1927 Lah. 284; 22 Nag.L.R. 175: A.I.R. 1927 Nag. 104; A.I.R. 1928 Oudh 13; 53 I.A. 24; A.I.R. 1930 All. 427; 1944 O.W.N. 195: 1944 O.A. (C.C.) 136; I.L.R. 19 Luck. 581; A.I.R. 1972 Madh. Pra. 57: 1971 M.P.L.J. 1014 (D.B.).

Under S. 108, the presumption is as to factum of death of the person untraced and it starts from the date when the dispute arises, that is to say, when the suit was filed: A.I.R. 1976 Cal. 356.

Though there is no presumption as to the date of death of a person not heard of for over seven years by persons who would have naturally heard of him, yet where such a person is shown as not having been heard for over seven years reckoned from the date of institution of pending proceedings wherein his being alive or dead is in issue, *held*, he may be presumed to have died at the latest on the date the proceedings were commenced. [Point not disputed.]: A.I.R. 1972 P.&H. 14: 1971 Punj.L.J. 539. If the exact date of death is not proved, the earliest date on which death can be presumed under S. 108 is the date on which the suit was filed. The presumption under S. 108 cannot have a retrospective effect: 1956 An.W.R. 137. This case has been explained in: A.I.R. 1957 Andh. Pra. 380: (1957) 1 An.W.R. 55. *See* also A.I.R. 1964 Andh. Pra. 326: (1963) 1 An.L.T. 389; 115 I.C. 626. It is so because the occasion for drawing a presumption under the provision arises when the dispute regarding the death of a person who has been unheard of for seven years is raised in a Court of law and it is only then that the question of burden of proof would arise: A.I.R. 1968 Raj. 48: 1967 Raj.L.W. 515.

If a person has not been heard for several years, there is a presumption of law that he is dead. But at what time within that period he died, is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within seven years, lies upon the person who claims a right, to the establishment of which that fact is essential. The presumption under S. 108, is available at the point of time when the party approaches the Court for necessary relief: 33 Cut.L.T. 944: I.L.R. (1966) Cut. 844: A.I.R. 1967 Ori. 70; I.L.R. 15 Pat. 312 (P.C.); I.L.R. 50 Mad. 289: A.I.R. 1926 P.C. 9; 165 I.C. 586; 1943 O.W.N. (H.C.) 124: 1943 All.L.W. 219; I.L.R. (1938) Bom. 155: A.I.R. 1938 Bom. 228; (1949) 51 Punj.L.R. 1: A.I.R. 1949 East Punj. 267; A.I.R. 1958 Assam 15; (1958) 2 M.L.J. 53: (1958) 71 Mad.L.W. 445: A.I.R. 1958 Mad. 453; A.I.R. 1970 Andh. Pra. 246; (1982) 2 Guj.L.H. 1006: (1983-1) 24 Guj.L.R. 359; (1985) 1 An.W.R. 257; (1992) 1 M.L.J. 187.

Where there is a dispute in a suit as to the date of death of a person from whom his relations had not heard for more than seven years it should first be for the person who alleged a particular date to prove that date affirmatively, but if no one could prove any specific date then the Court should draw a presumption that he was dead on the date of the institution of the suit and not at some antecedent date: 1952 Ker.L.T. 691: A.I.R. 1953 Trav.-Co. 114; I.L.R. (1959) 9 Raj. 276. *Held* Per *Koshi, C.J.* and *Joseph, J.* (*Govinda Pillai, J.* dissenting)—Where a party's case depends on establishing that a given person who is presumed to be dead was alive or dead at a particular time within the seven years period and there is no evidence at all on the subject, success or failure will depend on whether the party has succeeded in proving the date of death, Per *Koshi, C.J.*:—Under S. 108, Evidence Act there is no presumption as to the time, although there is as to the fact of the death; S. 108 does not enunciate anything more. While that section entitles the Court to presume that a person was dead on the date of the institution of the suit, it does not help the Court to say as to when he died. There is no presumption that he lived for seven years. It is erroneous to seek to apply both S. 107 and S. 108 to one and the same case. In the same way as a person cannot at the same time both be alive and dead, a Court cannot seek to apply to a given case both the presumption relating to the continuance of life and the counter presumption relating to death. S. 108 comes as a proviso to S. 107. To a case where the proviso is attracted the enacting section can have no application. *Govinda Pillai, J.* (dissenting).—The presumption allowed to be drawn under Ss. 107 and 108 appears to be that if a person was proved to be alive within thirty years when the question was raised then the party who asserted his death at any particular period within thirty years should prove it. The burden of

proving that the individual died within seven years after he was last heard of does not lie on the party who claims the right under that individual if he has not been heard of for seven years. What is only laid down in S. 108 is that the onus of proof would be on the party who asserted that he was alive after seven years. So the burden of proving the death within seven years or within the period when the question was raised when that period exceeded seven years would be on the party who asserted that that person was dead. Reading Ss. 107 and 108, Evidence Act together the proper working rule would appear to be that the person was alive till the question of his life or death was raised after the expiry of seven years from the date on which he was last heard of. This would be the reason for laying down the rule that the presumption of death would be on the date on which the question was raised and not on an antecedent date. If the person is not presumed to have died on an antecedent date prior to the one on which the question is raised the natural inference is that he was alive till the question is raised: A.I.R. 1956 Trav.-Co. 129: I.L.R. (1955) Trav.-Co. 1100.

S. 108 does not warrant that the exact date of death not being proved, the earliest date of death should be presumed as the date of institution of the suit; the exact time of death is a matter for evidence, not presumption. The onus of proof is cast not under S. 108 but under the general principle of the burden of proof: (1993) 2 M.L.J. 283.

Under S. 108 which is founded upon the principles of the English Common Law, the burden is on the person who asserts that a person is living when such a person has disappeared and has not been heard of for more than seven years. Under S. 108 the burden shifts to the party who affirms that the person 'is alive'. It cannot be disputed that that relates to the point of time at which the question itself emerges in the legal proceeding. Where a young man of 24 disappeared on 12th December, 1950 and failed to draw his usual allowance in January 1951, which was his only means of sustenance and was not heard of for more than seven years and no light was thrown on any probable motive nor was it suggested that foul play or accident was possible and one had to only speculate as to the cause of his disappearance, *held*, that it could not be presumed that he was dead even on the date of disappearance and that the only conclusion possible was that young man was dead at the time the question arose (date of plaint) owing to the failure of the opposite party to prove that he was alive: (1965) 78 Mad.L.W. 347: (1965) 2 M.L.J. 185: A.I.R. 1965 Mad. 440.

Where deceased widow inherited property of her husband on his death and she became full owner of said property after commencement of the Hindu Succession Act, 1956 and as she was not heard of for the last more than seven years before the filing of the suit by the plaintiff, it was contended that she should be presumed to have died, *held*, it was for the appellant to have proved about the time of death of widow as it was very material to find out as to whether she died after the commencement of Hindu Succession Act, 1956: A.I.R. 1975 P.&H. 222: 1975 Cur.L.J. 18.

Wife of a person who has been unheard of for seven years alienated his property to the plaintiff on 4th June, 1962. The plaintiff has been dispossessed by the defendants in July, 1962. In a suit by the plaintiff they challenged the right of the plaintiff's vendor to dispose of the same. In the absence of any proof as to the date of death of the transferor's husband, *held*, that he could be presumed dead earliest on the date when the plaintiff brought the suit and since on the date of the transfer there was no proof that he was not alive on that date, the plaintiff's suit could not be maintained: 1967 Raj.L.W. 515: A.I.R. 1968 Raj. 48.

The respondent's husband had an insurance policy in 1946 and was not heard of thereafter. The *premia* under the policy were paid on behalf of the policy-holder till 1948 but discontinued thereafter. From 1948 to 1952, the insurance company itself paid the *premia* under the non-forfeiture clause in the policy so as to keep the policy alive. In 1955, the respondent filed an application praying for a declaration that her husband must be presumed to have died on or after 16th March, 1953, on the expiry of 7 years from the date of disappearance on 16th March, 1946, and that she was the sole beneficiary under the policy as a nominee. The Court passed an order declaring that the respondent's husband might then be presumed to have died and directing the insurance company to pay into the Court the amount payable under the insurance policy.

In pursuance of that direction the insurance company deposited the amount.

Thereafter the insurance company represented that it was entitled to refund of the amount which had been paid under the non-forfeiture clause to keep the policy alive. That sum was retained in Court pending investigation of the company's claim. The rest of the money was paid over to the respondent by the Court.

The respondent objected that since the applicant (Insurance Company) had not proved that the respondent's husband was alive in or after 1948, the applicant was not entitled to claim the money paid by the applicant to keep the policy alive. The respondent also claimed interest from the presumed date of death of her husband till the date of the presentation of the petition. *Held*, (*i*) that in the special circumstances of the case, the respondent must be presumed to have died after July, 1952, and that the applicant Insurance Company was entitled to refund of the amount claimed; (*ii*) as to the respondent's claim for interest, the money did not become payable till the Court gave a finding that respondent's husband should be presumed to be dead, and interest could not be allowed on money that had not become payable: (1958) 71 Mad.L.W. 445: (1958) 2 M.L.J. 53: A.I.R. 1958 Mad. 453.

Suit for possession of property alleging that successors-in-interest had died and his line was extinct—Court investigating case and dismissing suit after 6 years on ground that the death was not proved and hence suit was premature—Dismissal is not from defect of jurisdiction or other cause of like nature—Provisions of S. 14(1) do not apply when subsequent suit is filed—S. 108, Evidence Act raises only presumption of death but not time of death: I.L.R. (1964) 2 Punj. 774: A.I.R. 1965 Punj. 80.

Where a coparcener's wife whose husband disappeared in 1930 and was not heard of thereafter sold the coparcenery property in 1970 and the sale was later on assailed on the ground that she had no right or title in the property sold by her, *held*, there is no presumption that the coparcener had died on any particular day; in the absence of evidence, it could not be said that the coparcener had died prior to the enforcement of Hindu Women's Right to Property Act, 1937 on 14th April, 1937; having no right or interest in the property, its sale by her is of no effect; she could not have conferred any title thereto on the purchaser. [A.I.R. 1984 Mad. 340, Affirmed]: A.I.R. 1995 S.C. 995: 1994 D.N.J. 410: (1995-1) 115 Mad.L.W. 10: 1995 (Supp.) 1 S.C.C. 27.

Where the insured motor cycle occasioning the accident on 24 September, 1974 stood in the name of a Flight Lieutenant reported missing in the Indo-Pak war of 1965, *held*, the case is covered under S. 107; the burden lay on the insurer to prove that the insured was dead on the date of accident or that the policy was taken in the name of a dead person absolving the insurer of its liability; but the insurer adduced no such evidence; even if not heard of for 7 years, the insured could not be presumed to be dead either on the date the policy was taken or the accident occurred; the presumption of his death could only relate to the date the claim was instituted or the written statement was filed in the Tribunal and not to any period anterior thereto: (1993-2) 104 Punj.L.R. 96 (D.B.).

6. Presumption regarding death of judgment-debtor—Burden of proof.—Where a decree is challenged on the ground that the judgment-debtor was dead on the date of passing of decree and it is argued that the defendant was seen alive on a certain date, since it is the decree-holder who claims a right, namely of execution of decree, the onus is on him to prove that the judgment-debtor was alive on a particular date within seven years of his having been seen alive, that is the date of passing of decree: 1967 Ker.L.J. 304: 1967 Ker.L.T. 1082.

But *see* (1993) 2 Ker.L.J. 488 [Where a decree was challenged by LRs of one of the judgment-debtors on the ground that it was a nullity since it was obtained against a dead person, *held*, since there was no presumption as to the date of death, the burden to prove that as on the date of the suit one of the defendants was in fact dead was on the said LRs of the deceased judgment-debtor. (1988) 1 Ker.L.T. 45, Rel. on; in view of A.I.R. 1971 Ker. 85: 1970 Ker.L.T. 976 (F.B.), some of the observations in 1967 Ker.L.T. 1082 cannot be fully accepted.]

7. Presumption in case of absconder.—S. 108 is nothing more than a proviso to S. 107 and the two sections must, therefore, be read together in order to appreciate their full import. Where a person is absconding from

justice in order to evade a trial upon a charge of murder, he would not communicate with any relations in the natural course of events because to do so would reveal his whereabouts and he might be apprehended by the Police and prosecuted. In such a case no presumption can arise because it is S. 107 and not S. 108 which would apply. There being, thus, no presumption of the death of the absconding person, the persons claiming his property as his reversioners have to prove that he had died before they succeed: I.L.R. (1956) Punj. 1232: A.I.R. 1957 Punj. 316.

If a wife has absconded to an unknown place, it cannot be construed as her death in the eye of law unless the requirements of S. 107 are fulfilled: A.I.R. 1989 Madh. Pra. 198: 1989 M.P.L.J. 328: 1989 Jab.L.J. 387.

When petitioner was shown as "Farar" (absconding) in revenue papers, *held*, the presumption was that he was alive and the burden was on the contesting respondent to prove that the petitioner was dead: 1986 All.W.C. 1224.

The plaintiffs, sisters of the last holder of the ancestral land, sued his collaterals for its possession and the defence taken was that the "last holder" had in fact predeceased his father and they had inherited the land prior to the commencement of the Hindu Succession Act, in their own right under custom whether it was previously held by the "last holder" or his father and had perfected their title by adverse possession. The mutation had been effected on the basis of the "last holder" not having been heard of for seven years by persons who would have naturally heard of him and he was an army deserter but the plaintiffs gave no positive date of his death. *Held*, under S. 107, the burden lay upon the plaintiffs to prove that the last holder had died; under S. 108, the burden again was on the plaintiff to prove the date of his death when he had not been heard of by them during the previous seven years; the date of death is not a matter of presumption but of evidence; besides, the presumption of his death is misconceived for he was not a person who had not been heard of but an Army deserter, apprehending arrest and evading it, no presumption under S. 108 could arise in his case for it is covered under S. 107. [A.I.R. 1926 P.C. 9; A.I.R. 1957 Punj. 316; A.I.R. 1965 Punj. 80, Foll.]: (1992) 2 Rev.L.R. 136.

8. "Persons who would have naturally heard of him".—A wife, who left her husband and is in the keeping of another, is not one of the persons who would naturally hear from him if he were alive: 117 I.C. 209: A.I.R. 1929 Nag. 127.

S. 108 provides that unless the provident fund authorities can give any proof that the husband of the petitioner is alive, the husband of the petitioner would be deemed to be dead as the wife of a person is the most likely person to know the whereabouts of her husband and she denied on oath any such knowledge: (1989) 2 Cal.L.T. (H.C.) 220.

9. Common catastrophe.—Where a husband and wife perish in a same boat disaster, there is no presumption of law arising from age or sex or state of health as to survivorship among them, nor is there any presumption that both died at the same time. The question is one of fact depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will, treat it as a matter incapable of being determined, the onus of proof being on the person asserting the affirmative: 77 Cal.L.J. 209: A.I.R. 1944 Cal. 132.

Where two brothers die in the same catastrophe and it is not known as to who died first, there is no presumption either of survivorship or of contemporaneous death. In such cases the plaintiff must prove his assertion. Two brothers died in a fire and the widow of one of them sought to succeed to the entire properties on the ground that her husband being the younger of the two must be deemed to have survived the other. *Held*, there was no such presumption in the absence of direct evidence and that the onus of proving it lay upon her: I.L.R. 9 Luck. 461: A.I.R. 1934 Oudh 101. Death of two persons in earthquake—No presumption of younger person surviving elder—Burden of proof. *See* 71 I.A. 171: A.I.R. 1944 P.C. 100: (1944) 2 M.L.J. 354 (P.C.).

10. Hindu and Mahomedan law rules.—The rule in S. 108 supersedes the rules in Hindu and Mahomedan law: A.I.R. 1923 Mad. 182: 43 M.L.J. 725; 2 Beng.L.R. 134; I.L.R. 9 Luck. 401: A.I.R. 1934 Oudh 41. There can be a presumption and inference of death irrespective of S. 108: 103 I.C. 329: A.I.R. 1927 All. 687. The rules as to presumption of death contained in this section would govern the case of a Mahomedan who was missing for

more than seven years. [I.L.R. 7 All. 297, Foll.]: 1932 All.L.J. 175. But *see* I.L.R. 2 All. 265 (F.B.).

11. No custom can whittle down or reduce period laid down in section 108.—The period of seven years laid down in S. 108 with regard to the duration when the whereabouts of a person are not known cannot be whittled down and reduced to 2/3 years under any custom. Where a woman, who married second time, pleaded dissolution of her earlier marriage automatically on the basis of existence of custom in her community according to which person whose whereabouts were not known for 2/3 years was presumed to be dead, *held*, such a custom being contrary to S. 108 was illegal and, thus, her second marriage was void: A.I.R. 1987 P.&H. 37: (1986) 90 Punj.L.R. 581: (1987) 1 D.M.C. 470: (1987) 1 Hindu L.R. 594.

12. Illustrative cases.—Presumption of life or death—Minor not heard of for some months—Mother appointed guardian. *See* 1 I.C. 465.

Admission—Construction—*A* stating that *A* and *B* are monthly joint tenants under the landlord of certain premises—This must be regarded as admission on part of *A* that *B* is alive and not that he is dead—S. 108 is ruled out and S. 107 is attracted—*A* must prove that *B* is dead: (1963-64) 68 Cal.W.N. 786: 1963 Cal.L.J. 75.

When certain person *A* had not been heard of for last 20 years by his near relations and *B* filed a suit against *A* on 8th February, 1955, it was for *B* to prove that *A* was alive on the date the suit was filed as well as on the date of the service of the summonses and on the date the *ex parte* decree was obtained in that suit. When a presumption of *A*'s death had been raised in the case, the burden would be shifted to *B* to prove, particularly when *A* had not been heard of for the last 20 years, that he was alive on any particular date prior to the date of a later suit which *B* was resisting on the basis of the *ex parte* decree obtained against *A*. When *B* had not discharged the onus on him, the decree in his favour cannot be given effect to: 1961 All.W.R. (H.C.) 622.

Where one of the two Muslim brothers, recorded as joint owners of land in revenue record from 1944-45 to 1965-66, had gone to Delhi for safety and was never heard of thereafter, and the other brother sought mutation of the lands in his own name as the heir of the unheard of brother, *held*, it could be presumed that the missing brother had not migrated to Pakistan for had he done so, the Union of India through the Custodian, defendant in the suit, would certainly have got half the land declared as evacuee property; the entire land belonged to the surviving brother in view of S. 108. [A.I.R. 1980 S.C. 1206, Rel. on]: A.I.R. 1982 P.&H. 106: 1981 Punj.L.J. 510.

Presumption of death, when can be raised—Ejectment suit by one of joint lessors—Other co-lessor alleged to have died in Kumbha of 1954—No evidence as contemplated by S. 108 given—Case held should be decided, not by applying S. 108, but by applying S. 107—Suit by one joint lessor held not maintainable—Contract Act, 1872, S. 45—Joint lessor—Suit by one for ejectment—Co-sharers—Joint lease by co-sharers—Suit by one for ejectment—Joint promises—Lease—Joint lease—T.P. Act, 1832, S. 111. *Held*, on facts, that it was impossible to hold that it was proved that co-lessor had not been heard of for seven years on the date when the second appeal was heard and decided by those persons who would have heard of him if he had been alive. As long as that was not proved, the provisions of S. 108 did not become applicable and the case had, therefore, to be decided not by applying S. 108 but by applying S. 107. *Held*, further that the suit by the plaintiff alone, without joining the co-lessor, in the absence of proof of the death of the co-lesser, was not maintainable, since one co-lessor alone could not terminate the tenancy and the rent was payable jointly to both: 1964 All.W.R. (H.C.) 294: 1964 All.L.J. 465.

Where plaintiff, wife of an employee of L.I.C., filed a suit for amount of death claim against defendant-Corporation on the ground that her husband was traceless for more than seven years and the defendant did not make any efforts to prove or disprove the factum of death of plaintiff's husband, *held*, the plaintiff was entitled to the policy amount in view of presumption under S. 108: (1993-1) 103 Punj.L.R. (Del.) 25: (1993) 49 Del.L.T. 145.

Where upon the death of the owner, his son and heir remained unseen and unheard by his wife and children for 22 years, when the wife and children sold the house by a sale

109. Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.—When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

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deed executed by them, *held*, the son is presumed to have died much prior to the execution of the sale deed; the sale deed could not be said to be invalid: 1994 (Supp.) 2 S.C.C. 113.

A title suit was decreed and during the pendency of appeal the plaintiff was kidnapped and became untraceable. On the appeal being allowed, his wife and children preferred a second appeal. *Held*, since it could not be presumed under S. 108 that the plaintiff was dead, his wife and children could not be deemed his legal representatives; obviously, they could not wait for seven years to file the appeal because of the law of limitations and other complications; therefore, the High Court under its inherent powers for the ends of justice allowed them to maintain the second appeal as they were managing and intermeddling with the plaintiff's estate after his kidnapping as his legal heirs: A.I.R. 1993 Pat. 105: 1993 B.B.C.J. 104: (1993) 1 Pat.L.J.R. 340.

Where the husband had not been heard of for more than 7 years but a suit for partition and separate possession of the ancestral property, purportedly lodged by him was resisted by the wife on the ground that he was an imposter and not her husband, *held*, the burden to prove that the plaintiff was the husband alive rested on him; on facts found that he was not the huband: A.I.R. 1995 Mad. 120.

Section 109—Synopsis.

1. General.
2. Partners.
3. Landlord and tenant.
4. Principal and agent.

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1. General.—"Have been acting as such"—Single instance—If sufficient: 40 Mad.L.W. 810: A.I.R. 1935 Mad. 268. Continuance—Presumption of. *See* (1913-14) 18 Cal.W.N. 33: 22 I.C. 383.

2. Partners.—Under S. 109 of the Evidence Act when the question is whether the persons concerned are partners and it has been shown that they had been acting as such, the burden of proving that they are not partners or that they had ceased to be partners is on the person who says that he was not a partner or had ceased to be a partner. The presumption under this section, therefore, is that the appellant, who has been acting as a partner, is in fact a partner in the firm and that he continues to be such: A.I.R. 1958 All. 829: (1958) 9 S.T.C. 699: I.L.R. (1958) 1 All. 673.

A person seeking to charge another with liability as a partner of firm should prove that such person is a partner or that he had been acting as such: A.I.R. 1935 P.C. 175. Where the plaintiff comes forward with a definite case that the partnership was dissolved on the date mentioned by him, the burden is on him to establish the fact not by virtue of S. 109, but by the rule that the plaintiff must establish every fact on which he relies: A.I.R. 1959 Bom. 528: I.L.R. (1959) Bom. 29.

3. Landlord and tenant.—(*See* also Ss. 101-104, Note 43 and S. 106, Note 12, *supra*). Where the appellants proved that their predecessor and the landlord were acting as landlord and tenant and the landlord accepted the rent even after the expiration of tenancy and the holding was agricultural, *held*, the burden under S. 109 was upon the lessor to prove that they did not stand in that relation or that they had ceased to be tenants: A.I.R. 1973 Gau. 80.

When it is shown that the person in possession before the defendant was a tenant of the plaintiff at one time, it is for the defendant to show when the tenancy ceased and possession became adverse to the plaintiff: 28 M.L.J. 361: 27 I.C. 804; I.L.R. 26 Bom. 410; 4 Cal.L.J. 202.

Where a tenant at will admits the tenancy, S. 109 comes into operation and there is a

110. Burden of proof as to ownership.—When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

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presumption against him that he continues as a tenant till he proves that the relationship has ceased to exist: 173 I.C. 222: A.I.R. 1938 Sind 16. On this section, *see* also 89 I.C. 674: A.I.R. 1927 Nag. 99.

Where in a suit for possession by way of pre-emption of the land in dispute, when the name of the plaintiff was recorded as tenant in the Jamabandi, *held*, the burden was on the purchaser of the said land to prove that he, and not the plaintiff, was in possession of the land as tenant at the time of sale: A.I.R. 1981 S.C. 695: (1981) 94 Mad.L.W. (S.N.) 78: 1981 Punj.L.J. 121.

Tenant for a year—Holding over—Presumption. *See* 39 I.C. 125.

Where in a suit for restoration of possession of the demised premises by the tenant on the ground of having been illegally evicted, both parties had adduced evidence, *held*, the question of onus is rendered immaterial; on the case being decided on merits on appraisal of evidence, the High Court will not interfere in revision: A.I.R. 1986 Del. 36.

4. Principal and agent.—(*See* also S. 106, Note 17, *supra*). Where there is an admission that parties stood in the relation of principal and agent, the burden of proving that they have ceased to stand to each other in that relationship is on the party who alleges such cessation of relationship: A.I.R. 1935 Lah. 49.

Section 110—Synopsis.

[*See* also Ss. 101-104, Note 76, *supra*].

1. Scope and applicability.
2. Possession must be lawful.
3. Evidence of possession.
4. Part possession.
5. Possession and patta.
6. Suit for possession.
7. Miscellaneous.

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1. Scope and applicability.—By virtue of S. 110, a person in possession is deemed to be owner until the contrary is shown: 41 P.L.R. 123. *See* also 45 Mys. H.C.R. 57: 17 Mys.L.J. 510.

Though S. 110 recognises a presumption that the person is possession also has good title, there is no corresponding section saying that the person with title should be presumed to be in possession. This presumption is one that can only come under S. 114: A.I.R. 1923 Bom. 361 (D.B.).

A presumption of origin in some lawful title arises only where no actual proof of title is forthcoming. Such a rule would have to be resorted to if there is absence of actual evidence. But if there is actual and convincing proof of the nature of the grant, the rule can hardly have any application. [A.I.R. 1948 S.C. 25, Rel. on]: A.I.R. 1974 Mad. 182: (1973) 2 M.L.J. 317: (1973) 86 Mad.L.W. 613 (D.B.).

As per S. 110 when the question arises as to whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. Possessionary title is sufficient to resist the suit for possession: (1991) 4 Karn.L.J. 526: I.L.R. (1991) Karn. 2761 (D.B.).

Possession implies co-existence of: (*1*) animus, that is intention to hold; and (2) *corpus*, that is physical control over property: 1974 M.P.L.J. 906 (D.B.).

Presumption of continuity of possession. *See* 1981 Punj.L.J. 500: 1981 Rev.L.R. 469.

The true import of S. 110 is that where a person is shown to be in possession of the property, the presumption of ownership is in his favour and the burden shifts on to the one who challenges that person's title to the property.

The presumption would arise if two conditions are satisfied, *viz.*: (*i*) that the possession is not *prima facie* wrongful; and (*ii*) that the title of the other contesting party to the property is not proved by direct evidence. The provisions of the section can be availed of by the party who alleges title in himself and also relies upon possession in proof of it, but fails to establish the title and succeeds in proving his possession. If a person claiming to be the true owner of a property interferes in the possession of another over it, the

possession of the latter would cast upon the former the burden of proving his ownership: A.I.R. 1970 Manipur 50.

Before drawing a presumption of title from possession, such possession must have been long and continuous. Spasmodic and interrupted possession by persons will not be sufficient. The presumption under S. 110 would apply if two conditions are satisfied: (1) that the possession of the plaintiff is not *prima facie* wrongful and (2) that the title of the defendant is not proved. Possession constitutes by itself a limited title to the property, a title which is good against all except the rightful owner. Possession is evidence of title, and gives a good title against a wrongdoer; but a person who has no possession, cannot, without proof of title, turn others out of possession even though they may have no title; for possession is a good title against any one who cannot prove a better title. Lawful possession would, of course, mean possession which has not been obtained by force or fraud. Possession has two fold value; it is evidence of ownership and is itself the foundation of a right of possession: A.I.R. 1983 N.O.C. 93 (Ori.).

Prior peaceful possession is *prima facie* evidence of ownership under S. 110, and is a good title against all persons except the true owner and can be relied on in successfully maintaining a suit for ejectment against another who has no title to the land in dispute: 118 I.C. 680 (Nag.).

Where nothing else is known, the person in possession of property is presumed to be owner: 45 I.C. 217.

Where plaintiff is in possession alleging ownership, onus of proving that he is not owner lies on defendant: 103 I.C. 36: A.I.R. 1927 Lah. 841.

But where defendant is in possession the onus is on plaintiff: 10 L.L.J. 488.

Onus on the party out of possession—Shifting of onus, *see* 4 Bur.L.T. 159: 11 I.C. 777. *See* also A.I.R. 1922 P.C. 181; A.I.R. 1931 P.C. 162; I.L.R. 9 Cal. 744 (F.B.) on shifting of onus.

The onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession and it would be contrary to all legal principles to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession: A.I.R. 1916 P.C. 21. The onus resting upon the plaintiff to prove his title cannot be discharged by merely relying upon the weakness of the defence: A.I.R. 1950 Pat. 359 (D.B.); 1 I. A. 76 (P.C.).

S. 110 insists only on proof of possession. The section is not limited in its application to immovable property but applies equally to movable property. So where *A* was proved to be in possession of disputed quantity of pepper at the relevant time, the presumption is that he is the owner and the burden of proving that he is not the owner is on the person who affirms that he is not the owner: 1959 Ker.L.J. 629: 1959 Ker.L.T. 682.

Lawful possession of land is sufficient evidence of right as owner as against a person who has no title whatever and is a mere trespasser. It is not necessary for the person claiming injunction to prove his title to the suit-land, it would suffice if he proves that he is in lawful possession of the same and that his possession was invaded by a person who had no title: I.L.R. (1951) Bom. 425: A.I.R. 1951 Bom. 380: (1951) 53 Bom.L.R. 163.

Title to land—Possession—Value of—Lawful possession—How far evidence of title or ownership. *See* I.L.R. 30 Pat. 1007: A.I.R. 1952 Pat. 314.

Where a person asserts ownership of a property he is in possession of, *held*, the burden of proving that he is not the owner lies on the party which affirms that the person in possession is not the owner: (1972) 85 Mad.L.W. 727 (D.B.); 1976 Punj.L.J. 224.

Presumption of title from possession can arise only where facts disclose no title in any party: 1968 Ker.L.J. 176: 1968 S.C.D. 500: A.I.R. 1968 S.C. 1165.

A plaintiff who has omitted to sue under S. 9 of the Specific Relief Act, when first dispossessed, is not debarred when the summary relief under that section has become barred by limitation, from relying, in a suit for ejectment on this section. As soon as he has proved that the defendant has dispossessed him, the onus is thrown upon the latter to prove his title: 2 P.L.J. 61: 38 I.C. 797.

S. 9 of the Specific Relief Act, 1877 in no way controls the operation of S. 110 or a suit based upon possessory title. S. 9 provides a summary remedy to a person who has, without his consent been dispossessed of

immovable property otherwise than in due course of law, for recovery of possession without establishing title. A distinction has to be drawn between a suit based upon possessory title and a suit under S. 9 of the Specific Relief Act. In the former case, the plaintiff would be entitled to a decree only where the plaintiff's possession was sufficient proof of his title, while in the latter case the Court has merely to see whether the plaintiff was in possession within six months prior to the date of the institution of the suit: A.I.R. 1972 Pat. 186.

A distinction must be made between the rule of evidence embodied in S. 110 and the principle on which the concept of possessory title is based. That principle is that possession constitutes by itself a limited title to the property, a title, which is good against all except the rightful owner. This title usually described as possessory title, has all the features of an estate in land. Like any other estate it can be transferred *inter vivos* or by a testamentary disposition and can also be acquired by inheritance. Possession has a twofold value; it is evidence of ownership, and is itself the foundation of a right to possession. A person who, while in peaceful possession, is dispossessed by a trespasser can file a suit and recover possession merely by proving his prior possession. The plaintiff is not required to establish ownership against the defendant-trespasser. Proof of title in a third person does not displace the limited possessory title which is enough for the plaintiff to succeed.

A suit on possessory title must be distinguished from a suit filed under S. 6 of the Specific Relief Act of 1963 within 6 months of dispossession. The latter type of suit cannot be resisted on the ground of title, so that the suit can be maintained even against the true owner if he has dispossessed the plaintiff otherwise than in due course of law. A suit on possessory title, on the other hand, can be filed within twelve years of dispossession (Art. 64 of the Limitation Act, 1963) and the plaintiff can maintain it against any person who does not have a better title. [A.I.R. 1968 S.C. 1165 and I.L.R. 23 Mad. 179, Rel. on; *Obiter* observations of *Broomfield, J.* in A.I.R. 1936 Bom. 201 held not good law in view of A.I.R. 1968 S.C. 1165]: 1970 Mah.L.J. 355: (1970) 72 Bom.L.R. 142: A.I.R. 1970 Bom. 405.

Where the defendant pleaded that he is the owner alongwith the plaintiff and claimed share in the property, the burden is on him to prove that he is the owner, for he has admitted the plaintiff's title; the defence set up as a matter of pleading and law undoubtedly cast the burden on the defendant; if he fails to discharge it and the plaintiff's possession not being disputed, the presumption under S. 110 is attracted: (1984) 1 An.W.R. 129: (1983) 2 An.L.T. (N.R.C.) 49.

No presumption of title arises from the fact that a brother is residing in a house purchased by another brother: (1980) 2 M.P.W.N. 96.

When the property stands in the name of a person, the presumption is that he is the owner of the property and anybody who alleges that he is not the owner, must prove the same. Where the document of purchase stood in the name of the plaintiff and the defendant admitted said fact but he alleged that the property was purchased in plaintiff's benami, *held*, it was for the defendant to prove that the apparent state was not the real state and the plaintiff was really the benamidar of her husband and his brothers: A.I.R. 1973 Cal. 128: I.L.R. (1972) 2 Cal. 703 (D.B.).

S. 110 no doubt enacts that title is to be presumed from lawful possession. This is a rebuttable presumption and like all rebuttable presumptions, must yield to proof. Where, therefore, title is proved or assumed the presumption created by S. 110 can no longer apply. Madras Land Encroachment Act, S. 2 declares, subject to a saving clause, that the Government is the owner of certain kinds of property including the beds of tanks. There is no conflict between S. 110, and this provision. The title of the Government being statutorily declared, the rule of presumption enacted by S. 110 is not brought into play. But there is nothing to prevent long possession being relied upon as evidence of a grant made by the original owner: 1938 Mad.W.N. 244: A.I.R. 1938 Mad. 193: (1938) 2 M.L.J. 434.

Possession avails the plaintiffs against the entire world than the true owners. On the basis of the possession, a presumption arises of his *prima facie* title and long peaceful lawful possession would lead to the inference of his title. It is not for the plaintiff to negative the alleged title of the defendant nor does the plaintiff carry the burden to prove adverse possession when the title is alleged in the

defendant even though it may be the State. It is only when the presumption arising from the plaintiff's possession is displaced by the defendant leading evidence to establish title that the presumption under S. 110, in view of the known fact of the defendant's title, ceases to be available to the plaintiff. The burden thereafter shifts to the plaintiff to prove his title whether by acquisition from the defendant or by prescription. The length of such adverse possession which is statutorily required in case of the defendant State would be of course sixty years under the Old Limitation Act, 1908. This burden shifts to the plaintiff, only in those cases where the facts are known by the defendant having shown his title: (1971) 12 Guj.L.R. 668 (D.B.).

Where in a suit against the Secretary of State for declaration of the plaintiff's title to a certain vacant site, the plaintiff proved his possession for over 30 years, *held*, that the burden of proving that the plaintiff was not the owner was upon the defendant and that the mere classification of the land as village site by the Government had no legal effect whatsoever except as an assertion of title: I.L.R. 33 Mad. 173: 20 M.L.J. 71.

Plaintiff is not bound to prove adverse possession for sixty years to establish his title as against the Secretary of State for India in Council. (*Ibid*). Under S. 110 of the Evidence Act proof of long possession of an "otta" and therefore, of the land under it would constitute *prima facie* proof of title in the person in possession and the burden would shift on the person who wants to displace that presumption. This presumption avails even against the Government: A.I.R. 1951 Madh. Bh. 114.

Presumption from juridical possession—Suit against Government, *see* 6 Sind L.R. 210: 19 I.C. 565.

The respondent filed a suit for declaration that he was the owner of site situated in front of his house as he was in possession of it for more than 12 years, and also for an injunction against the Government restraining it from taking eviction proceedings under the Land Encroachment Act. The defence set up by the Government was that site was surveyed as part of the public street, and unless the respondent was able to prove his title and possession beyond 60 years, he cannot maintain the suit. The Courts below relying on the presumption laid down under S. 110 of the Evidence Act held that the respondent had possession for more than 12 years and the Government had failed to adduce any evidence to prove that they had subsisting title to or possession within 60 years and decreed the suit. It is this view that is challenged in second appeal, by contending that the presumption laid down under S. 110 of the Evidence Act does not apply in a suit against the Government.

Held, S. 110 of the Evidence Act embodies the well-recognised principle that possession is *prima facie* proof of ownership. A person in possession is entitled to remain in possession until another person can disclose a better title. Therefore, once the plaintiff proves that he has been in possession of the suit property, the burden of proving that the plaintiff is not the owner is on the first defendant who affirms that the plaintiff is not the owner. The section does not make any distinction between the Government and a private citizen. S. 110 is, therefore, equally applicable where the Government claims to be the owner or challenges the ownership of the plaintiff who is in possession of the property: (1967) 2 An. W.R. 433.

In the case of a boundary dispute between the parties, the possession of the disputed land is an important element to be taken into consideration in determining the dispute: A.I.R. 1941 Cal. 632: 197 I.C. 756.

Where an assessee was found in possession of gold which was seized and he was convicted as carrier, *held*, inclusion of gold's value as his income under the Income-tax Act, 1961 was not justified as S. 110 of the Evidence Act, could not be invoked: (1984) 147 I.T.R. 251: 1984 Tax.L.R. 989.

The presumption of possession following title to land under S. 110 is recognised under S. 37(1) of the Land Revenue Code, 1879; it is rebuttable as well as available against the State: (1971) 12 Guj.L.R. 668 (D.B.).

Under this section it is presumed that woman has power to dispose of all property which was in her possession at the time of her death: A.I.R. 1927 Oudh 618.

Trustee—Acquisition of possessory title: (1956) 2 All E.R. 881.

Where a person is in possession of property and he uses it for four months of every

year for tethering his cattle, such possession is *prima facie* evidence of title, but the Court should not say that the person's ownership is established: 119 I.C. 701: A.I.R. 1929 Nag. 318. *See* also A.I.R. 1936 Pat. 602.

2. Possession must be lawful.—For the application of presumption under S. 110, it must be proved that the possession is lawful. If a person is in possession of a land for a number of years on the basis of valid title deeds and there is nothing on record to show that the plaintiff or her predecessor-in-title had come into possession of the suit-land as a result of encroachment on municipal land, possession of the plaintiff over the suit-land cannot but be held to be lawful: 1985 M.P.L.J. 454.

Lawful possession however short is presumptive evidence of title as owner and of the title to possession: A.I.R. 1915 Mad. 345 (D.B.); I.L.R. 20 Cal. 834 (P.C.); (1968) 2 S.C.W.R. 344.

The presumption under S. 110 would apply only if the possession of the claimant (plaintiff) is *prima facie* not wrongful, and if the title of the defendant is not proved. It is necessary for the plaintiff to prove that his possession was of such a character as to lead to the presumption of title and not such a sort of possession as would be regarded as wrongful in its origin. The presumption under S. 110 will not apply when there is a statutory presumption in favour of the Government: I.L.R. (1942) Bom. 357: (1942) 44 Bom.L.R. 295: A.I.R. 1942 Bom. 161.

To apply the provisions of S. 110 to plaintiff's possession, that possession must be founded on a *prima facie* right. Mere acts of user will not lead to a presumption of title in case the possession is *prima facie* not proved to be lawful. In this suit filed against the municipality it was held that the plaintiff's possession of the piece of land in dispute was referable to a sale certificate issued to him by the executing Court and was *prima facie* lawful in origin and that the presumption arising in favour of the municipality under S. 36 (*h*), Indore Municipal Act was displaced: A.I.R. 1956 Madh. Bh. 70.

3. Evidence of possession.—The onus laid on a party by S. 110 is discharged by his showing that the possession enjoyed by the other party rests on a basis inconsistent with a right of property: 32 Sind L.R. 340: A.I.R. 1938 P.C. 87 (P.C.)

Proof of possession varies with the nature of property: A.I.R. 1915 Oudh 204. The possession to be proved must be such possession as, the property is capable of or such as has been the normal method of user usually: A.I.R. 1957 Trav.-Co. 223.

The mere fact that defendant claimed rent could not defeat the presumption of title arising in plaintiff's favour from the fact that the plaintiff had possession when the suit was instituted: (1934) 36 Punj.L.R. 64: A.I.R. 1934 Lah. 324.

Land revenue receipts do not *ipso facto* prove actual possession of the land by the holders of the receipts: A.I.R. 1979 Gau. 55.

Where *J*, the plaintiff, claimed the reliefs of declaration and injunction against City Municipality of Indore in the City Munsif's Court alleging possession of the suit open sites in the temple and on behalf of the temple and the trial Court decreed the suit finding possession for over 25 years on the statements of the plaintiff and his two witnesses and such user as Tulsi plants, and a flower tree standing thereon for sometime which were used for the temple, the suit was dismissed in appeal by the District Judge on the ground that no title had been acquired by exclusive user or possession for the statutory period of sixty years as against the Government in whom the sites were vested. In the second appeal benefit of S. 110, Evidence Act was relied on. *Held*, possession is mixed question of law and fact. It has to be inferred from facts proved and cannot be founded on the bare statement of witnesses that a party had been in possession. Possession under S. 110 of the Evidence Act must be of such a character, as to lead to a presumption of title, based on *prima facie* right. Mere acts of user of the land, as in the instant case, do not amount to such a character. The title of the Government to the open sites (in suit) subsists unless proved facts lead to a reasonable inference that the right to the land has been parted with or extinguished by possession for over the statutory period: A.I.R. 1951 Madh. Bh. 80.

If in a suit by one aggrieved by the result in a proceeding initiated under S. 145 of Cr. P. Code, both the parties fail to prove their title to the property, then the party who proves to have had possession of it prior to

such initiation of the proceeding under S. 145 must succeed: 1967 Cr.L.J. 1042: A.I.R. 1967 Pat. 254.

In a suit for ejectment it is upon the plaintiff to make out his title by definite evidence which is not open to any reasonable doubt. He cannot succeed merely by showing a semblance of title or by adducing evidence which would support the case only so far as to establish it to some slight degree of probability. He cannot rely on the weakness of the defendant's title but must succeed on the strength of his own. Where he fails to satisfy the Court as to the truth of his claim, the suit has to be dismissed: 1947 O.W.N. 509. *See* also I.L.R. (1946) Kar. 24 (P.C.).

"Possession"—Meaning of—Suit for possession of house site in village—Plea by Government that it is a passage—Failure to prove—Plaintiff proved to have tethered cattle, stored grass and built otli—Effect of—If warrants inference of title—Burden of proof—Not thrown on defendant (Government): (1937) 39 Bom.L.R. 216: A.I.R. 1937 Bom. 193.

4. Part possession.—In question of disputed ownership of land occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area unless it can be reasonably attributed to a right of the whole area. The portions so occupied may be so numerous and so closely adjoining that they practically cover the whole area. Alternatively, the occupation of a portion may be reasonably attributable to a right of ownership in a larger area, as for instance, occupation of a portion of a field may be attributed to a right extending over the whole field. But the area must be defined, in other words, it must be attributable to an existing boundary: A.I.R. 1934 P.C. 185.

Where a portion of a house is proved to be in possession of a person for a long time, a presumption of ownership of that portion arises in his favour under S. 110, Evidence Act, although there may not be any documentary evidence on record to prove his ownership. A declaration of his ownership can, therefore, be rightly given in absence of any proof of title on the part of the disputing party. Similarly, if such owner has, for the enjoyment of his portion, right to use the pol, darichi and the staircase, the other party can rightly be restrained from interfering with the use and enjoyment of the disputed portion. But simply because one of the parties is the owner of a part of the house, an inference cannot be drawn that party is the joint owner of that property also which is necessary for the use of his portion: 1957 Raj.L.W. 647: A.I.R. 1958 Raj. 294. *See* also 1982 M.P.W.N. 154.

5. Possession and patta.—Intangible right in immovable property—Right of patta—Possession and patta—Distinction: A.I.R. 1957 Hyd. 23.

Plaintiff in possession—Patta in name of defendant—Defendant alleges to be benamidar for plaintiff—Suit on title by plaintiff claiming possessory title—Nature of evidence: A.I.R. 1965 Manipur 27.

6. Suit for possession.—Where a plaintiff not in possession sues for possession and sets up a case of possession by the defendant on his behalf but fails to discharge the onus on him, then it is open to a Court to presume that the defendant's possession must be rightful: A.I.R. 1950 Kutch 50.

It is not necessary for the person claiming injunction to prove his title to the suit land. It would suffice, if he proves that he is in lawful possession of the same and that his possession was invaded by a person who had no title: A.I.R. 1951 Bom. 380: I.L.R. (1951) Bom. 425.

Where in a suit for possession of suit land, the defendant contested the plaintiff's claim on the ground that the plaintiff was allotted the land being Harijan and he could not sell the same before the expiry of ten years, *held*, it was for the defendant to establish that there was any embargo on the right of the plaintiff to sell the land: 1994 Punj.L.J. 78.

Mere previous possession will not entitle a plaintiff to decree for recovery of possession except in a suit under S. 9, Specific Relief Act, even though peaceful possession for a long period of time may under certain circumstances give rise to an inference of title in the plaintiff as against a trespasser who has no right to possession what so ever: A.I.R. 1917 Cal. 469 (S.B.).

Where the plaintiff suing for possession did not prove title and the defendant who dispossessed the plaintiff also failed to prove the title, *held*, the plaintiff is entitled to decree on the ground of prior possession: 1979 M.P.L.J. (Note) 19.

111. Proof of good faith in transactions where one party is in relation of active confidence.—Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations

(*a*) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(*b*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

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7. Miscellaneous.—Where the bill of lading showed the owner to have consigned the goods to self or agent and thereby he retained his possession and right of disposal over the goods during the voyage, *held*, in a suit for damages for loss of goods by accident during the voyage, the burden to prove that the consignor was not the owner and the property in goods lost had passed to the person to whom the bill of lading was endorsed lies on the common career. [A.I.R. 1958 Cal. 730 and A.I.R. 1964 Cal. 290, Foll.]: A.I.R. 1983 Cal. 237 (D.B.); A.I.R. 1983 Cal. 408.

Where in a suit for specific performance of a contract and ouster of a trespasser from the suit land against the Improvement Trust, the Trust admitted ownership and possession but the trespasser claimed adverse possession, *held*, the burden to prove that the Trust was not the owner lay on the party claiming adverse possession and not on the plaintiff to prove the Trust's ownership: A.I.R. 1982 Pat. 219: 1982 B.L.J.R. 403.

Where appellant filed an ejectment petition against respondent relying on a will under which he was made the owner of the house part of which was occupied by respondent even during the life time of the executant but the appellant failed to prove the genuineness of the will, *held*, once respondent was found to be in occupation of part of the house, then he was entitled to seek a declaration of possessory title as good against the whole world including appellant except the true owner. [A.I.R. 1927 Lah. 841; (1893) I.L.R. 20 Cal. 834 (P.C.) & 1902 Punj. Re. 78, Rel. on]: A.I.R. 1980 P.&H. 122: 1980 Rev.L.R. 80 (D.B.).

Presumption as to possession—Pakani Patrika—Name of X shown in the column of "cultivators" for some years—Column left blank in subsequent years—Presumption is that X continued in possession in those subsequent years also—There is no warrant for assuming that the owner re-entered into possession in those years: (1979) 1 An.W.R. 58.

Gift of deities and their properties by shebait in favour of plaintiff—Suit by defendant challenging gift—Defendant already in possession since prior to gift—Onus to prove that defendant was not the owner is on plaintiff: I.L.R. (1964) Cut. 918: A.I.R. 1965 Ori. 201.

Possession as evidence of title—Nightsoil collected by sweepers of Municipal Board from houses and streets and deposited on leased land—Ownership in nightsoil before it was deposited on leased land must be deemed to be in Board: 1965 All.L.J. 432: I.L.R. (1965) 1 All. 435: A.I.R. 1965 All. 527.

Where the plaintiff is found to be in lawful possession and defendant does not prove superior title in himself, a decree for possession can be passed on the basis that plaintiff had prior lawful possession though the suit is not under S. 9, Specific Relief Act. *G*, after having been taken in adoption in 1929 by the widow of *D*, was in possession of *D*'s property since then till he was dispossessed by *T* the daughter of *D* in 1944. *G*'s adoptive mother died in 1936. *T* could not prove any superior title in herself. *Held* that *G* was entitled to a decree for possession: 1960 Nag. L.J. (Notes) 65.

Section 111—Synopsis.

1. Scope and applicability.
2. Active confidence.
3. "Fiduciary"—Meaning of.
4. Undue influence.
5. Husband and wife.

6. Guardian and ward.
7. Pleader and client.
8. *Pardanashin*/illiterate ladies.

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1. Scope and applicability.—S. 111 relates to transactions entered into by persons between whom there is fiduciary relationship: 1936 O.W.N. 1106: A.I.R. 1937 Oudh 56. *See* also 78 I.C. 850: A.I.R. 1925 Oudh 16; 8 Nag.L.R. 150: 17 I.C. 363; I.L.R. 36 Cal. 493: 2 I.C. 553; I.L.R. 25 All. 358; I.L.R. 30 Mad. 169: 17 M.L.J. 19 (F.B.) (Donor and donee); I.L.R. 18 Cal. 545 (P.C.) (Agent and principal); 11 M.I.A. 551; I.L.R. 20 All. 447 (husband and wife); A.I.R. 1926 Nag. 414 (deed by pardanashin lady).

S. 111 applies where the validity of a transaction, which is otherwise valid in all respects is called in question on the ground that the person benefiting from it did not act in good faith or took advantage of his position.

In a case where one party alleges that the other executed a promissory note in consideration of debt and the other denies execution and alleges that the document itself is a forged one, S. 111 ordinarily has no application: A.I.R. 1968 All. 224.

Under S. 111, whenever good faith of transaction between persons one of whom stands to other in position of active confidence is in question, there is presumption against the deed and the burden of proving good faith is on the person holding position of active confidence: A.I.R. 1937 Oudh 87 (D.B.).

S. 111 has no application except as between parties to the transaction itself. Where there is transaction between two persons and one of the parties is in a position of advantage over the other, who puts trust in him, he must, if the other contracting party challenges the good faith of the transaction, prove that he has not abused that trust. But that does not mean that when a question arises which is entirely outside one of good faith as between the contracting parties, and the transaction is impugned from another angle altogether, merely because a sale takes place between solicitor and client or between person who have not that special relationship but some other analogous relationship, the method of impugning it should be different or the things to prove should, in any way, be varied: A.I.R. 1938 Rang. 412: 178 I.C. 772; A.I.R. 1922 Cal. 203 (D.B.).

S. 111 cannot come into operation unless the good faith of the parties is questioned by any one. In the absence of any allegation as to want of good faith by the plaintiff, no Court can assume this fact *suo motu* and place burden of proof of good faith on a defendant: 1943 R.D. 173.

When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence, the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position; he has to prove that there was fair play in the transaction and that the apparent is the real; in other words, that the transaction is genuine and *bona fide*: A.I.R. 1975 Gau. 30.

Obviously, as between parties *inter se* dealing on the footing of complete equality, want of good faith is not presumed; *prima facie*, law presumes in favour of the deeds duly executed; ordinarily, the burden lies on the party seeking to invalidate a transaction for fraud, undue influence and bad faith to prove the same. However, a major exception to this rule is that in case a relationship of "active confidence" or fiduciary relationship subsists between the parties like that guardian and ward, agent and principal, doctor and patient, spiritual advisor and disciple or trustee and *cestui que* trust, etc., the initial burden does not shift to the weaker party challenging the transaction; it rests on the person who upholds it: A.I.R. 1982 All. 376 (D.B.).

2. Active confidence.—Active confidence in S. 111, indicates that the relationship between the parties must be such that one is bound to protect interests of the other. But the words should, in order that the law may be really protective, receive wider interpretation: A.I.R. 1935 Cal. 671 (D.B.). Where there is relationship of confidentiality between the two parties to a deed, terms of which are clearly harsh and unconscionable as regards the interests of one of the parties, *held*, it is for

the other party to prove good faith of the transaction: A.I.R. 1930 P.C. 139.

Person in position of active confidence—Burden of proving *bona fides* of transaction is on him: A.I.R. 1933 Lah. 861.

Active confidence—Literate woman with considerable intellectual capacity and habits having dealings with another person—No presumption that person stood in position of active confidence to her—Pairoker is not necessarily in a position of active confidence to the person for whom he does pairvi in a suit: A.I.R. 1968 All. 224.

3. "Fiduciary"—Meaning of.—The word "fiduciary" as per Webster's New International Dictionary connotes "a person in trust, a person or thing holding something in trust; of or pertaining to a trust, pertaining to or of the nature of trusteeship". The Courts on noticing that any party is not in a position to exercise his independent will for such reasons, place the burden of proof on the other party in the advantageous position to establish that he did not abuse his advantage: A.I.R. 1982 All. 376 (D.B.).

4. Undue influence.—(*See* also Ss. 101-104, Note 105, *supra*). The three stages for consideration of a case of undue influence were expounded in A.I.R. 1926 P.C. 60 in the following words: In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached, namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by under influence is to lie upon the person who was in a position to dominate the Will of the other: A.I.R. 1967 S.C. 878; 1982 Hindu L.R. 36 (Madh. Pra.) (D.B.).

The questions of undue influence and of mental incapacity are totally different. For establishing undue influence, there must be evidence of either fraud or coercion: I.L.R. 22 Cal. 324 (P.C.).

To treat undue influence as having been established by proof of the relation of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it, is erroneous. That merely proves influence. It must be further established that a person in a position has used the position to obtain unfair advantage for himself so as to cause injury to the person relying upon his authority or aid: I.L.R. 10 Lah. 761: A.I.R. 1929 Lah. 309.

Onus to prove undue influence is on caveator—Every influence is not undue influence and mere fact that bequest is in favour of persons who were looking after testator at or about time of will does not by itself indicate that will was executed under undue influence: I.L.R. (1966) 1 Cal. 408.

Undue influence—Pleadings: I.L.R. (1964) 2 Ker. 259: A.I.R. 1965 Ker. 189.

Undue influence—Onus of proof. *See* A.I.R. 1955 S.C. 363.

Undue influence—Burden of proof—When shifts: I.L.R. (1964) 2 Ker. 259: A.I.R. 1965 Ker. 189.

Where the fact of undue influence was not seriously disputed, the burden lies on him, who denies it, to show that no undue influence was used and the transaction was made in good faith: 1934 All.L.J. 817: A.I.R. 1934 All. 507.

Execution of will—Undue influence—Proof: A.I.R. 1957 Ker. 115.

Undue influence would in normal circumstances presuppose some knowledge of the transaction by the influenced person. Thus, where the case of a lady, who was not a house-wife but was an artist and film actress, was that she had abandoned the entirety of the administration of the business of the family in the hands of her husband but she did not say that she had to accept whatever the husband said and her plea was that she was not at all aware of the transaction in question and that the signature was obtained from her by her husband on the impugned document without her being informed of the nature of the transaction, *held*, this was not a case of undue influence to which the principles of S. 111 would apply: A.I.R. 1990 Mad. 46: (1989-2) 104 Mad.L.W. 294 (D.B.).

Until it has been established that party against whom undue influence is pleaded was in a position to dominate Will of other party, no assistance on issue of undue influence will be available under S. 16(3), Contract Act. Burden of proof in such case remains on latter: A.I.R. 1932 P.C. 202.

Undue influence—S. 16, Contract Act, analysed—Presumption under sub-S. (2)—Shifting of burden of proof—Limited application of sub-S. (3)—*Held*, plea of undue influence raised by defendants was not proved: A.I.R. 1963 S.C. 1279.

Contract Act, 1872, S. 16(3)—Undue influence—Plaintiff old, infirm, weak and having none to look after him—Appellant, grandson of plaintiff's own brother, helping him at time of plaintiff's illness—Plaintiff executing a deed of gift believing it to be deed of Will in favour of appellant on his request—*Held*, burden lay on appellant to prove that deed was not induced by undue influence: A.I.R. 1966 All. 438.

Where a gift deed, executed willingly, is shown to have been obtained by exercising undue influence upon an illiterate man of 70 years on the pretext of its being a power-of-attorney to manage his property, *held*, the deed has to be set aside; the burden to prove absence of undue influence would lie on the party which seeks to sustain the deed: A.I.R. 1972 Him. Pra. 33.

Where the appellant, an issueless widow, who was living with her elder brother and was fully under the control and authority of said brother executed a will bequeathing her property and thereafter executed a settlement deed in favour of her nephew but later prayed for its revocation on the ground of undue influence and coercion by her brother, *held* , impugned deed was vitiated by undue influence: (1990) 1 Hindu L.R. 132 (Ker.) (D.B.).

Proof of person being in position to dominate will of another—Transaction entered into appearing on face of it unconscionable—Burden to prove that transaction is not induced by undue influence is on person benefiting by it: (1969) 1 Mys.L.J. 507: (1969) 18 Law Rep. 104.

Gift of entire property by old, illiterate Mohammadan in favour of his grand nephew on whom he was dependent even for his maintenance—Son and unmarried daughters disinherited—Independent advice given by friend but not accepted—Presumption of undue influence, *held*, rebutted: 1964 Raj.L.W. 302: A.I.R. 1964 Raj. 250.

5. Husband and wife.—There is no presumption of law or fact in India that a woman to whom a man is engaged to be married is in a position to dominate his will so as to override his own real intentions; it is not mere influence but undue influence of the wife which has to be proved in order to vitiate the will; *held*, on facts, the will in favour of a newly married second wife by the husband to the exclusion of his mother, son and daughters was not brought about by the wife's undue influence. [A.I.R. 1971 All. 304, Rel. on]: A.I.R. 1974 S.C. 1999.

Where husband was in management of wife's property who was illiterate and was signing any document asked to sign, *held*, in respect to a deed mortgaging all her property for benefit of husband, presumption of undue influence did arise. *See* A.I.R. 1945 P.C. 8.

Where a lady was not a house-wife but a film actress, *held*, presumption of undue influence could not be raised. *See* A.I.R. 1990 Mad. 46, cited under Note 4, *supra*.

6. Guardian and ward.—Where a minor soon after attaining majority executed what purported to be a deed of settlement in favour of his maternal uncle, the minor's *de facto* guardian after the death of his parents, and afterwards sued his maternal uncle for cancellation of the deed on the ground that it had been procured fraudulently by mis-representation, *held*, not having denied the factum of having been the minor's *de facto* guardian in his written statement, the burden lay upon the defendant to prove good faith of the transaction. The defendant was undoubtedly in the position of active confidence; merely because at the time the deed was executed the plaintiff was no longer a minor would make no difference; such minor cannot be expected to come out of that influence merely on attaining majority or within a short time thereafter. [A.I.R. 1922 Cal. 203; A.I.R. 1935 Cal. 671, Foll.]: A.I.R. 1977 Cal. 297: (1977) 2 Cal.L.J. 54: (1976-77) 81 Cal.W.N. 960 (D.B.).

When the minor after attaining majority, ratifies the debt incurred by a guardian, *held*, in absence of anything to show that the ratification was due to undue influence by the guardian no presumption of undue influence could be drawn: A.I.R. 1937 Oudh 56 (D.B.).

7. Pleader and client.—Where a pleader who was engaged by a judgment-debtor in an execution proceeding, advances money to him to pay off the decretal amount and takes a mortgage of the judgment-debtor's property in favour of his (pleader's) son, thereby securing a long term and profitable investment for his money, *held*, in view of the fiduciary relation existing between the pleader and his client, it is incumbent on those seeking to enforce the mortgage to prove the utmost good faith on the part of the pleader in persuading his client to execute the mortgage. As the pleader knows that the onus of supporting his transaction would rest upon him, he must preserve the evidence which would be required to support it, if he desires that it should be upheld: I.L.R. 12 Luck. 435; A.I.R. 1937 Oudh 37. *See* also 1940 O.A. 910: A.I.R. 1940 P.C. 204: (1939) 52 Mad.L.W. 777 (P.C.); A.I.R. 1924 P.C. 34 [Where a pleader purchases his client's property in execution sale in the name of his wife, after ceasing to be the client's pleader, the sale is vitiated.]

Gift by a person to his Counsel's wife—Validity—Proof of spontaneity eliminates proof of independent legal advice: A.I.R. 1969 Cal. 111.

8. *Pardanashin*/illiterate ladies.—(*See* also S. 101-104, Note 80, *supra*). A *pardanashin* illiterate lady is entitled to protection at the time she executed a document; may be, she might gather business experience subsequently; but that would not disentitle her of the protection for there can be no presumption that the business experience she possessed subsequently was also there in her when the document was executed: (1973) 39 Cut.L.T. 499.

While dealing with a deed purportedly executed by a *pardanashin* lady, *held*, the Court must satisfy itself before giving effect to the deed that (*1*) she was really *pardanashin*, living in complete seclusion and having little or no commerce with the outside world; (2) the deed was executed by her or through an authorised person with full understanding of what she was about to do; (3) she had full knowledge and understanding of the effect of the deed, not merely the deed having been read over or translated to her; (4) she had independent and disinterested advice; and (5) she understood the deed as a whole: A.I.R. 1986 Gau. 71: (1986) 1 Gau.L.R. 147 (D.B.).

It is for the person claiming the benefit from the disposition of property by a *pardanashin* to establish affirmatively that it was substantially understood by the lady and was really her free and intelligent act: 31 Cal.W.N. 635: A.I.R. 1931 P.C. 100: 16 M.L.J. 94 (P.C.); A.I.R. 1934 P.C. 208; A.I.R. 1925 P.C. 204.

Document executed by *pardanashin* lady—Proof of—Onus: A.I.R. 1966 Pat. 110.

Judicial decisions recognising the principles protecting the transactions made by *pardanashin* ladies fall broadly into two groups, namely, firstly, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically: A.I.R. 1921 Cal. 131.

Law gives special protection to *pardanashin* ladies due to social conditions of the time; they are presumed to have imperfect knowledge; if a document has been taken from them, the Court has to ascertain whether the executrix was a free agent and duly informed about the nature of the document; the normal presumption that a person affixing his name to a document knows about its contents does not apply to *pardanashin* ladies. It is well settled that the burden of proof always rests upon the person who seeks to sustain a transaction with a *pardanashin* lady to establish that she had executed the deed after having carefully understood its nature and it was not only her physical but also mental act; this special burden can be discharged by proving that the

deed was explained to, and understood by, her but also by other direct and circumstantial evidence. This special rule for protection of *pardanashin* ladies should not be confused with the other doctrine of fraud, duress and undue influence applicable to all persons, whether *pardanashin* ladies or others: A.I.R. 1984 Pat. 257: 1984 B.B.C.J. (H.C.) 605; I.L.R. 3 Cal. 324 (P.C.); A.I.R. 1940 P.C. 134.

Town-bred ladies, in *parda* or not, know that in case of illness in the house the physician should be called and for executing legal deeds, the lawyer should be consulted; even *quasi pardanashin* ladies in urban areas know this; in the fast changing situation, the protection should be extended only to real *pardanashin* ladies who are really ignorant: A.I.R. 1986 Gau. 71: (1986) 1 Gau.L.R. 147 (D.B).

As to whether the presumption in favour of *parda* woman should be extended to every illiterate and ignorant woman, *see* 10 Mys.L.J. 217.

It is well settled that the protection available to a *pardanashin* lady is equally available to an illiterate lady: (1973) 39 Cut.L.T. 499.

Originally applied to *pardanashin* ladies, the area of operation has gradually been enlarged to other similarly handicapped females unable to cope with the complexities of life: A.I.R. 1982 All. 376 (D.B).

In the case of execution of a deed by a *pardanashin* or illiterate lady, it must be proved affirmatively and conclusively that the deed was not only executed by, but was explained to and really understood by, the grantor. The Court would demand affirmative proof on the subject of the lady's intelligent understanding and execution of a deed and would not readily hold this onus to have been discharged where it is not shown that the lady had any independent advice: A.I.R. 1986 Ori. 53: (1985) 60 Cut.L.T. 487 (D.B.).

Pardanashin lady—Mortgage by—Suit to enforce—Burden of proof on plaintiff—Proof of independent advice. *See* A.I.R. 1958 Ori. 62.

Where it was found that the woman executing the sale deed and suing for its cancellation was not only of advanced age but also an illiterate rustic village woman with a very weak eye-sight, *held*, she is entitled to the protection law accorded to *pardanashin* ladies; such protection necessarily arises from old age, infirmity, ignorance, illiteracy, mental deficiency, inexperience and dependence on others. [1965 All.L.J. 1080, Rel. on]: A.I.R. 1981 All. 222.

Where a *pardanashin* lady was kept fully informed throughout of all the various stages of negotiations of compromise and was fully and intelligently aware that the Advocate engaged was clothed with authority to compromise the suit on her behalf and was in fact exercising his authority, *held*, it cannot be said that the lady had not been proved to have authorised the agreement: A.I.R. 1930 P.C. 158. *See* also A.I.R. 1940 P.C. 70.

Where the appellant claiming herself to be a *pardanashin* lady demanded benefit of S. 111 but the evidence on the record showed that lady rather behaved as a male member in her day to day dealings as she filed suits and complaints in various Courts and prosecuted them in a 'manly' manner and she was meeting the petition writers, the lawyers and all others coming in her way during the course of litigation, *held*, the lady could not, therefore, be deemed to be enjoying the status of a *pardanashin* lady and was, therefore, not entitled to the benefit of S. 111: A.I.R. 1985 J.&K. 22: 1984 Kash.L.J. 327 (D.B.).

The quantum of evidence required to prove a transaction by a *pardanashin*, old and illiterate woman would vary from case to case; the rule of special protection of such women cannot inflexibly apply to every case. Thus, where the donor, a Muslim *pardanashin* woman, illiterate and old, made an oral gift to her daughter, an only surviving issue, living with her for 15 or 16 years, *held*, she did understand the nature and effect of the gift; it emanated from her own mind. [(1914) I.L.R. 36 All. 81 (P.C.); A.I.R. 1955 All. 573, Rel. on]: A.I.R. 1972 All. 219 (D.B.).

Where the scribe of the documents did not make any statement that he read over and explained the contents of the documents to the defendant, an illiterate lady, and that she understood the same, no other evidence was produced, *held*, due execution of the document was not proved. [A.I.R. 1963 S.C. 1203, Rel. on]: A.I.R. 1994 Ori. 111.

[1][**111-A. Presumption as to certain offences**.—(1) Where a person is accused of having committed any offence specified in sub-section (2), in—

(*a*) any area declared to be a disturbed area under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order; or

(*b*) any area in which there has been, over a period of more than one month, extensive disturbance of the public peace,

and it is shown that such person had been at a place in such area at a time when fire-arms or explosives were used at or from that place to attack or resist the members of any armed forces or the forces charged with the maintenance of public order acting in the discharge of their duties, it shall be presumed, unless the contrary is shown, that such person had committed such offence.

(2) The offences referred to in sub-section (1) are the following, namely:—

(*a*) an offence under section 121, section 121-A, section 122 or section 123 of the Indian Penal Code (45 of 1860);

(*b*) criminal conspiracy or attempt to commit, or abetment of, an offence under section 122 or section 123 of the Indian Penal Code (45 of 1860).]

112. Birth during marriage, conclusive proof of legitimacy.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

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1. Inserted by Act 61 of 1984, S. 20 (w.e.f. 14-7-1984).

Section 112—Synopsis.

1. Scope and applicability.
2. Birth during continuance of marriage.
3. "Begotton"—Meaning of.
4. Access and non-access.
5. Onus to prove non-access.
6. Evidence of non-access.
7. Death of husband or dissolution of marriage.
8. Cohabitation, whether raises presumption of marriage.
9. Period of gestation.
10. Acknowledgment of paternity.
11. Blood-group test.
12. Void and voidable marriages.
13. Miscellaneous.

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1. Scope and applicability.—The presumption under S. 112 is applicable not only during the subsistence of the marriage, but also if the child is born within 280 days of the dissolution, provided the mother remains unmarried. A finding that adultery is not proved cannot bar the denial of paternity on non-access: (1990) 1 Ker.L.T. 94: (1990) 1 Ker.L.J. 65: (1990) 1 Hindu L.R. 258: (1990) 2 D.M.C. 247.

The presumption, which S. 112 contemplates, is a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the section, namely, non-access between the parties to the marriage at a time when according to the ordinary course of nature the husband could have been the father of the child. Access and non-access connote existence and non-existence of opportunities for marital intercourse. Non-access can be established not merely by positive or direct evidence; it can be proved undoubtedly like any other physical fact by evidence, either direct or circumstantial, which is relevant to the issue, though, as the presumption of legitimacy is highly favoured by law, it is necessary that proof of non-access must be clear and satisfactory: A.I.R. 1954 S.C. 176; A.I.R. 1954 Him. Pra. 32; A.I.R. 1960 Punj. 169. Once access or intercourse by the husband is proved, no evidence will be allowed to show that the child is not the child of the husband, that is to say,

the presumption to be drawn becomes an irrebuttable one: (1965) 78 Mad.L.W. 651.

Subject to proof of impossibility of access, the presumption under S. 112 of the Evidence Act shall be drawn by all Courts, civil, criminal and revenue, governed by the Indian Evidence Act: (1950) 1 M.L.J. 158: A.I.R. 1950 Mad. 394.

S. 112 can have no application to a case where the maternity of a person is in dispute, and not his paternity:(1939) 52 Mad.L.W. 57: A.I.R. 1940 P.C. 93 (P.C.). As to applicability of section, *see* I.L.R. 48 All. 625: A.I.R. 1926 All. 589; I.L.R. 7 Lah. 368: A.I.R. 1926 Lah. 529; I.L.R. 49 Mad. 553: A.I.R. 1922 Mad. 628: 50 M.L.J. 453; I.L.R. 17 Luck. 416: A.I.R. 1942 Oudh 143.

S. 112 enacts a strong presumption favouring legitimacy against bastardy; the rule is founded in the notion that it is undesirable to enquire into a child's paternity whose parents had a subsisting marital status with access to each other; the continuance of the marriage and availability of access is conclusive proof of legitimacy; no evidence in such a case is permissible that the child could have been begotten of another man; such conclusive presumption is, however, rebuttable by proof of non-access at any time when the child could have been begotten; on facts found, the presumption of legitimacy stood rebutted: A.I.R. 1977 Karn. 115: (1977) 1 Karn.L.J. 206 (D.B.); 1982 M.P.L.J. 487.

S. 112 lays down a rule of prudence in accordance with the rule of natural justice. Subsistence of a valid marriage involves mutual rights and obligations; the husband is entitled to the wife's company and the wife is entitled to keep aloof only when justified; in a cultured society, chastity is the rule and lapses from virtue an exception. Presumptions of law are always in favour of the rule, not the exception; exception has to be proved in each case, depending upon its facts and circumstances. Morality and innocence are legal presumptions accepted as a matter of course and the converse is to be proved by positive evidence; this is the basis of the presumption of paternity available only to an offspring of a legally wedded couple. Lapses from virtue and non-access are matters for proof and not for presumption. The presumption which is the basis of the section is that he is the father whom the marriage indicates; it arises from the conception in favour of marriage and against concubinage in a civilised society. Public policy demands such a presumption. Law in general presumes against vice and immorality. These are the basic features on which the presumption embodied in S. 112 rests. But the presumption can definitely be rebutted by evidence; when either by admission or evidence non-access during the relevant period is proved and access of the paramour is established, the presumption stands rebutted. It is not impossible for a child to be born to a woman by her paramour when her marriage is subsisting; the presumption under S. 112 is strong but is not conclusive: 1985 Ker.L.T. 338: 1985 Cr.L.J. 1553: 1985 Ker.L.J. 293: (1986) 1 Hindu L.R. 451.

S. 112 can be applied with reference to recent events where the question of marriage or cohabitation can be examined: S. 114 is, on the other hand, sanctioned in order to provide for cases of ancient origin which may not admit to clear and direct proof.

It is the principle of law that *"Odiosa et inkonesta non sunt in lege presumenda"* (nothing odious or dishonourable will be presumed by the law). So the law presumes against vice and immorality. One of the strongest illustrations of the principle, is the presumption in favour of the legitimacy of children in a civilised society. But where illegitimacy seems as common as marriage and legitimacy, a presumption of legitimacy cannot be drawn and legitimacy or illegitimacy will have to be proved like any other fact in issue: I.L.R. (1960) Cut. 230.

The causes of adulterine bastardy have been reduced to two: (*1*) the impotence of the husband, and (*2*) the absence of sexual intercourse between the husband and wife when the period of the wife's gestation commenced. The general rule of law or presumption in favour of legitimacy being so strong the evidence to disprove the existence of sexual intercourse between the husband and wife was necessarily to be conclusive. The presumption in favour of legitimacy was expressly declared by some writers not to be a presumption *juri set de jure* but one that was liable to be controverted nor was proof necessary to controvert it required to be of the highest order. The Court is not concerned in cases of this nature with the question of the probability or the improbability of the legitimacy of the child but with the question of the

impossibility alone. The only question that can be legally put to determine legitimacy of child is whether there was by the laws of nature a possibility, under the circumstances of access or non-access, that such a child can be the real son of the parent from whom he claims to derive his title. The presumption which is incorporated in S. 112 of the Evidence Act contemplates a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the section, namely, non-access between the parties to the marriage, at a time, when according to the ordinary course of nature, the husband could have been the father. Access and non-access connote, existence and non-existence of opportunities for marital intercourse. It is also equally settled that non-access can be established not merely by positive or direct evidence; it can be established also by indirect evidence or circumstantial evidence, but it is necessary that the proof of non-access must be clear and satisfactory: (1967) 80 Mad.L.W. 15: I.L.R. (1966) 2 Mad. 373, affirmed in A.I.R. 1971 S.C. 2352: (1970) 2 M.L.J. (S.C.) 121: (1971) 1 S.C.R. 49, relying on A.I.R. 1954 S.C. 176; A.I.R. 1967 S.C. 569.

Difference between English and Indian law: (1926) 28 Bom.L.R. 607: A.I.R. 1926 Bom. 248.

Under the English law rebuttal of the presumption of legitimacy is more a question of quality of onus whereas in Indian law it is rather a question of admissibility of evidence for discharge of the onus. [A.I.R. 1986 All. 259 and 1991 Cr.L.J. 939, Disting.]: 1993 Cr.L.J. 1659: (1992) 2 Cal.H.N. 327: (1991-92) 96 Cal.W.N. 1103.

Although the law presumes in favour of marriage and against concubinage, it does not presume that concubinage ripens into marriage by mere efflux of time or birth of children: A.I.R. 1952 Bilaspur 13. The presumption of legitimacy created by S. 112 can be rebutted only by proof of non-access leaving no room for doubt. If the husband has had access, the wife's adultery will not justify a finding of illegitimacy—Proof of impotence would be equivalent to proof of non-access: 26 I.C. 966: 16 Cr.L.J. 84: (1914) 11 U.B.R. 23; 10 I.C. 389: (1911) 1 Mad.W.N. 312; 77 P.R. 1911: 12 I.C. 946; 22 I.C. 409. *See* also A.I.R. 1926 Oudh 231: I.L.R. 1 Luck. 71; 5 Mys.L.J. 249.

Where children are born during subsistence of a marriage, it is a conclusive proof under S. 112 that they are legitimate children unless the husband contending otherwise can show that he had no access to the wife at any time when they could have been begotten. In other words, this conclusive presumption of law can be displaced only by proof of the particular fact mentioned in the section, namely, non-access between the parties to the marriage at a time when, according to the ordinary course of nature, he could have been the father of the children. Access and non-access only connote existence of opportunities for marital intercourse. A special protection is given by the law to the status of legitimacy in India. The law is very strict regarding the type of the evidence which can be let in to rebut the presumption of legitimacy of a child. Even proof that the mother committed adultery with any number of men will not of itself suffice for proving the illegitimacy of the child. If she had access to her husband during the time the child could have been begotten the law will not countenance any attempt on the part of the husband to prove that the child is not actually his. The presumption of law of legitimacy of a child will not be lightly repelled. It will not be allowed to be broken or shaken by a mere balance of probability. The evidence of non-access for the purpose of repelling it must be strong, distinct, satisfactory and conclusive. The standard of proof in this regard is similar to the standard of proof of guilt in a criminal case. These rigours are justified by considerations of public policy for there are a variety of reason why a child's status is not to be trifled with. The stigma of illegitimacy is very severe and we have not any of the protective legislations as in England to protect illegitimate children. No doubt, this may in some cases require a husband to maintain children of whom he is probably not father. But, the Legislature alone can change the rigour of the law and not the Court. The Court cannot base a conclusion on evidence different from that required by the law. [A.I.R. 1954 S.C. 176; A.I.R. 1972 Ker. 80; I.L.R. (1837) 5 Cal. and Fin. 163; A.I.R. 1959 Mad. 396; A.I.R. 1951 Mad. 910, Rel. on]: 1975 Ker.L.T. 533.

The mere fact that a woman is immoral or is living in a house separate from that of her husband, is having relations with other men is not sufficient to rebut the conclusive

presumption of legitimacy which is raised by S. 112 unless it is proved that the husband and wife had no access to each other during the period indicated in the section. The burden of proving such non-access is upon him who asserts it, for stigma attaches to illegitimacy, and it is wrong to brand a child as illegitimate on insufficient grounds: 1947 All.L.J. 569.

The terms of S. 112 must be given their due effect and any evidence to the effect that a wife has been leading an improper life, even if the Court should be prepared to accept it as true, will not rebut the presumption enacted in that section. A statement by husband that a child in the womb of his wife was not his child and must have been procreated by somebody else is not entitled to any weight; nor does it amount to such proof, even assuming it to be true, as will displace the effect of S. 112. The fact that the parties are governed by the Mohammedan law makes no difference so far as the application or effect of the presumption under S. 112 is concerned. The fact that under that law there may be a divorce of a wife by the husband making oath accompanied by an imprecation as to his wife's fidelity, and that if he denies the parentage of the child with which the wife is then pregnant, it will be bastardised, cannot override the presumption enacted in S. 112: 1937 Mad.W.N. 757. *See* also A.I.R. 1937 Lah. 266.

S. 112 of the Act applies where legitimacy of a child during subsistence of marriage is questioned—Illegitimate child born—Paternity to be proved by person alleging it: 1965 M.P.L.J. (Notes) 162.

The presumption under S. 112 applies quite irrespective of the fact whether the mother was married or not at the time of the conception: A.I.R. 1937 Lah. 784.

S. 112 has to be interpreted and applied with reference to the facts and circumstances of each case to determine whether or not there was an opportunity for intercourse between the spouses; if it is proved that the husband did not have intercourse with the wife, he need not then prove want of opportunity: A.I.R. 1986 Madh. Pra. 57: 1986 M.P.L.J. 105: (1986) 1 Hindu L.R. 543.

To rebut the conclusive presumption under S. 112 there must be conclusive evidence that the husband could not be the child's father: A.I.R. 1987 Rer. 5: 1986 Ker.L.J. 744: 1986 Ker.L.T. 1068: (1986) 2 Hindu L.R. 342: (1987) 1 D.M.C. 140: (1987) 1 Hindu L.R. 133 (D.B.).

Nature of presumption under the section explained: A.I.R. 1934 Mad. 310: 66 M.L.J. 279. *See* also A.I.R. 1934 Mad. 318: 66 M.L.J. 283; A.I.R. 1957 Mad. 160.

The presumption under S. 112 of the Evidence Act is irrebuttable where as the presumption under S. 21 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 is rebuttable. Therefore, the statutory presumption under S. 21 of the 1987 Act cannot be said to be unreasonable: 1995 Cr.L.J. 477 (S.C.).

Provisions are as much applicable to the offspring of a marriage between Hindus as it is to children of spouses professing other faith: (1968) 2 Mys.L.J. 39: 15 Law Rep. 204: A.I.R. 1969 Mys. 17.

S. 112 of the Evidence Act, is very general in its terms and it applies to all persons including Mohamedans who may have personal law of their own relating to legitimacy as there is no provision exempting them from the application of S. 112. [A.I.R. 1926 All. 589 and A.I.R. 1936 All. 528, Foll.]: A.I.R. 1977 Mad. 182: (1977) 90 Mad.L.W. 98: (1977) 1 M.L.J. 482: I.L.R. (1977) 1 Mad. 303.

As to presumption of legitimacy from marriage in the case of Mahomedans, *see* A.I.R. 1936 All. 528.

Word "valid" in section means flawless, and hence presumption will not apply in case of "fasid" marriages under Mahomedan law: I.L.R. 1 Luck. 71: A.I.R. 1926 Oudh 231.

Hindu wife converting to Islam—Marriage does not stand automatically dissolved—Marriage with Muslim—Legitimacy of child born of that tie—Presumption: A.I.R. 1969 All. 75.

The case of a married woman stands on a different footing from that of a spinster or widow who may be living as a mistress with somebody. For a mistress it may be open to prove that the real father of the child born during the period of her concubinage is different from her paramour. In such a case the presumption which would naturally arise in respect of paternity of the child in favour of the paramour is capable of being rebutted: I.L.R. (1942) Nag. 383: 1942 Nag.L.J. 254: A.I.R 1942 Nag. 96.

As to proof needed to establish paternity, *see* A.I.R. 1926 Mad. 1130.

Plea of illegitimacy—Onus of proof—Presumption: A.I.R. 1957 Madh. Pra. 174.

The law is that there is a presumption in favour of the legitimacy in respect of the birth of a child born during subsistence of marriage unless non-access between the two spouses is proved and the standard of proof required in such cases is the same which obtains in a criminal trial, namely, proof beyond all reasonable doubt. In other words, the law is very jealous and zealous in vouchsafing the fact that a child born in the circumstances laid down in S. 112 ought not to be illegitimised or bastardised on frivolous and weak evidence with regard to the proof of non-access and the Courts are duty bound to see that the evidence adduced before them has made them morally certain that the factum of non-access *inter se* the spouses has been proved: 1989 Cr.L.J. 1852: (1989) 1 Sim.L.C. 237: (1989) 2 Crimes 165: (1989) 2 Rec.Cr.R. 587.

The presumption regarding legitimacy cannot be rebutted by circumstances which only create doubts and suspicions: 39 P.L.R. J.&K. 51. *See* also A.I.R. 1942 Mad. 129: (1941) 54 Mad.L.W. 411.

The presumption of legitimacy is so strong that that it is for the husband to prove that it was physically impossible for him to have cohabited with his wife during the time in which the child was conceived: 1953 Cr.L.J. 1214: A.I.R. 1953 Vindh. Pra. 28.

The effect of S. 112 is that where a child is born during lawful wedlock, that child will have to be assumed to be the child of the man who was at the time the husband of the mother, unless it is shown that they had no opportunity of sexual intercourse in consequence of which the child could have been begotten. Every assumption is to be made in favour of legitimacy of a child born in lawful wedlock, and the onus of proving non-access or illegitimacy, is on the party alleging the same. The law requires in such cases the positive proof of a negative fact, that is, non-access as between the parties to the marriage and the mere fact that they are living separately in two different houses is insufficient to establish non-access. The fact of non-access has to be proved like any other physical fact and may be established both by direct and circumstantial evidence of an unambiguous character, but unless such evidence is forthcoming, it will not be possible for any Court "to believe it to be probable that there was no access". An entry in the birth register containing the name of the mother only does not warrant the inference that the child born is not illegitimate. An entry in the birth register may be relevant under S. 35 to show the date of birth but the question as to how far the fact that the name of the mother and not that of the father was given by the informant would bear on the question of the child's legitimacy, even if it is assumed to be relevant, depends largely on the means the informant may be shown to have possessed of the knowledge in connection with the child's birth. If the informant is a stranger, who did not know the father, the statement, even if relevant, would be wholly unimportant, and the entry would be of no value when the informant is not examined and no explanation is given for his non-examination by the party relying on the entry in support of his plea of illegitimacy: (1941) 54 Mad.L.W. 411: A.I.R. 1942 Mad. 129. *See* also A.I.R. 1943 Mad. 632: (1943) 2 M.L.J. 108; I.L.R. (1942) Nag. 383: 1942 Nag.L.J. 254: A.I.R. 1942 Nag. 96.

2. Birth during continuance of marriage.—According to S. 112 of the Evidence Act birth during continuance of a valid marriage is "conclusive proof" of legitimacy unless, as the latter part of the section itself provides, it is proved that the husband and wife had no access to each other at any time when the child could have been begotten. Thus, the presumption of legitimacy though strong is rebuttable. No doubt the evidence must be strong and unequivocal. It is not quite impossible for children born to a married woman to be legally held to be the progeny of a paramour: 1964 M.L.J. (Cr.) 390: 1962 Ker.L.J. 28: (1962) 1 Ker.L.R. 136: 1962 Ker.L.T. 138; (1841-46) 2 Moo. Ind. App. 245 (P.C.).

Birth during subsisting marriage—Conclusiveness of presumption: (1970) 2 S.C.J. 653.

The continuance of marriage for the purposes of S. 112 does not require to be shown in any particular manner: A.I.R. 1941 P.C. 11.

A child born during lawful wed-lock attracts the initial presumption of legitimacy; this rule of law is, however, rebuttable by showing non-access between the parents

when the child could have been conceived. But once access by the husband is proved, no evidence can be allowed to show that the child is not the husband's child; it is immaterial how soon after marriage the child is born. Though ordinary period of gestation is 280 days, a child born within less than 280 days, if there be no evidence of non-access, be presumed to be legitimate, notwithstanding whether or not the mother was married at the time of conception. The section is based on the maxim *pater est quem nuptiae demonstrant* (father is he whom the nuptials indicate). [1978 Hindu L.R. 719 (Him. Pra.), Dissent. from]: A.I.R. 1988 Del. 93: (1987) 1 D.M.C. 528: (1988) 93 Punj.L.R. (Del.) 1: (1987) 1 Hindu L.R. 583: (1987) 1 Hindu L.R. 384. *See* also 1994 D.N.J. 446 (Raj.) (D.B); 1982 M.P.W.N. 179.

Son born during continuance of valid marriage—Father disowning son but failing to establish non-access to wife during subsistence of marriage when son could have been begotten—*Held*, in the circumstances, presumption of legitimacy was available: 1982 All.L.J. 1335; 1965 M.L.J. (Cr.) 215.

Suit for declaration that child born to wife is illegitimate. Parents of child are not prohibited from deposing whether or not they had at any time when child would have been begotten access to one another [1924 A.C. 687, held did not apply in India]: 1953 Nag. L.J. 614: A.I.R. 1953 Nag. 374: I.L.R. (1954) Nag. 204. The principle of English Common Law according to which neither a husband nor a wife is permitted to give evidence of non-access, after marriage to bastardise a child born in lawful wedlock does not apply to legitimacy proceeding in India: (1954) 1 M.L.J. 152: 1956 S.C.R. 424: A.I.R. 1954 S.C. 176. But *see infra*. In a divorce case where the paternity of the infant is in question, neither husband nor wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock: (1937) 39 Punj.L.R. 262: A.I.R. 1937 Lah. 176.

Where no definite date of marriage was proved but it was established that a child was born to the parties after the marriage, *held*, it could be inferred that the marriage took place about 280 days before the birth of the child: 1983 Hindu L.R. 578 (P.&H.).

Where the question of paternity is one of evidence only, the case is governed by S. 112 and not by the personal law of the parties: 26 I.C. 996: 16 Cr.L.J. 84. A legal presumption in favour of legitimacy will arise only if it is proved that there was a valid and lawful marriage between the parents of the person whose legitimacy is in question. But the burden of proving such a lawful marriage is on the person who claims to be legitimate, and if he does not establish that he cannot rely on the presumption so as to shift burden of proving the contrary on to those who allege illegitimacy: 1935 O.W.N. 25: A.I.R. 1935 Oudh 80. *See* also 1944 O.W.N. 83: I.L.R. 20 Luck. 108.

The rule that continuance of a valid marriage will prevent an inference being drawn to the effect that the children born of the woman during the continuance of the valid marriage were born to another man as a result of adulterous intercourse is only a rule of evidence and not a conclusive presumption. It is open in a particular case to show that despite the subsistence of a valid marriage the husband had no access to the woman at the concerned period and the children were born to the paramour: (1962) 2 M.L.J. 529: (1962) 75 Mad.L.W. 681: A.I.R. 1963 Mad. 210.

Nothing except evidence that the husband did not have sexual intercourse with his wife at the period of conception, can illegitimise a child born in wedlock. The mere use of contraceptives does not alter this proposition of law: (1953) 2 All E.R. 1013.

A wife, who gave birth to a child, was, at the material time for conception, committing adultery with certain person. The adultery was condoned by the husband and the parties continued to sleep together and to have marital intercourse. The husband, however, used a contraceptive sheath on each occasion of marital intercourse during the relevant period. The parties accepted the probability that the child was the child of the adulterer and when registering the birth the wife left the name of the father blank. *Held*, that there was no repelling of the legal presumption and the child, actually born in wedlock, must be taken to be legitimate: (1959) 3 W.L.R. 447.

Where the legitimacy of a person is challenged in a suit, a mere finding to the effect that the husband after the marriage remained outside for long periods, that on his return from one of these periods of absence he found cause to be dissatisfied with the conduct of his wife and denied his paternity of the child to her, is not sufficient to meet

with the requirements of S. 112. In order to fulfil the requirements of S. 112, it is necessary to prove that during the period there was no occasion for the wife to meet her husband: A.I.R. 1937 Lah. 266.

Merely because the husband was suffering from a serious illness, that is not a sufficient reason for holding that the presumption which arises under S. 112 cannot be attracted: A.I.R. 1956 Bom. 129.

Parties living in same room—Presumption of access and cohabitation. *Held* that in view of the admitted evidence that the wife was living with the husband in the same room it should be presumed that the pregnancy was due to cohabitation with her husband: (1958-59) 63 Cal.W.N. 341: 1959 Cr.L.J. 834: 1959 Cal.L.J. 39: A.I.R. 1959 Cal. 454.

A girl born during the continuance of her parents' marriage would not justify the presumption that the marriage did not continue merely because the mother was getting maintenance from the father under Court orders; it could not mean that they could not or did not cohabit thereafter and that the girl was not born to her mother from the loins of her deceased father; the mother's categorical statement without rebuttal by the defendants is sufficient: (1984) 86 Punj.L.R. 358: 1984 Cur.L.J. 131.

Where the marriage between the parties was never dissolved and a child was born within two months after the wife was driven out of her husband's house, *held*, it could be presumed that the child was born during their wedlock: (1991) 1 Hindu L.R. 421 (Madh. Pra.).

Adultery is generally proved by presumptive proof based on (*i*) circumstantial evidence, (*ii*) evidence of non-access and birth, (*iii*) contracting venereal disease and (*iv*) confessions and admissions; adultery is seldom susceptible of proof except by proof of circumstances which clearly establish it; thus, where by medical evidence it was proved that a daughter born to a wife during the subsistence of the marriage was not and could not be born of husband, adultery stood established: A.I.R. 1986 Madh. Pra. 57: 1986 M.P.L.J. 105: (1986) 1 Hindu L.R. 543.

When a child is born during the continuance of a valid marriage there is conclusive presumption that the child is legitimate issue of married couple but if it is shown that the couple had no access to each other at a time when the child could have been begotten, the legitimacy of the child cannot be presumed. Where petitioner's mother did not come with her husband at the time of marriage but she was detained by her parents for gauna ceremony and before gauna ceremony the petitioner was born, *held*, as the parties to the marriage had no access to each other at the time when the petitioner could have been begotten, therefore, the petitioner could not be presumed to be legitimate son of his mother's husband. [A.I.R. 1927 Mad. 361; A.I.R. 1930 Mad. 194; A.I.R. 1937 Lah. 266; A.I.R. 1954 S.C. 176 and A.I.R. 1971 S.C. 2352, Rel. on; A.I.R. 1942 Oudh 143, Disting.]: A.I.R. 1982 All. 335: 1982 All.W.C. 534.

The parties to marriage were in touch with each other, residing for a short period in reasonable proximity, the wife being in the house of a relative of the husband. There was nothing to suggest that she was unfaithful or that the parties were on terms of personal hostility. *Held* that if the child could have been begotten during this period his legitimacy was undeniable: A.I.R. 1934 P.C. 49: 66 M.L.J. 288 (P.C.).

Where a daughter, born during pendency of maintenance proceedings filed by her mother against her father, filed application for maintenance but the father denied that she was his daughter, however, there was evidence that when mother left her husband's house, she was pregnant and there was no evidence that she had illicit relations with anyone and distance of the houses of the couple was only of ten minutes walk and in the earlier proceedings filed by the wife for maintenance, he had admitted that he was father of the girl, *held*, paternity of the girl stood proved: 1993 Cr.L.J. 1008 (Him. Pra.).

Where husband and wife were living separately for long in the same village, *held*, a conclusive presumption arises as to the legitimacy of a child born during the subsistence of a valid marriage unless it is established that at the time child was conceived, the husband had no access to his wife. [I.L.R. (1966) 2 Mad. 373, Affirm.]: A.I.R. 1971 S.C. 2352: (1971) 1 S.C.R. 49.

Where a child was born during the continuance of a valid marriage and even according to the petitioner they had spent at least one night together and, thus, he failed

to establish non-access to the respondent after marriage, *held*, the child was born to the petitioner: (1993) 2 Ker.L.J. 1019 (D.B.).

Where children were born during certain years of cohabitation of husband and wife, *held*, they were legitimate children of that husband and wife: (1989) 1 Hindu L.R. 359 (Andh. Pra.).

Where parties to the marriage were married for about 15 years and the wife was throughout living at the husband's village house while husband was posted elsewhere and a child was born to her on 2-8-1980 which the husband pleaded was not her child but wife stated that she visited the husband on 28-12-1979 and stayed overnight and during that time they had sexual intercourse, *held*, the very fact that they stayed under the same roof was sufficient to prove access and child born was legitimate child. [A.I.R. 1965 S.C. 364; A.I.R. 1934 P.C. 49; A.I.R. 1954 S.C. 176, Rel. on]: A.I.R. 1984 All. 129: 1983 All.W.C. 952: 1984 Hindu L.R. 199.

Where though petitioner-husband underwent a vasectomy operation but he failed to produce any reliable material to show that such operation was successful, *held*, despite the presumption in S. 112, it could not be said that the child born to his wife during wedlock was not born to him: A.I.R. 1982 Ker. 68: (1982) 1 D.M.C. 256 (D.B.).

Where respondent married the appellant in 1969 and had three children and underwent vasectomy operation on 8-1-1976 and thereafter both of them lived together and on 30-8-1978 the appellant wife gave birth to another child which the respondent alleged was begotten through another man but the respondent failed to prove that in or about November 1977 when fourth child was conceived he was unable to procreate, *held*, the fourth child was begotten through the respondent only: A.I.R. 1987 Ker. 5: 1986 Ker.L.J. 744: 1986 Ker.L.T. 1068: (1987) 1 D.M.C. 28: (1987) 1 D.M.C. 140: (1987) 1 Hindu L.R. 133: (1986) 2 Hindu L.R. 342 (D.B.).

Where in the contested divorce petition under S. 13 of the Hindu Marriage Act, 1955 on the ground of the wife having given birth to an illegitimate child conceived during the subsistence of marriage when the couple had no access to each other, the charge was denied and the wife preferred a counter-claim for a decree of restitution of conjugal rights, *held*, on the husband's failure to prove the ground, the burden whereof was very heavy on him, the wife would clearly be entitled to the counter-claimed decree: A.I.R. 1980 N.O.C. 136 (All.).

A woman married a second time claiming that her first marriage had been dissolved and begot a child while she was living with her second husband. It was, however, found that her first marriage had not been legally dissolved and therefore, it was subsisting in the eye of law. But there was evidence to show that her first husband had no access to her at the time when the child was begotten by her. *Held*, that in the circumstances, the child should be held to the progeny of the second husband notwithstanding the fact that the first marriage was subsisting in law. No doubt the presumption in law is that a child born during the continuance of a valid marriage is the legitimate child of the husband by that marriage but this presumption does not arise where there is evidence that the husband and wife had no access to each other at any time when the child could have been begotten. The evidence to establish non-access need not necessarily be positive or direct evidence. Non-access can be proved like any other physical fact by evidence either direct or circumstantial which is relevant to the issue. But as the presumption of legitimacy is highly favoured by law, it is necessary that proof of non-access must be clear and satisfactory: 1963 Ker.L.J. 1002: 1963 Ker.L.T. 1038.

Where *A* and *B* remained as husband and wife and united in lawful wedlock the children born during the period could be treated as children of *A* and not of *C* also (younger brother of *A*) and could not inherit the latter's self-acquired properties though *C* and *B* also were conducing themselves as husband and wife during the life-time of *A* and *C* had admitted the children as his children: I.L.R. (1952) Trav.-Co. 709: A.I.R. 1953 Trav.-Co. 470.

Child born during continuance of valid marriage—Wife living with her parents during one and half years before birth of child—Distance between village of husband and parents of wife about two miles—Wife also residing occasionally at Dohgri of her father—Distance between Dohgri and husband's village about two furlongs—

Husband visiting village occasionally during the previous three years—Both husband and wife young—It is not unreasonable to assume that husband had opportunity of intercourse—Mere fact wife was residing at her parent's house does not lead to only conclusion that husband could not have had such opportunity—Presumption under S. 112 remains unrebutted: A.I.R. 1967 Him. Pra. 38.

In proceedings under S. 488, Cr. P. Code, an admission of paternity of an illegitimate child by the alleged putative father is irrelevant in view of the clear wording of S. 112, if the applicant mother fails to prove that she and her husband had no access at the time when the child could have been begotten: (1941) 2 M.L.J. 693: A.I.R. 1942 Mad. 251; (1943) 56 Mad.L.W. 383: (1943) 2 M.L.J. 108; I.L.R. (1960) Ker. 167: 1959 Ker.L.T. 945: A.I.R. 1960 Ker. 119.

Where appellant's mother failed to prove that she had no access with her husband at the time when the child for whom she claimed maintenance could have been begotten, *held*, the burden of proof was not upon the alleged putative father of the children but it was for the mother to show that they were born only to the alleged father through an exclusive relationship with him. [1975 Mad.L.W. (Cr.) 240; 1941 Mad.W.N. (Cr.) 161, Rel. on]: (1990) 1 Hindu L.R. 92: (1990) 2 Crimes 78 (Mad.).

Where opposite party who was already married developed intimacy with the petitioner and out of her alleged intimacy with the petitioner two boys were born and subsequently she filed a suit against petitioner for maintenance of alleged illegitimate children but she failed to prove that her previous husband had no access to her when the alleged children were conceived, *held*, she was not entitled to maintenance for them for the simple reason that they could not be held to be illegitimate children of the petitioner when the husband of the opposite party had also access to her during the period those children were conceived by her. [A.I.R. 1962 Mad. 141; A.I.R. 1971 S.C. 2358, Rel. on]: 1980 Hindu L.R. 790 (Pat.); 1989 Cr.L.J. 1852: (1989) 1 Sim.L.C. 237: (1989) 2 Crimes 165; 1972 Ker.L.J. 12: 1972 Cr.L.J. 696.

Where the appellant husband failed to establish that he had no access to the respondent wife during the period she was stated to have lived away from him and he never specifically stated that the child born was not from his loins and a petition for dissolution of marriage was filed after eight years of birth of the child alleged to be illegitimate, *held*, the child was legitimate: (1985-1) 87 Punj.L.R. 692: (1986) 1 Hindu L.R. 535 (D.B.).

3. Begotten—Meaning of.—The word "begotten" used in S. 112 means "conceived", not "born"; because as a general rule, it is the birth and not conception after marriage which makes the child legitimate. [1978 Hindu L.R. 719 (Him. Pra.), Dissent. from]: A.I.R. 1988 Del. 93: (1987) 1 D.M.C. 528: (1987) 1 Hindu L.R. 583: (1987) 1 Hindu L.R. 384: (1988) 93 Punj.L.R. (Del.) 1.

S. 112 proceeds upon adopting the period of birth as distinguished from conception, as the turning point of legitimacy: I.L.R. 10 All. 289 (S.B.); A.I.R. 1926 Lah. 529 (D.B.).

Presumption under S. 112 applies quite irrespective of whether the mother was married or not at the time of conception: A.I.R. 1937 Lah. 784.

4. Access and non-access.—Access and non-access connote existence and non-existence of opportunities for marital intercourse: 1965 M.L.J. (Cr.) 215; (1990) 1 Hindu L.R. 258: (1990) 2 D.M.C. 247: (1990) 1 Ker.L.J. 65.

The word "access" means no more than opportunity of intercourse: I.L.R. 12 Rang. 243: A.I.R. 1934 P.C. 49; 66 M.L.J. 288 (P.C.). *See* also (1941) 54 Mad.L.W. 411: A.I.R. 1942 Mad. 129; (1941) 2 M.L.J. 693; 1942 Nag.L.J. 254: A.I.R. 1942 Nag. 96; I.L.R. (1945) Mad. 53: A.I.R. 1944 Mad. 376: (1944) 1 M.L.J. 285; (1958-59) 63 Cal.W.N. 341; 1979 W.L.N. 555: I.L.R. (1979) 29 Raj. 1224.

The words "access" and "non-access" are words of significance in matrimonial causes. The Courts are bound to adopt the timorous course of construing such words of art in its correct and not in some vague and extended meaning. The words access can be explained as an indicia of opportunity for marital intercourse. Like any other physical fact it could be proved by direct or circumstantial evidence. Direct evidence can only be secured through the spouses concerned.

There is nothing in the Evidence Act to prevent the spouses giving evidence of non-access: (1968) 81 Mad.L.W. 490: (1969) 1 M.L.J. 366: A.I.R. 1969 Mad. 235.

The term "access" as used in S. 112 has been consistently interpreted to include the existence of opportunities for marital intercourse between the husband and the wife at the time when the child could have been begotten according to the ordinary course of nature. A conclusive presumption of legitimacy attracted by S. 112 can be rebutted only by showing that the husband and the wife had no access to each other at the time when the child could have been begotten. What is required to be shown for rebutting the conclusive presumption which is a presumption of law is that the husband and the wife had no access to each other at any time when the child could be begotten: 1993 Cr.L.J. 1659: (1992) 2 Cal.H.N. 327: (1991-92) 96 Cal.W.N. 1103; (1983) 9 All.L.R. 720; 1983 All.L.J. 1290.

5. Onus to prove non-access.—The burden of showing that parties to a marriage had no access to each other at any time when child could have been begotten is on the person challenging legitimacy of the child: I.L.R. 12 Rang. 243: A.I.R. 1934 P.C. 49: 66 M.L.J. 288 (P.C.).

In view of S. 112, there is a presumption regarding legitimacy of a child born during the continuance of a valid marriage, the burden for proving non-access is on the husband who so alleges: 1982 Hindu L.R. 304 (Raj.).

In a claim for maintenance under S. 488, Cr.P.Code by the wife for herself and the child, the husband contended that the child being illegitimate the wife could not claim anything as she was leading adulterous life. *Held*, that the presumption of legitimacy being highly favoured by the law it was necessary that proof of non-access must be clear and satisfactory. It was for the husband to prove that it was physically impossible for him to have co-habited with his wife during the period in which the child was conceived. A mere statement by the husband that a child born of his wife was not his child and must have been procreated by someone else, was not entitled to any weight nor did it amount to such proof, even assuming it to be true, as would displace the effect of the provisions of S. 112 of the Evidence Act: 1960 M.P.L.J. (Notes) 179.

As to burden and nature of proof to prove non-access, *see* I.L.R. 55 Mad. 243: A.I.R. 1932 Mad. 39: 61 M.L.J. 878; I.L.R. 55 Mad. 292: A.I.R. 1932 Mad. 44: 61 M.L.J. 874.

Where a minor born within five months of dissolution of marriage of his parents but conceived before marriage filed an application for maintenance against his father, *held*, the onus to prove that the respondent father had no access with the mother of the petitioner was on the respondent: (1986) 2 Hindu L.R. 25 (Bom.).

Child born in lawful wedlock—Delivery 305 days after last coitus between husband and wife—Child is of the husband—Onus to prove non-access—Onus lies heavily on person alleging illegitimacy—Method of proof—Non-access may be proved by legal evidence as admissible to prove any other physical fact—Evidence of non-access—Family custom that husband and wife will have no coitus unless particular ceremony is performed—Ceremony not performed, but husband and wife living under same roof for months together—Non-performance of ceremony is not proof of non-access: 1966 Jab.L.J. 24: 1966 M.P.L.J. 11: A.I.R. 1966 Madh. Pra. 252.

Where the spouses' respective places were nearby and the fact in issue was whether the child born to the wife was illegitimate, *held*, the decision does not depend on whether the parties had in fact met at the time when the child could have been begotten but whether the parties had no access to each other at any such time; it is for the husband to prove non-access; otherwise the presumption is that the child was their legitimate child: A.I.R. 1983 All. 435: 1983 Hindu L.R. 605; 1989 Hindu L.R. 157 (All.).

Where in the maintenance proceedings under S. 125 of the Code of Civil Procedure the child's parentage was proved by an extract from the birth certificate issued under the T.N. Birth and Death Registration Act, 1969 wherein the child was shown as having been born to its parents, *held*, the child is entitled to maintenance; the father may challenge the child's paternity in civil proceeding by a full-fledged trial to obtain a final and authoritative decision by proof of non-access under S. 112: (1988) 1 Hindu L.R. 519 (Mad.).

Where a wife gave birth to a child during pendency of proceedings for dissolution of marriage and a question arose as to the legitimacy of child, *held*, the onus was on the husband to establish absence of access: A.I.R. 1982 Del. 458: (1982) 2 D.M.C. 6: 1982 Rajdhani L.R. 622.

It is for the husband to plead non-access and to have a proper issue framed and then lead satisfactory evidence. In the absence of this whatever admission or statements the wife might have made in an unguarded moment without due deliberation cannot be flung against her only at the time of arguments: I.L.R. (1972) 22 Raj. 701.

6. Evidence of non-access.—There is nothing in S. 112 to show that the husband or the wife is precluded from giving evidence to show that they had no access to each other at any time when the child could have been begotten. In proceedings under S. 488, by married woman, claiming maintenance for an illegitimate child from its putative father, evidence of the husband and the wife on the point can be admitted: (1945-46) 50 Cal.W.N. 916: A.I.R. 1947 Cal. 183. Competency of husband or wife to give evidence of non-access. *See* I.L.R. (1945) Mad. 53: (1944) 1 M.L.J. 285.

According to S. 112 it could be shown that the parties to the marriage had no access to each other at any time which could have led to the conception. This could be established by the statement of husbands and wives who are under S. 118 of that Act competent to testify to any relevant fact: (1947) 49 Punj.L.R. 321.

Non-access can be established not merely by positive or direct evidence, it can be proved undoubtedly like any other physical fact by evidence, either direct or circumstantial, which is relevant to the issue, though, as the presumption of legitimacy is highly favoured by law, it is necessary that proof of non-access must be clear and satisfactory: 1965 M.L.J. (Cr.) 215.

The presumption of legitimacy under S. 112 though strong is rebuttable. But the evidence in rebuttal must be strong and unequivocal, that at the time when the child could have been conceived, the husband could not have had access to his wife: 1962 Ker.L.J. 28: (1962) 1 Ker.L.R. 136: 1962 Ker.L.T. 138.

It is well settled that proof of non-access must be distinct, definite and clear; the Courts are loath to hold that a child born to spouses in a subsisting marriage is really illegitimate; that is why very strict proof of non-access is insisted upon; though a negative fact, the Courts insist upon its positive proof; access in S. 112 does not imply actual cohabitation; it means no more than "opportunity of intercourse". Merely because a husband and wife are living apart or husband is living with another woman or wife is living with her paramour does not imply non-access; even when a child is born to her, the husband would be conclusively presumed to be its father. That presumption stands rebutted where the paramour effectively kept out the husband from the wife at the relevant period or the husband remained out of the country throughout that period: A.I.R. 1972 Ker. 80.

The presumption of legitimacy of a child born in lawful wedlock can be rebutted only in the manner contemplated by S. 112; once access is present or non-access is not proved, the presumption becomes irrebuttable and cannot be displaced, the contention of non-access cannot be accepted on a mere balance of probability; the standard of proof therefor has to be the same as is required to establish the accused's guilt in a criminal case. Access or non-access connotes only the existence or non-existence of opportunity for marital intercourse, and the burden of proving it entirely rests upon the person disclaiming it; even the fact that the wife is living in adultery is insufficient to prove non-access. And the question of access or non-access must be considered with reference to the time when the child could have been begotten; the normal period of gestation may vary between either side of nine months, no such assumption can be made under S. 112; the matter has to be decided on the facts and circumstances of each case and in the light of the common course of events and medical possibilities: 1981 Cr.L.J. 156.

S. 112 merely requires proof of the satisfaction of the Court that the parties had no access to each other, not that there was no possibility of access. A finding that there was no access is a pure finding of fact: 150 I.C. 306: A.I.R. 1934 Nag. 124. As to when the presumption is rebutted, *see* A.I.R. 1937 Rang. 67.

In order to disprove legitimacy it must be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. Where the evidence showed that the father was living in another place and nothing more was proved, *held* that the presumption under S. 112 applied and that there is no question of divorce under those circumstances: 1929 Mad.W.N. 696: A.I.R. 1930 Mad. 194.

Per *Ramaprasada Rao, J.*—In a petition for judicial separation against the wife, on ground of her adultery and consequent birth to her of a child in appraising the evidence of non-access during relevant time, it is no doubt imperative for the Courts to foster and protect the marital tie as it is a matter concerning society at large and is of grave public importance. *A fortiori* it is so, when a matter arises whether the husband should be deemed to have access to wife at the crucial time such that the resultant child may, be legitimised instead of bastardised. Husband's evidence of non-access should be considered with caution with a lynx eye. As corroboration of such evidence is practically impossible and indeed not required the surrounding circumstances, an overall picture and the conduct of the parties do act as legal accessories to weigh such uncorroborated testimony. Even in cases where adultery or any other matrimonial offence is alleged, the offence complained of should be proved beyond reasonable doubt. Undoubtedly, a matrimonial proceeding is an ordinary civil proceeding. But as it involves the disruption of a marital tie, law imposes a stricter degree of scrutiny of the evidence, if uncorroborated. Such corroboration is demanded as a rule of precaution and prudence so that a well instructed mind may be able, after bringing to bear its own observations and experiences of life to judge from the pros and cons of each particular case, whether the sole *ipso dixit* renders possible the theory set out. In the ultimate analysis, the evidence of the husband and other evidence and circumstances ought to be clinching and cogent to exclude the possibility of innocence of the person against whom the matrimonial offence is alleged: (1968) 81 Mad.L.W. 490: (1969) 1 M.L.J. 366: A.I.R. 1969 Mad. 235.

The burden under S. 112 is a heavy burden and, since any pronouncement on legitimacy is a serious pronouncement having grave consequences, evidence of non-access should be clear and convincing. It is not enough for the husband to merely assert that he did not have access to his wife but it must be proved that the circumstances were such that there was no opportunity for access of sexual intercourse at any time when the child could have been begotten. In the absence of such evidence, the presumption is that the child was legitimate. The application for restitution filed by the wife was disposed of on the report made by the wife that the matter had been settled between the parties. During pendency of suit for maintenance filed by the wife subsequently a child was born. The husband merely denied that the child was born to him while the wife asserted that he was the father of the child. No evidence was produced by the husband as to what were the relations between the spouses at the most crucial point of time. *Held*, that the wife had not forfeited her right to maintenance on the ground that she was unchaste. There was a presumption that the child so born was a legitimate child and that presumption could be displaced only on production of proof that at the time the child could have been begotten there were no opportunities for access. The bald statement by the husband that the child was not his and that he had no access to her was not sufficient. It could be seen, from the manner in which the proceedings for restitution of conjugal rights terminated, that the mere fact that the two parties were arrayed on opposite sides to the maintenance proceeding, did not constitute an impediment to their coming together as asserted by the wife in those proceedings: (1968) 2 Mys.L.J. 39: 15 Law Rep. 204: A.I.R. 1969 Mys. 17.

It cannot be said that if a husband proves "non-access" in the sense that he never had intercourse with his wife, he should prove further, that he had no opportunity of having intercourse with her. Though a husband might have had an opportunity of intercourse with his wife, if he proves to the satisfaction of the Court that notwithstanding such opportunity he had no actual cohabitation with his wife, he establishes "non-access" within the meaning of S. 112. The rule that the evidence of the husband is not admissible in bastardy proceedings does not apply to India and hence the evidence of the husband cannot be ruled out: A.I.R. 1949 Mad. 881: (1949) 1 M.L.J. 426.

The presumption of law under S. 112 cannot be lightly repelled. The evidence of paramour must be strong, distinct, satisfactory and conclusive. It must be to the utmost satisfaction of the Court and that at the time of conception, there was no access by the husband to the wife in sexual sense. It can only be shown in rebuttal by the husband that he had severed of physical relations with the

wife. The burden of proving non-access lies heavily upon him who disputes the paternity of child. Thus, where the husband gave only oral testimony that the wife never resided with him and they had no access, *held*, non-access had to be proved by a strong evidence and not by oral testimony of the husband: 1992 Mah.L.J. 237; 1986 Mah.L.J. 347.

Evidence of non-access—Living apart in different houses is insufficient to establish non-access: 1966 Jab.L.J. 24: 1966 M.P.L.J. 11: A.I.R. 1966 Madh. Pra. 252.

Proof *per se* that the woman was living with the paramour is no evidence of non-access by the husband. The fact that the husband has been living with another woman for a number of years, does not amount to clear proof of non-access. The mere fact that the husband and wife are living separately in two different houses is insufficient to prove non-access. The question whether the husband and wife had access to each other is one of the fact and the party interested in denying the legitimacy of the child, must set up a plea of non-access and prove the same: A.I.R. 1960 Ker. 119.

Adultery of wife—No kind of access between couple since the wife began to live with parents from 17th November, 1957—Child born to wife 402 days after severance of ties and separation—Inference is that the child was born of adulterous intercourse of wife: A.I.R. 1969 Mad. 235: (1968) 81 Mad.L.W. 490: (1969) 1 M.L.J. 366.

Where the husband sought to establish adultery by the birth of child on the ground that he had no intercourse with the wife because she would always pretend pains in her private parts, *held*, it did not amount to non-access; the presumption of legitimacy of the child not rebutted: (1986) 1 Hindu L.R. 681 (Bom.). *See* also 1979 W.L.N. 555: I.L.R. (1979) 29 Raj. 1224.

Where the parents married in 1897 but the wife deserted the husband three months thereafter and lived with a paramour near her husband's village and the evidence was that all through she had been living with her paramour, and there had been no kind of access between the husband and the wife, it was held that the presumption as to the legitimacy of a son born in 1901 was in the circumstances, rebutted: A.I.R. 1934 Mad. 318: 66 M.L.J. 283.

Adultery—Proof—Non-access—Evidence: *See* I.L.R. (1957) Punj. 181.

7. Death of husband or dissolution of marriage.—The provision in S. 112 does not necessarily mean that if the child is born beyond a period of 280 days, it must be presumed that the child is illegitimate. Undoubtedly, if the plaintiff comes to Court, the initial burden is on him. But then one cannot overlook the rule laid down by S. 114, Evidence Act, and having regard to the common course of natural events and human conduct. If the child is born within a reasonably possible period of the normal period of gestation, then the Court should raise a presumption of legitimacy and then the burden would shift. The question of legitimacy is of grave importance, a matter of social status and affects the whole future of a person. The onus in such a case is founded on the interest of the child and the interest of the State in matters of legitimacy: (1962) 64 Bom.L.R. 752: 1963 Mah.L.J. 23: I.L.R. (1963) Bom. 77: A.I.R. 1963 Bom. 165.

Child born nine months after death of father presumed to be legitimate: 123 I.C. 550: A.I.R. 1930 P.C. 139 (2): 58 M.L.J. 708 (P.C.).

Where legal dissolution of the marriage has not taken place, child born must be taken to have been born during continuance of valid marriage: A.I.R. 1930 Mad. 194.

Child born within 18 days after dissolution of marriage. Presumption of legitimacy can be displaced only by proof of non-access between husband and wife: 1959 Ker.L.T. 71: I.L.R. (1959) Ker. 157: A.I.R. 1959 Ker. 366.

Where a female child was born to the plaintiff within seven months of the death of her husband and there was no evidence on record to show that the parties to the marriage had no access to each other at the time when she could have been begotten, *held*, the presumption under S. 112 was that she was the legitimate child of the deceased: (1989) 1 Hindu L.R. 125: (1989) 1 Rev.L.R. 145.

Where the second child was born within 280 days of the divorce between the parties, *held*, the presumption would be in favour of legitimacy of that child. It would be for the husband to rebut that presumption by bringing material on record destroying such presumption: 1980 Hindu L.R. 305 (Guj.).

While considering the question of legitimacy of a posthumous child born beyond the period of 280 days, the Court cannot disregard cases where the Courts refused to declare legitimacy of the child where the period that elapsed between the last coitus and the birth of the child was more than the normal period. They clearly show that something more than mere delay in delivery is required to negative legitimacy. *Held*, on facts, that unless there was anything either in the medical or other evidence led before the Court, the mere fact that 306 days had elapsed after the death of the father would not be sufficient to hold that the posthumous son was an illegitimate son and that the evidence was vague and wholly insufficient to negative his legitimacy: (1962) 64 Bom.L.R. 752: 1963 Mah.L.J. 23: I.L.R. (1961) Bom. 77: A.I.R. 1963 Bom. 165.

Presumption as to the legitimacy under S. 112, does not necessarily mean that if a child was born beyond the period of 280 days it can be presumed that the child was illegitimate and if in the facts and circumstances of a good case and considering the medical evidence, if any, led by the parties it could be held that the child was born within a reasonable period of the normal period of gestation, then the Court should raise a presumption of legitimacy. Thus, where the alleged illicit relations between appellant's wife and another person developed prior to 19-3-1962 and a child was born on 27-2-1963 though the husband and wife were living under one roof upto 18-4-1962, *held*, the period of gestation of 313 days could not be said to be unreasonable nor even the period of 343 days counting it from 19-3-1962 when admittedly the appellant-husband had sexual intercourse with the wife and, thus, a presumption arose that the child was legitimate son of the parties. [A.I.R. 1963 Bom. 165 and (1947) 2 All E.R. 95 and (1823) 37 E.R. 1049, Rel. on]: A.I.R. 1971 Guj. 33.

A son was born to a Mahomedan wife 419 days after her husband's death. *Held*, that the period of gestation was so extraordinarily unusual as to be suspiciously improbable and rebutted all assertions of mother's chastity: 120 I.C. 495: A.I.R. 1930 Lah. 97.

The fact that in determining the legitimacy of a posthumous child born beyond the period of 280 days, the Court applied the principles enunciated in divorce cases and that these cases occurred during lawful wedlock, would not in principle make any difference. As the question of adultery and legitimacy are closely interlocked, one completely dependent upon the other, the quantum of proof must be the same in each case and the evidence must show that the child is not a legitimate child beyond any reasonable doubt: (1962) 64 Bom.L.R. 752: 1963 Mah.L.J. 23: I.L.R. (1963) Bom. 77: A.I.R. 1963 Bom. 165.

8. Cohabitation, whether raises presumption of marriage:—(*See* also S. 114, Note 101, *infra*). Where a couple lived for considerable time as husband and wife till her death and the husband recognised her as a legally wedded second wife and her son as his own, *held*, a long and weighty catena of authorities raise a strong presumption in favour of marriage and against concubinage: (1987) 2 Hindu L.R. 27 (Cal.) (D.B.); A.I.R. 1929 P.C. 135; A.I.R. 1927 P.C. 185.

Where a couple lived as man and wife for half a century, *held*, a strong presumption arises in favour of wedlock; though it is a rebuttable presumption, a heavy burden lies upon the party which seeks to deprive the relationship of legal origin; law leans in favour of legitimacy and frowns upon bastardy; the objection that no evidence of the priest having conducted the wedding ceremonies is adduced deserves no consideration; the High Court's finding affirmed: (1978) 91 Mad.L.W. (S.N.) 168 (S.C.).

A long uninterrupted cohabitation for over 30 years with children born and acknowledged as such throughout and the husband having himself managed the divorce of the wife from her previous husband, *held*, the presumption of the *factum* and validity of the marriage is clearly therefor justified; the term marriage inherently implies a valid marriage; a marriage which is not valid is no marriage at all: (1980) 21 Guj.L.R. 887: 1981 Hindu L.R. 211 (D.B.).

If a man and a woman are proved to have been having cohabitation over a long period of time, that cohabitation would produce a presumption that they were married spouses. But, if the woman with whom there was such cohabitation is proved to be a public woman, that presumption would be unavailable: (1966) 2 Mys.L.J. 60: 7 Law Rep. 97: A.I.R. 1968 Mys. 155; I.L.R. 32 All. 345 (P.C.).

9. Period of gestation.—The premature birth of a child in seven months is not at all

uncommon; in fact the child's death immediately or soon after makes it very probable that it was a premature arrival: 1953 Cr.L.J. 1214: A.I.R. 1953 Vindh. Pra. 28.

A child admittedly born in mid-January could have been conceived in previous June; computation is made from the date of commencement of the pre-intercourse menstrual cycle if known; otherwise, a period of 14 days is added to the date of conception or the date of intercourse, whichever is known. [A.I.R. 1963 S.C. 364, Foll.]: 1984 Hindu L.R. 157 (All.).

Where annulment of marriage was sought by the husband on the ground that the wife was pregnant by another person at the time of marriage and the wife delivered a full term mature boy and the Lady Doctor deposing as expert witness opined that conception had occurred a little less than two months prior to the marriage, *held*, though the Lady Doctor had not specialised in gynaecology, yet, her knowledge of midwifery as obstetrician having been proved to be of high order, her testimony could not be rejected by the High Court. [1968 Cur.L.J. 365 (P.&H.), Reversed]: A.I.R. 1979 S.C. 879.

Where a child was born to the respondent wife within 162 days after the first coitus between the petitioner and respondent took place, *held*, the child was illegitimate. [A.I.R. 1965 S.C. 364, Foll.]: A.I.R. 1974 Mys. 61.

Where birth of the child took place only 6 months and 4 days after the marriage and the child was not premature and further there was no access between the parties prior to their marriage, *held*, presumption of legitimacy contemplated by S. 112 stood rebutted and there was left no manner of doubt that child born to the wife was not of the husband: A.I.R. 1988 Del. 93: (1987) 1 Hindu L.R. 384: (1987) 1 D.M.C. 528: (1987) 1 Hindu L.R. 583: (1988) 93 Punj.L.R. (Del.) 1.

Normal child born after normal delivery of 171 days after first coitus between wife and husband—Normally it should be held that child was not of the husband—Conflicting evidence of doctors on the point—Appreciation of. Per majority—The usual period of gestation from the date of the first coitus is between 265 and 270 days and delivery is expected in about 280 days from the first day of the menstruation period prior to a woman conceiving a child. Where the child was born after 171 days of the first coitus between the husband and wife, and the child and the delivery was normal, normally the Court should hold that the child was not the child of the husband, unless there is evidence which would justify the Court in holding otherwise. *Held*, on evidence (Per majority, *Mudholkar, J. Contra*) that the conception had taken place before the first coitus between the husband and the wife and that the wife was pregnant by someone other than the husband at the time of the marriage. The mere fact that the mother's character in general is not challenged does not suffice to rebut the conclusion arrived at from the various circumstances. S. 114, provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation of facts of the particular case. The conclusion about the child born to the wife being not the child of the husband fits in with the presumption to be drawn in accordance with the provisions of S. 114. People in general consider that the child born, being of a gestation period of 185 days, cannot be a fairly mature baby and cannot survive like a normal child. Medical opinion, as it exists today and as is disclosed by text books on Obstetrics and Gynaecology, however, refer to some rare exceptions of live-births even with a gestation period of a few days less than 180 days. But in the present case it was not possible to accept the wife's case of the conception having taken place from and after the first coitus with the husband for several reasons. S. 112 of the Evidence Act provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. The fact that a child was born during the continuance of the valid marriage between the parties could not be taken to be conclusive proof of its being a legitimate child of the husband, as the various circumstances established that it must have been begotten sometime earlier than the marriage (which was the day of first coitus) and it had been found that the husband had no access to the wife at the relevant time. In the case of evidence of doctors, the Court should not leave the

questions undecided merely because the two doctors differ. Where they differ, the Court relied on the evidence of the one who had superior qualifications and experience in the particular branch of medical science: (1964) 7 S.C.R. 267: A.I.R. 1965 S.C. 364.

Where a child was born to the couple 175 days after they had their first intercourse on marriage, *held*, the husband's burden to prove that it was not his child stood discharged; it is then for the wife to show that the husband had had pre-marital intercourse with her; on facts, the wife's plea not established; the child, even if born during the subsistence of marriage, is not legitimate: 1982 Hindu L.R. 499 (Madh. Pra.).

Where a daughter was born to a couple, governed by the Portuguese law, after 180 days from the solemnisation of their marriage, and its subsistence, *held*, the presumption is that she was a legitimate child; the presumption of legitimacy was legislatively established for protecting and safeguarding the family, a basic unit for any civilised society; only in very limited cases can such presumption be rebutted; the burden of rebutting it lay on the father denying his paternity; on facts, not discharged: A.I.R. 1986 Bom. 89: 1985 Mah.L.J. 788: I.L.R. (1985) Bom. 2447: 1986 Mah.L.R. 142 (D.B.).

Where the child was born on 240th day from the date of the marriage and the husband had opportunities to meet the wife at her parents place, *held*, the child born was the legitimate child of the parties: A.I.R. 1973 Mys. 178: (1972) 2 Mys.L.J. 256 (D.B.).

Where the husband repudiated the daughter born 259 days after the marriage as not his, *held*, as per medical jurisprudence, a child can be born seven months after pregnancy and assuming that the wife had menstruated 15 days before the marriage, the daughter born during subsistence of marriage was legitimate; trial Court's finding to the contrary reversed: 1982 Hindu L.R. 603 (P.&H.).

Giving birth to a viable child after 28 weeks' duration of pregnancy is not biologically an improbable or impossible event. Thus, where the husband and wife were close relations and not strangers before marriage, *held*, on the sole ground that the child had been born in about 7 months time after the marriage, it could not be concluded that the child should have been conceived even before the husband had consumated the marriage: A.I.R. 1987 S.C. 1049: 1987 Cr.L.J. 849: (1987) 1 S.C.C. 624: (1987) 2 D.M.C. 225: (1987) 1 Hindu L.R. 362.

Period of gestation—Period may be as long as 308 days. [I.L.R. 24 All. 445, Foll.]: A.I.R. 1956 Bom. 120.

A child born 11 months after marital intercourse between its parents had ceased, is illegitimate: 1913 Mad.W.N. 983: I.L.R. 38 Mad. 466: 25 M.L.J. 524 (F.B.). *See* also 27 M.L.J. 580: 26 I.C. 61.

Where a child was born to a married woman after over 8 months from the date of marriage and the husband alleged that the child was not his as he was incapacited from having sexual intercourse for one month from date of marriage due to some operation he had to undergo. *Held*, that even assuming that the husband was so incapacitated the time available, over seven months, was sufficient to raise the presumption that he was the father of the child: I.L.R. (1953) Trav.-Co. 726: A.I.R. 1953 Trav.-Co. 434.

10. Acknowledgment of paternity.—Where there is an acknowledgment by parents as son by repute and habit for a long time, the burden is on the other side to disprove the presumption of paternity by other reliable evidence: 102 I.C. 713: A.I.R. 1927 Mad. 733; (1932) 34 Punj.L.R. 914: A.I.R. 1933 Lah. 520.

Under the Mohamedan law acknowledgment of a son as a legitimate son raises a presumption of marriage between the woman and the father of the child born: A.I.R. 1922 P.C. 159; A.I.R. 1918 P.C. 11, unless the other side can prove that the boy whose paternity was acknowledged was of illegitimate descent: A.I.R. 1916 P.C. 27.

Under Mohammedan law when the paternity of a child cannot be proved by establishing the marriage between its parents at the time of its conception or birth, the law recognises "acknowledgment" as a method whereby such marriage and legitimate descent can be established for the purpose of inheritance. The doctrine of acknowledgment, however, is not applicable where the lawful union between the parents of the child is not possible as in the case of incestuous intercourse or an adulterous connection. The doctrine is also not applicable where the

marriage necessary to render a child legitimate is disproved. Thus, where at the time of the birth of the defendants there was no valid marriage between the plaintiff's father and defendants mother and the defendants were born during pre-marital stage and further there was no evidence to show that the plaintiff's father had, at any time, acknowledged the mother of defendants as his wife, *held*, the defendants could not be held to be legitimate sons of the plaintiff's father by relying on the doctrine of "acknowledgment". A child born of "Zina" could not be made legitimate by acknowledgment. [A.I.R. 1916 P.C. 27, Foll.]: A.I.R. 1981 Mad. 209: (1981) 94 Mad.L.W. 97: (1981) 1 M.L.J. 402: 1981 Hindu L.R. 460. *See* also A.I.R. 1918 Nag. 32. *See* however A.I.R. 1930 Lah. 97; 1937 Mad.W.N. 957.

11. Blood-group test.—It may possibly be ascertained by blood-group tests that a particular person is not the biological father of the child; such tests by themselves cannot indicate with certainty that a particular person is the biological father. However, where one of the two men must be the child's biological father, and one of them is excluded by the blood as not being such father, *held*, the other man could be declared as the child's biological father: 1993 Cr.L.J. 1659: (1992) 2 Cal.H.N. 327: (1991-92) 96 Cal.W.N. 1103.

S. 112 is clear enough that once the husband is shown to have had access to the wife at any time when the conception could have taken place, the scope of adducing rebuttal evidence becomes non-available. The contending party cannot be permitted to say that he will rebut the conclusive presumption of law regarding paternity by proving directly by blood test that the husband is not the biological father of the child which will virtually be an abrogation of the existing provision of S. 112. In case of determination of paternity of a child born or conceived during wedlock, neither the language of S. 112 nor the interpretation it has consistently received throughout, nor even the consideration of welfare of the children in disputed cases of paternity in general, demands or permits blood test as exploratory or investigative experiment for determining paternity. However, the question whether blood test should be resorted to for determining the paternity of a child who was not born or conceived during wedlock, does not fall within the scope of S. 112 and different considerations may arise in such cases: 1993 Cr.L.J. 1659: (1992) 2 Cal.H.N. 327: (1991-92) 96 Cal.W.N. 1103.

Blood test can supply helpful evidence to exclude a particular parentage set up in the case. But the party asserting the claim to have a child and the rival set of parents put to blood test must establish his right to do so. It would be unjust to direct a test for a collateral reason to assist a litigant in his or her claim. The child cannot be allowed to suffer. If the Court believe that the application for blood test is designed for ulterior motive, it would not be justified to accede to such a prayer: A.I.R. 1986 All. 259.

Where the husband sought blood test of the child in a maintenance case to disprove the child's paternity, *held*, the application merited rejection; the rules about permissibility of blood tests to prove or disprove paternity are: (1) that Courts in India cannot order blood test as a matter of course; (2) applications made for blood test in the nature of having a roving inquiry cannot be entertained; (3) the husband must make out a strong *prima facie* case of non-access to dispel the presumption under S. 112; (4) the Court must carefully examine the possible consequence of ordering the blood test like branding the child as a bastard and the mother as unchaste; and (5) no one can be compelled to give sample of his or her blood for the test: A.I.R. 1993 S.C. 2295: 1993 Cr.L.J. 3233: (1993) 2 D.M.C. 162: (1993) 2 Hindu L.R. 253: (1993) 3 S.C.C. 418: (1993) 2 An.L.T. (Cr.) 3561; 1995 Cr.L.J. 81 (Mad.).

Though blood test is one of the tests for establishing paternity and, therefore, of adultery, yet no one can be compelled to give a sample of blood for its analysis; and no adverse inference can be drawn against that person for such refusal: A.I.R. 1986 Madh. Pra. 57: 1986 M.P.L.J. 105: (1986) 1 Hindu L.R. 543.

Before a blood test of a person is ordered his consent is required because such test is a constraint on his personal liberty; whether even a Legislature can compel a blood test is doubtful as also whether the guardian *ad litem* can give consent for such test. The maximum that can be done where a party refuses to have a blood test is to draw an adverse inference which has only a very little relevance and will not advance the

husband's case for he has to prove that he had no opportunity to have any sexual intercourse with the wife at a time when the children could have been begotten, the only proof permitted under S. 112 to dislodge the conclusive presumption enjoined by the section. [A.I.R. 1954 S.C. 176; A.I.R. 1972 Ker. 80; I.L.R. (1837) 5 Cal. and Fin. 163; A.I.R. 1959 Mad. 396; A.I.R. 1951 Mad. 910, Rel. on]: 1975 Ker.L.T. 533.

In the husband's divorce case on the ground of adultery, he pleaded that the children were not begotten from him and he asked for the blood-group test of his wife and children for determining paternity, *held*, though direction for test of the wife could be given but non-compliance by her would not be material as the onus lies on him to prove non-access during the relevant period; direction for blood-group test of children declined as it would cause them irreparable harm: 1979 W.L.N. (U.C.) 71.

Where the wife did not agree to give her own and her daughter's blood for blood test to ascertain the paternity of the child born 259 days after marriage, *held*, since it is conceded by the husband's Counsel that such a test is of hardly any assistance in deciding about paternity, no adverse inference could be raised against the wife: 1982 Hindu L.R. 603 (P.&H.).

Blood test for establishing paternity provides circumstantial evidence of adultery: [Modes and implication of test discussed elaborately]: A.I.R. 1986 Madh. Pra. 57: 1986 M.P.L.J. 105: (1986) 1 Hindu L.R. 543.

12. Void and voidable marriages.—S. 16 of the Hindu Marriage Act, 1955 which says that "Notwithstanding that a marriage is null and void under S. 11, any child of such marriage shall be legitimate," applies only if there was solemnization of marriage at any time. Thus, where there was no proof of solemnization of marriage, S. 16 of the Hindu Marriage Act, 1955 could not be invoked and children born out of such union could not be treated as legitimate children: (1981) 94 Mad.L.W. 192: 1981 Hindu L.R. 362.

Marriage induced by fraud: 1960 Cr.L.J. 351: A.I.R. 1960 Ker. 101.

13. Miscellaneous.—A youth of 15 years is not incapable of procreation and hence from mere age alone no conclusive inference that he could not possibly have been the father of the child, can be made. The question ultimately depends on the drawing of reasonable inference from the evidence and from the proved facts in this case: 29 Cut.L.T. 584: I.L.R. (1963) Cut. 415.

Where marriage between a man and a woman was not established and a copy of birth certificate was produced to prove the paternity of child, the name of the child as well as the name of father were not disclosed in the entry, and no one was examined who had informed the authorities with respect to birth of the child, *held*, it could not be inferred that the man was the alleged father of the child: (1990) 1 Hindu L.R. 113 (P.&H.).

Legitimacy—Woman leaving husband ten days after marriage and living as concubine of appellant—Child born seven months after the woman leaving her husband—No evidence that birth of child was premature—No evidence that woman was living as concubine of appellant even before her marriage—Appellant cannot be presumed to be the father of the child: (1967) 80 Mad.L.W. 25: (1967) 1 M.L.J. 102.

Where in a suit for partition, the widow's right to inheritance was challenged on the ground that she had thrown the "thali" which was picked by her husband which amongst Kamma Redis, to which the couple belonged, amounted to customary divorce; the custom so pleaded being derogatory to the general Hindu law, the burden lay on the defendants to prove that it was ancient, certain and reasonable and fulfilled the requirements of a valid custom; found on facts, both the pleadings and the proof was sketchy and the custom was not proved; thus, divorce having not been proved, the widow was entitled to inherit from her husband as his lawful wife: A.I.R. 1977 Karn. 115: (1977) 1 Karn.L.J. 206 (D.B.).

In Khati community Natra form of marriage is possible even where the former husband of the woman is alive. The dissolution takes place in different shapes. Either the former husband is paid some Zagda money or he does not care to ask for any. Where there is a possibility of a valid Natra form of marriage and the man and woman live together as husband and wife even during the lifetime of her former husband who did not take any step to assert his rights as husband and the community regarded their children as that man's children, *held*, that every presumption would be made in favour of the validity of the marriage and the dissolution of the previous marriage and the Natra marriage with the second husband. This presumption is rebuttable, but rebutting evidence must be clear and specific and ought to indicate that no valid marriage could have taken place: 1961 M.P.L.J. (Notes) 245: 1961

113. Proof of cession of territory.—A notification in the [1][Official Gazette] that any portion of British territory has [2][before the commencement of Part III of the Government of India Act, 1935 (26 Geo. 5, ch. 2)] been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

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1. Substituted by the A.O. 1937, for "Gazette of India".

2. Inserted, *ibid*. (Part III of the Government of India Act, 1935, came into force on 1st April, 1937).

Jab.L.J. 1126: A.I.R. 1963 Madh. Pra. 160. *See* also 1982 Jab.L.J. (Notes) 77.

Suit for partition by mother on behalf of minor son—Evidence to show that the mother had deserted the defendant 24-30 years back and the minor was born subsequently—Defendant in cross-examination admitting that the plaintiff was his wife—Non-framing of fresh issue about non-access does not result in wrong decision of the case: (1968) 2 Mys.L.J. 42: 15 Law Rep. 197: A.I.R. 1969 Mys. 8.

Where the proof of the plaintiff's paternity was supported by a marriage invitation card of his mother with, and his birth entry in the birth register showing him to be the son of, the deceased who was then married to another woman and had begotten children, *held*, no presumption of the second marriage and the plaintiff's paternity could be raised on such scant evidence: (1986) 99 Mad.L.W. 175: (1986) 1 M.L.J. 225: (1986) 2 Hindu L.R. 190 (D.B.).

Where a question arose as to whether plaintiffs were legitimate children of 'V' and 'K' and it was found that in the funeral ceremony invitation card relating to 'K' which was issued by 'V' he had described her as his wife and that the voters' list showed 'V', 'K' and plaintiffs as voters living in family house and the house-tax receipts in name of one of plaintiffs were formerly in name of 'V', *held*, the fact that no elderly witness was examined or there was total denial of cohabitation by 'V' would not rebut the presumption of marriage between 'K' and 'V'. Thus, plaintiffs were legitimate children of 'K' and 'V'. [1989-2) 104 Mad.L.W. 197, Disting.; (1968) 11 M.L.J. 411; A.I.R. 1992 S.C. 756; A.I.R. 1970 Mys. 305, Rel. on]: A.I.R. 1995 Mad. 188 (D.B.).

Where the evidence showed that the appellant was born during the continuance of a valid marriage, but 2 years after the husband and wife had separated they had no access after separation, *held*, that the presumption of legitimacy raised in favour of the appellant under S. 112 stood rebutted: A.I.R. 1965 Him. Pra. 32.

Where a rustic Muslim wife unable to remember either the date of her marriage or of the birth of her daugher but deposed that the daughter was born one year after the marriage; some discrepancies in time in the depositions cannot whittle down the effect of the positive plea of the daughter having been born one year after the marriage in proceedings under S. 125 of the Code of Criminal Procedure, 1973 for the child's maintenance: 1984 Hindu L.R. 618 (Ker.).

Where the wife gave birth to a child at her mother's home after, as per her husband, 14 months, and as per the wife, 10 months 10 days, after she had left for good the matrimonial home and none of them, admittedly, had access to each other during the interregnum, *held*, the wife's adultery stood established; direct evidence of adultery being rare, it is to be inferred from attending circumstances; inclination of the spouse and the opportunities available proved by clear, cogent and convincing evidence admitting of no other inference; the presumption of legitimacy under S. 112 stood rebutted: 1984 Hindu L.R. 609 (Madh. Pra.).

Though there is a strong presumption in favour of marriage and the defendant's burden to disprove it is heavy but the necessity to discharge that burden arises only if the plaintiffs discharge their burden by establishing the facts upon which the legal presumption in favour of marriage could be properly raised; on facts, *held*, the plaintiffs' evidence was not sufficient to raise the presumption; insufficiency of the defendant's evidence was of no consequence: (1986) 1 M.L.J. 225: (1986) 2 Hindu L.R. 190: (1986) 99 Mad.L.W. 175 (D.B.).

Finding as to legitimacy—Finding is of fact—Interference in second appeal—When allowed: I.L.R. (1963) Bom. 77: A.I.R. 1963 Bom. 165.

Section 113—Note.

In British India advantage was taken of S. 113, Evidence Act, in cases of cessations to Native States Prince or Ruler. That section is now obsolete and has been omitted in Burma

[1][**113-A. Presumption as to abetment of suicide by a married woman.**—When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.—For the purposes of this section, "cruelty" shall have the same meaning as in section 498-A of the Indian Penal Code (45 of 1860).]

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1. Inserted by Act 46 of 1983, S. 7.

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and Ceylon but is still borne on our statute although no longer required in view of the provision in the Constitution of India: A.I.R. 1969 S.C. 783: (1969) 3 S.C.R. 254.

Section 113-A—Synopsis.

1. Constitutional validity.
2. Scope and applicability.
3. Retrospective operation of section.
4. "Relative"—Who is.
5. Cruelty—What is.
6. Illustrative cases.

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1. Constitutional validity.—Though the prosecution has to prove its case to the hilt and the burden is always on it, *held*, S. 113-A is not discriminatory; commission or abetment of suicide by a married woman occurs within her marital home, an intractable terrain to others but accessible to the class of offenders, namely, the husband and his relations; they have the special knowledge of what had actually transpired; the Legislature, therefore, drew presumptive evidence in the prosecution's favour; but it does not absolve the prosecution from adducing "proof beyond reasonable doubt;" the accused may displace the presumptive evidence by some evidence; the prosecution has still to establish its case beyond reasonable doubt; S. 113-A is neither discriminatory nor hit by Art. 14; the point is not *res integra*. [A.I.R. 1957 S.C. 877, Foll.]: (1994) 3 Karn.L.J. 335: (1994) 1 D.M.C. 356: (1993) 2 Hindu L.R. 672 (F.B.); (1987) 3 Crimes 471 (Andh. Pra.).

By no stretch of imagination can it be said that S. 113-A has introduced an invidious classification as between the treatment of a married woman by her husband and his relations within seven years of marriage and after seven years of marriage; married women after lapse of seven years become a class apart; with the passage of time and birth of children, chances of her being treated with cruelty become remote. The classification is, thus, reasonable and has nexus with the object of the statute, namely, the eradication of the evil of dowry and ensuring a life of dignity for married women in their matrimonial homes: 1994 Cr.L.J. 3472 (P.&H.) (F.B.).

There being inbuilt safeguards in S. 113-A as the Court is required to have "regard to all the other circumstances of the case" before it can raise the presumption against the husband and his relations for having abetted the wife to commit suicide on proof of the wife having been subjected to cruelty (which has the same meaning as in S. 498-A of the Indian Penal Code), *held*, S. 113-A is not hit by Art. 21 or Art. 20(3) of the Constitution; the acts of cruelty are committed within the four walls of the matrimonial home which negatives the likelihood of the other evidence being available; there is nothing arbitrary or negation of fair procedure or equality in S. 113-A: 1994 Cr.L.J. 3472 (P.&H.) (F.B.).

Though the Supreme Court has struck out the offence of attempting suicide made punishable under S. 306 of the Indian Penal Code as violative of Art. 21 of the Constitution and for not being irreligious, *held*, it cannot be contended that the offence of abetting to commit suicide is also rendered a non-offence and *ultra vires* of the Constitution; a volitional attempt to commit suicide is altogether on different footing where the commission of suicide results from a well-planned cruelty compelling the wife to commit suicide: 1994 Cr.L.J. 3472 (P.&H.) (F.B.).

2. Scope and applicability.—The fiction under S. 113-A has been created looking to very peculiar, particular and special circumstances in which a wife is placed in her husband's house in Indian society; said fiction will not obviously apply to other cases

of abetment to commit suicide where there is no relationship of husband and wife: 1995 Cr.L.J. 893 (Madh. Pra.).

The legislative intent is clear to curb the menace of dowry deaths, etc., with a firm hand. It must be remembered that since such crimes are generally committed in the privacy of residential homes and in secrecy, independent and direct evidence is not easy to get. This is why the Legislature has by introducing Ss. 113-A and 113-B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundational facts are established and the unfortunate event has taken place within seven years of marriage. This period of seven years is considered to be the turbulent one after which the Legislature assumes that the couple would have settled down in life: A.I.R. 1991 S.C. 1532: (1991) 3 Rec.Cr.R. 489. Courts are expected to construe these provisions in a way that the object behind the provisions is fulfilled: (1994) 1 Rec.Cr.R. 541 (Del.) (D.B.).

S. 113-A deals with the presumption about abetment of suicide by a married woman; if she commits suicide within seven years of her marriage and it is shown that her husband or his relatives had subjected her to cruelty, *held*, the Court may, considering all other circumstances, presume that her suicide was abetted by her husband or his relatives; thus, in case of unnatural death of a woman in the husband's and his near relations' house to which others had no access, those inmates have to explain the circumstances of her death; if the explanation is not convincing, cogent and reliable, it would, alongwith other circumstances, be a factor against the husband and his near relations; S. 113-A, though technically inapplicable, applied to a case where second Muslim wife found strangled within four years of marriage and the explanation of dacoity found baseless: (1992-2) 40 B.L.J.R. 908 (D.B.); (1992) 2 Crimes 746 (P.&H.); (1992) 2 Crimes 462 (Pat.); (1987) 2 Crimes 325: 1987 Cr.L.J. 1163 (Cal.).

For raising a presumption under S. 113-A, it must first be shown that the woman had committed suicide: 1992 Cr.L.J. 2455: (1993) 2 Hindu L.R. 196: (1994) 1 D.M.C. 267 (Bom.) (D.B.); (1993) 2 Rec.Cr.R. 28 (P.&H.) (D.B.).

The words "intentionally aids" used in Cl. thirdly of S. 107 of the Indian Penal Code are wide enough to cover a married woman being treated with cruelty; S. 113-A further clarifies the import of the definition of abetment of suicide by a married woman as a response to the current social challenges; the two statutory provisions, thus, do not contradict, but rather supplement, each other: 1994 Cr.L.J. 3472 (P.&H.) (F.B.).

Under the newly inserted S. 113-A of the Evidence Act, presumption as to commission of an offence under S. 306 (abetment of suicide) would be available only on the proof that the deceased wife was subjected to cruelty by the accused within the meaning of the newly inserted S. 498-A of the Indian Penal Code: (1991) 2 Cal.L.T. (H.C.) 370: (1992) 3 Rec.Cr.R. 335.

It is only on the proof of the offence under S. 498-A of the Indian Penal Code having been committed that the trial Court has to draw the presumption of the accused's guilt for abetting the offence after taking into consideration all other circumstances; if the offence under S. 498-A of the Code is not proved, the latter exercise would be futile: 1989 Cr.L.J. (N.O.C.) 52 (Andh. Pra.).

Scope of S. 498-A, I.P.Code, cannot be enlarged by reference to S. 113-A of the Evidence Act: (1986) 2 Rec.Cr.R. 194 (P.&H.).

The *Explanation* added to S. 113-A, provides the meaning of "cruelty" as in S. 498-A, I.P.Code. It appears to be clearly the intention of the Legislature to draw past instances of cruelty within a period of seven years from the date of the marriage of a woman who commits suicide as result of cruelty. Thus, when a period of seven years from the date of marriage is to be considered to raise a legal presumption, it cannot be done without drawing the past instances from the commencement date of the aforesaid provisions.

S. 113-A casts onerous duty on the Court to draw a presumption. The presumption that has been drawn must appeal to the judicial conscience. Suspicion, however strong, cannot take the place of proof. If there is no acceptable evidence, the Court also cannot come to a conclusion to convict the accused merely on the ground that it is morally satisfied about the truth of the case. By taking into consideration the spirit and object and the changed circumstances necessitated for introducing S. 113-A, the Court should shed its conservative approach in appreciating cases relating to suicidal deaths of married women

or dowry deaths: (1988) 2 An.L.T. 946: (1989) 1 A.P.L.J. 2.

The presumption available to be raised under S. 113-A is rebuttable. The Parliament in its wisdom not only used the expression "may presume", but has also supplemented the same by using the further expression "having regard to all the other circumstances of the case" which casts a positive responsibility on the Court to take into consideration all the other circumstances of the case also, namely, the circumstances which may be there besides the two basic circumstances mentioned in the section itself: 1995 Cr.L.J. 2472 (Ori.).

Unless the husband (the Court was not concerned with his relatives in the instant case) can be held guilty of subjecting the deceased to cruelty, no presumption of abetting the deceased in committing suicide is available under this provision: (1986) 13 Cr.L.T. 298: (1987) 1 Rec.Cr.R. 480 (P.&H.).

Where on evidence, the outstanding demand for dowry—only "a radio, a bell-metal glass and Rs. 100"—had been met and settled before the married woman had committed suicide, *held*, no presumption under S. 113-A could be raised merely because there was no other "earthly reason" for the married woman to commit suicide; the presumption under the section is neither mandatory nor to be drawn mechanically in every case; in the absence of a nexus between the cause (demand for dowry) and the effect (death by suicide), no presumption is permissible; the Court is not required to "shall presume" or it only "may presume" but "having regard to all the other circumstances of the case"; on facts, presumption set aside: (1993) 1 Hindu L.R. 192: 1993 Cr.L.J. 134: (1992) 1 Crimes 850 (Cal.) (D.B.).

The degree of proof required in a criminal trial is stricter than in a civil proceeding; in a criminal trial, however intriguing may be the facts and circumstances, the charges against the accused must be proved beyond all reasonable doubts; the proof should not be based on surmises and conjectures. Such requirement continues even after insertion of S. 498-A in the Indian Penal Code and S. 113-A in the Evidence Act. Besides there is no absolute standard of proof in a criminal trial; whether the charges against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of each case and the quality of evidences adduced and materials placed on record: A.I.R. 1994 S.C. 1418: 1994 Cr.L.J. 2104: (1994) 1 S.C.C. 73.

Where there was no dependable evidence on record to prove that on the relevant day when the deceased wife committed suicide, the accused husband instigated or aided in any manner the deceased to commit suicide, and further the marriage between the deceased and the accused took place before 10 to 12 years, *held*, the presumption under S. 113-A would not be applicable: (1990-2) 10 Guj.L.H. (U.J.) 10 (D.B.).

Where a bride died in extremely suspicious circumstances just five days after her marriage, *held*, a presumption arose under Ss. 113-A and 113-B against the accused: (1991) 2 Hindu L.R. 9 (Madh. Pra.).

Presumption under S. 113-A could be invoked only when the prosecution has discharged the initial onus of proving that the deceased woman had been subjected to cruelty. Where the prosecution could not establish that the accused had subjected the deceased to cruelty who committed suicide within seven years of her marriage, *held*, a presumption under S. 113-A could not be raised: 1994 Cr.L.J. 1602 (Karn.); 1992 Cr.L.J. 2385: (1992) 2 Hindu L.R. 594 (Ori.).

A close reading of S. 8-A of the Dowry Prohibition Act, 1961 shows that merely because the accused is charged with offences under S. 3 or S. 4 of the said Act, the initial burden which is always on the prosecution to prove basic ingredients of the sections for bringing home the charges to the accused will not get displaced or dispensed with. Further, if in a prosecution for offence of dowry death presumption under S. 113-A can be validly raised and the burden can be shifted on the accused then in prosecutions for demanding dowry or for taking or giving dowry or for its abetment the shifting of burden of proof on the accused under S. 8-A of Dowry Prohibition Act can equally validly be countenanced: (1994) 1 D.M.C. 356: (1993) 2 Hindu L.R. 672: (1994) 3 Kam.L.J. 335 (F.B.).

3. Retrospective operation of section.— The provisions of S. 113-A do not create any new offence and as such it does not create any substantial right but it is merely a matter of procedure of evidence and as such it is retrospective: A.I.R. 1990 S.C. 209: 1990 Cr.L.J. 562: (1990) 1 Rec.Cr.R. 279: (1990) 1 Hindu L.R. 353; (1990) 3 Crimes 9 (Madh. Pra.).

Ss. 498-A, I.P.Code and 113-A of the Evidence Act include in its amplitude the past events prior to the date of amendment, *i.e.* , 25-12-1983. Thus, a conviction can be based relying on the incidents of cruelty committed by the appellant prior to the commencement date of amended provisions. [A.I.R. 1983 S.C.

826; A.I.R. 1964 S.C. 446; A.I.R. 1961 S.C. 307, Rel. on]: (1987) 1 Bom.C.R. 668: (1988) 2 Crimes 580; 1987 Cr.L.J. 901; (1994) 1 Bom. C.R. 84 (D.B.).

Even before the insertion of S. 113-A, the Court was not absolved of putting the parties to proof that the wife had committe suicide on being abetted by her husband and in-laws; S. 113-A facilitates Court to raise a statutory presumption, though rebuttable, against the accused; raising the presumption is not part of the substantive law but of procedural law which is retrospective in nature. Thus, where the suicide was committed prior to the introduction of S. 113-A, *held*, the Court could rightly raise the presumption thereunder: (1987-1) 91 Punj.L.R. 115: (1987) 1 Hindu L.R. 189.

The provision though retrospective will not apply to a case where trial was concluded by the trial Court and the appeal against the trial Court's order was pending: (1991) 2 Rec.Cr.R. 380 (P.&H.) (D.B.).

4. "Relative"—Who is.—The presumption envisaged under S. 113-A is against the husband and his relatives; the father of the deceased woman cannot be said to be the relative of the husband for the purpose of S. 113-A: (1990) 2 Ker.L.T. (S.N.) 51: (1990) 3 An.L.T. 146.

5. Cruelty—What is.—Reminding his wife of and on, after she had once been coerced to bring to him from her brothers Rs. 5,000 that she should have brought a television, a fridge and a scooter and continuing to harrass her, *held*, the Court could presume under S. 113-A that it was the husband's cruel and intentional conduct to abet her to commit suicide; conviction upheld but sentence of imprisonment reduced: (1987) 1 Hindu L.R. 189: (1987-1) 91 Punj.L.R. 115; 1990 Cr.L.R. 377 (Guj.). *See* also 1994 (Supp.) 1 S.C.C. 173: 1994 S.C.C. (Cr.) 235; 1989 Marriage L.J. 56 (P.&H.).

Where the appellant used to consume liquor almost daily despite constant protests by his wife and he also used to come home late at night, *held*, the conduct of the appellant did not amount to cruelty under S. 498-A, I.P.Code and, therefore, no presumption under S. 113-A could be raised: 1988 Cr.L.J. 1048: (1988) 2 Rec.Cr.R. 225 (P.&H.). But when such acts, *i.e.*, consuming liquor daily and coming home late, were coupled with beatings and demanding dowry and harassment to bring money, *held*, such acts amount to cruelty, attracting presumption under S. 113-A: 1989 Cr.L.J. 1186: (1988) 2 An.L.T. 846.

6. Illustrative cases.—Where there was evidence to prove that the deceased, a newly wedded woman, was constantly abused, taunted for bringing less dowry and also defamed for carrying an illegitimate child by the accused who died of burn injuries, *held*, presumption as to abetment of suicide was available: A.I.R. 1990 S.C. 209: 1990 Cr.L.J. 562: (1990) 1 Hindu L.R. 353.

Where deceased who committed suicide within seven years of her marriage and there was evidence that she was being subjected to physical and mental cruelty after her marriage but she did not implicate the accused in her dying declaration, *held*, a presumption could be raised under S. 113-A: (1994) 1 Bom.C.R. 84 (D.B.).

Where the wife had committed suicide within seven years of marriage and there was convincing evidence that her husband had been subjecting her to cruelty, *held*, he could be convicted under S. 306 and S. 498-A of the Indian Penal Code for abetment: 1989 Rajdhani L.R. 265; (1992) 1 All Cr.L.R. 420 (P.&H.) (D.B.); (1987) 32 Del.L.T. 329.

Where deceased committed suicide within less than seven years of her marriage and there was evidence that she was harassed and tortured by appellant's mother-in-law for bringing insufficient dowry, *held*, a presumption as to abetment of suicide by the appellant could be raised under S. 113-A: (1986-1) 89 Punj.L.R. 101.

Where oral evidence regarding alleged torture for non-payment of dowry was not reliable and the prosecution omitted to disclose letters, alleged to be written by the deceased-wife, *held*, presumption under S. 113-A could not be raised: 1990 Cr.L.J. (N.O.C.) 138 (Cal.) (D.B.); 1987 Cr.L.J. 1412 (P.&H.).

Where there was no cogent or reliable evidence of the wife being maltreated or tortured by her husband or in-laws in connection with the demand for dowry or her having made any such complaints to her parents and the demand for a motor cycle was made only to her brother, endorsed by the wife herself, *held*, no presumption of dowry death could be raised merely because the wife had committed suicide within a few months of the marriage. [A.I.R. 1990 S.C. 209, Disting.]: 1992 Cr.L.J. 2472 (P.&H.) (D.B.).

Where the deceased wife had only once written to her father that if anything happens to her he should recover her dowry ornaments she would be leaving with her

[1][**113-B. Presumption as to dowry death.**—When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.—For the purposes of this section, "dowry death" shall have the same meaning as in section 304-B of Indian Penal Code (45 of 1860).]

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1. Inserted by Act 43 of 1986, S. 12 (w.e.f. 19-11-1986).

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husband or in her almirah, besides asking him to take her to the parental home and all other letters addressed to her husband, her in-laws and her parents expressed love, respect and consideration for her husband and in-laws and her unhappiness emanated not from any demand for dowry but the loss of her infant son and her inability to remain with her husband at the places of his posting, *held*, no presumption under S. 113-A could be drawn against the accused: (1992) 2 Hindu L.R. 594: 1992 Cr.L.J. 2385 (Ori.).

Where, in the letter received by the sister of the deceased, a few days before she committed suicide, there was not even a word suggesting harassment meted out to her on account of any unlawful demand and the evidence of the father and sister of the deceased regarding demand of dowry was contradictory, *held*, no presumption could be drawn under S. 113-A: 1993 Cr.L.J. 1400 (P.&H.) (D.B.).

Where it was established that the woman who died due to drowning was harassed for dowry demands by the petitioners but there was nothing to show that she at any time revealed her mind or mood to be suicidal and further she was pregnant at the time of her death, *held*, it could not be said with certainty that she committed suicide and, thus, no presumption could be raised under S. 113-A: (1994) 1 D.M.C. 267: 1992 Cr.L.J. 2455: (1993) 2 Hindu L.R. 196 (Bom.) (D.B.). *See* also (1991) 1 Rec.Cr.R. 359 (P.&H.); (1993) 3 Rec.Cr.R. 404 (P.&H.).

Where it was alleged that the death of the deceased who died within seven years of her marriage was not a case of suicide but a suspected dowry death and Police was very much in the picture right from the beginning but still body was not sent for post-mortem and was cremated abruptly, and evidence also showed that deceased was harassed for dowry, *held*, investigation by C.I.D. was ordered: 1988 Cr.L.J. 1399 (Mad.).

Section 113-B—Notes.

The legislative intent is clear to curb the menace of dowry deaths, etc., with a firm hand. It must be remembered that since such crimes are generally committed in the privacy of residential homes and in secrecy, independent and direct evidence is not easy to get. This is why the Legislature has by introducing Ss. 113-A and 113-B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundational facts are established and the unfortunate event has taken place within seven years of marriage. This period of seven years is considered to be the turbulent one after which the Legislature assumes that the couple would have settled down in life: A.I.R. 1991 S.C. 1532: (1991) 3 Rec.Cr.R. 489. Courts are expected to construe these provisions in a way that the object behind the provisions is fulfilled: (1994) 1 Rec.Cr.R. 541 (Del.) (D.B.).

When the question at issue is whether a person is guilty of dowry death of a woman and the evidence discloses that immediately before her death she was subjected by such person to cruelty and/or harassment for, or in connection with, any demand for dowry, S. 113-B of the Evidence Act provides that the Court shall presume that such person had caused the dowry death. Of course, if there is proof of the person having intentionally caused her death that would attract S. 302, I.P.Code: A.I.R. 1991 S.C. 1532: (1991) 3 Rec.Cr.R. 489.

S. 113-B, though mandatory, only enjoins upon the Court that on proof of facts and circumstances mentioned therein to draw the presumption of its being a case of dowry death; that would shift the onus on the accused that the deceased was not treated with cruelty by the accused soon before her death. It is, then, for the accused to seek the option

of himself appearing as a witness or to prove his defence by other evidence; since under S. 315 of the Code of Criminal Procedure, no adverse inference against the accused can be drawn for his non-appearance as a witness, there are sufficient in-built safeguards against the provision being hit by Art. 21 or Art. 20(3) of the Constitution: 1994 Cr.L.J. 3472 (P.&H.) (F.B.).

The applicability of S. 113-B is limited to cases "when the question is whether a person has committed dowry death of a woman....." That too requires proof of two further facts. Firstly, it is shown that soon before her death such a woman had been subjected by such person to "cruelty" or "harassment" and, secondly, that the cruelty of her husband was "for or in connection with any demand for dowry". If these two facts are established by evidence, the presumption under S. 113-B as to the commission of the offence under S. 304-B, I.P.Code would be attracted straightway. The presumption under S. 113-B, cannot be read or drawn or inferable where the charge is confined to S. 302, I.P.Code: 1993 Cr.L.J. 2636: 1993 All.L.J. 920 (D.B.).

S. 113-B, as indeed S. 304-B of the Indian Penal Code, was incorporated on the anvil of the Dowry Prohibition (Amendment) Act, 1984, the main object whereof is to curb the evil of dowry and to make it severely punitive; S. 113-B permits a legal presumption that it would be a dowry death if the wife victim was subjected to cruelty or harassment for or in connection with any demand for dowry; the interpretation of its provisions must be in consonance with the modern needs: 1990 Cr.L.J. 1666 (Andh. Pra.); 1995 Cr.L.J. 174 (Ori.).

Under S. 113-B, where a married woman's death is caused by cruelty or harassment connected with dowry demand, *held*, the Court shall presume that such dowry death was caused by the person who had made the demand: (1992-2) 40 B.L.J.R. 908 (D.B.); (1992) 2 Crimes 746 (P.&H.).

The offence of dowry death under S. 304-B of the Indian Penal Code is a new offence created with effect from 19-11-1986; triable by a Sessions Court, it is punishable with minimum imprisonment of seven years extendable to life imprisonment. The corresponding amendments of the Code of Criminal Procedure and the Indian Evidence Act relate to the trial and proof; the offence of dowry death is more stringent than the offence under S. 498-A of the Code; thus, if dowry death occurred prior to the enforcement of S. 304-A, it would tantamount only to be a death by cruelty which is triable by a Magistrate and punishable by fine and imprisonment upto three years. S. 113-B is, thus, not attracted in case of a dowry death prior to 19-11-1986: (1992) 1 Hindu L.R. 228 (S.C.); 1994 (Supp.) 1 S.C.C. 173: 1994 S.C.C. (Cr.) 235; 1993 Cr.L.J. 2636: 1993 All.L.J. 920 [On difference of opinion between the two Judges in 1992 Cr.L.J. 2294: 1992 All.L.J. 749].

Husband or the relatives need not be the actual or direct participant in the commission of offence. *See* (1991) 1 Rec.Cr.R. 115 (Andh. Pra.).

A combined reading of S. 113-B of the Evidence Act, and S. 304-B, I.P.Code shows that there must be material to show that soon before her death the victim must have been subjected to cruelty or harassment. The expression "soon before" is very relevant. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment, and only in that case the presumption operates. "Soon before" is a relative term. It would depend upon the circumstances of each case and no fixed period can be indicated in that regard. Where in determining the question as to whether death of deceased was a suicide or homicide, prosecution failed to show that soon before the occurrence there was cruelty or harassment, *held*, no presumption as to "dowry death" could be drawn under S. 113-B: 1994 Cr.L.J. 1684: (1994) 2 D.M.C. 382: (1995) 1 D.M.C. 435 (Ori.) (D.B.).

Only when the prosecution establishes by cogent evidence that soon before the death the lady was subjected to cruelty or harassment for or in connection with any demand for dowry can there be a presumption that the death is a dowry death: (1994) 2 Ker.L.J. 632 (D.B.); 1995 Cr.L.J. 174 (Ori.). Thus, where the evidence about the alleged cruelty in connection with the demand of dowry was quite vague, incomplete, inconsistent and unworthy of credence, *held*, S. 113-B could not be pressed into service for raising presumption of dowry death: 1995 Cr.L.J. 1345 (Raj.).

Where though the deceased-wife died within $2^1/_2$ of her marriage by consuming poison and there were allegations of maltreatment and harassment for bringing insufficient dowry but evidence relating to cruelty soon before her death was vague and untrustworthy, *held*, presumption under S. 113-B could not be raised: 1995 Cr.L.J. 1020 (Raj.).

Where a bride died in extremely suspicious circumstances just five days after her marriage, *held*, a presumption arose under Ss. 113-A and 113-B against the accused: (1991) 2 Hindu L.R. 9 (Madh. Pra.).

Where the deceased committed suicide within $1^1/_2$ months of marriage and there was allegation of harassment for dowry, *held*, presumption under S. 113-B could be raised: (1987) 2 Rec.Cr.R. 512 (Del.) (D.B.). *See* also (1992) 1 Rec.Cr.R. 675 (P.&H.).

Where death of bride occurred within about 14 months of marriage and there was *prima facie* material in regard to harassment in connection with demand for dowry, *held*, a presumption arose under S. 304, I.P.Code read with S. 113-B of the Evidence Act against the petitioners: (1990) 2 Hindu L.R. 411 (Del.).

Where deceased wife died within one and a half years of her marriage and her father consistently stated that the accused son-in-law was dissatisfied with the dowry and used to taunt the deceased as she was less educated and un-intelligent, *held*, provisions of S. 113-B were applicable: (1992) 2 Hindu L.R. 391 (P.&H.) (D.B.); (1992) 1 Rec.Cr.R. 387 (P.&H.) (D.B.).

Where the deceased woman died an unnatural death as a result of strangulation within seven years of marriage and the evidence of material witnesses indicated that there was demand for dowry and cruelty on the part of the accused-husband, *held*, a presumption as to "dowry death" could be raised under S. 113-B: A.I.R. 1995 S.C. 120.

Where deceased women died within three years of her marriage otherwise than under normal circumstances and the evidence of her parents and neighbour clearly showed that she was being harassed for dowry, *held*, the accused persons were guilty of causing "dowry death" and they were liable to be convicted: 1989 Cr.L.J. 2330: (1990) 1 Hindu L.R. 449 (Andh. Pra.) (D.B.). *See* also (1990) 3 Rec.Cr.R. 18 (P.&H.) (D.B.); (1995-2) 43 B.L.J.R. 928 (D.B.); 1995 Cr.L.J. 2728 (Mad.).

Where the accused persons had treated the deceased with cruelty in connection with demand for dowry and the death occurred within seven years of the marriage and from the evidence of the father, the brother and the mother of the deceased it was clear that they were not even informed soon about the death and the accused hurriedly cremated the dead body, *held*, the presumption under S. 113-B was attracted: A.I.R. 1991 S.C. 1226: 1991 Cr.L.J. 1713: (1991) 1 S.C.C. 371: (1991) 1 Hindu L.R. 409.

Where a married lady died unnatural death within seven years of marriage and there was evidence of maltreatment and harassment for bringing insufficient dowry, *held*, presumption under S. 113-B was clearly attracted: 1994 Cr.L.J. (N.O.C.) 176 (P.&H.); (1994) 1 Hindu L.R. 351 (P.&H.) (D.B.); 1995 Cr.L.J. 989 (Ker.) (D.B.).

In case of dowry death, the person in whose care the victim was entrusted must necessarily account for the crime as he is supposed to have special knowledge about the crime: 1989 Cr.L.J. (N.O.C.) 13 (P.&H.) (D.B.).

Where in the F.I.R. lodged by the brother of the deceased woman who died due to burn injuries, no allegation was made against the accused regarding harassment or cruelty towards the deceased on account of having brought less dowry, *held*, no presumption under S. 113-B could be raised: (1994) 1 D.M.C. 506: (1993) 2 Hindu L.R. 521: (1993) 3 Rec.Cr.R. 404 (P.&H.); 1995 Cr.L.J. 312 (All.) (D.B.).

Where there was no evidence that there was any demand of dowry prior to the marriage and witnesses admitted that nothing was given by the deceased's parents within five years preceding the incident and further deceased's brother stated that if his sister would have complained of any cruelty or harassment, he would not have sent her back when she had come to his house about twenty days prior to her death, *held*, simply because a young lady had brought her life to a tragic end by committing suicide, it could not be said that she had embraced death on account of any demand of dowry by her husband or mother-in-law which was not satisfied: 1992 Cr.L.J. 309 (Raj.) (D.B.).

Where there was no convincing evidence to establish that the wife died within seven years of her marriage and that she was treated with cruelty for want of dowry soon before her death, *held*, no presumption could be drawn under S. 113-B: (1993) 1 Hindu L.R. 482 (Raj.).

Where there was no legal, cogent or reliable evidence to prove either that the appellants instigated, aided or abetted the commission of suicide by deceased wife or that the appellant acted with cruelty or that their wilful conduct was likely to drive deceased to commit suicide and testimony of brother of deceased was not sufficient to prove that the marriage of the deceased took place within seven years of her death due to intake of poison, *held*, no legal presumption could be drawn against the appellant that they were guilty of causing dowry death: 1994 Cr.L.J. 1679 (P.&H.).

114. Court may presume existence of certain facts.—The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume—

(*a*) that a man who is in the possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(*b*) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(*c*) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration,

(*d*) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;

Where a bride died of poisioning but there was no evidence of harassment on account of dowry and, on the other hand, the mother-in-law immediately informed the neighbours and removed her to the hospital, *held*, presumption under S. 113-B could not be raised: (1991) 2 Rec.Cr.R. 118 (P.&H.).

Where a wife committed suicide but her letter, relied upon by the prosecution, complaining of ill-treatment by her in-laws was not proved, her father had admitted that he was prepared to marry his other daughter to the brother of his son-in-law, there was no cogent evidence to prove demand for dowry, there were no injuries on her body and she was removed to the hospital by her in-laws soon after she took poison, *held*, the prosecution having failed to prove that soon before her death and within seven years of her marriage, she was subjected to cruelty and harassment in connection with demand of dowry by her in-laws, no presumption could be drawn against them; conviction set aside: 1993 Cr.L.J. 3723 (Madh. Pra.).

Where though the death of wife occurred because of burn injuries within seven years of her marriage, but there was no evidence from which an inference could be drawn that her husband pestered her with demand for money, *held*, merely because accused failed to explain as to what else would have prompted his wife to end her life in jiffy, presumption envisaged in S. 113-B cannot be invoked: 1991 Cr.L.J. (N.O.C.) 15: (1991) 1 Ker.L.J. 359: (1991) 1 Ker.L.T. 494 (D.B.).

Section 114—Synopsis.

1. Scope and applicability.

2. "Common course of natural events and human conduct".

3. Illustrations to section 114—Scope of.

Illustration (a)

4. Constitutional validity.

5. Scope and applicability.

6. Conditions precedent for raising presumption.

7. Presumption—When can be raised.

8. Raising of presumption—Whether shifts onus of proof.

9. Possession—What is.

10. Possession must be recent.

11. Recovery from place accessible to others.

12. Mere knowledge of place of concealment.

13. Recovery from house in occupation of joint family.

14. Presumption in case of carrier.

15. Presumption of murder and robbery.

16. Presumption of dacoity.

17. Deaf and dumb accused.

18. Illustrative cases.

Illustration (b)

19. Accomplice's testimony (*See* Notes under S. 133, *infra*).

Illustration (c)

20. Presumption regarding consideration.

Illustration (d)

21. Presumption regarding continuance of state of things.

(*e*) that judicial and official acts have been regularly performed;

(*f*) that the common course of business has been followed in particular cases;

(*g*) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(*h*) that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(*i*) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it—

As to *illustration* (*a*)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;

As to *illustration* (*b*)—*A*, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. *B*, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of *A* and himself;

Illustration (e)

22. Scope and applicability.
23. Presumption is discretionary.
24. Regularity of judicial acts.
25. Happening before Court.
26. Regularity of attachment and sale in execution.
27. Regularity of official acts.
28. Presumption to be raised only when official act has been done.
29. Presumption regarding Acts, Orders and Notifications of Government.
30. Regularity of registration proceedings.
31. Sanction for prosecution.
32. Proceedings under the Prevention of Food Adulteration Act, 1954.
33. Police record.
34. Identification proceedings.
35. Warrant.
36. Record-of-rights.
37. Revenue records.
38. Election matters.
39. Birth and death registers.
40. Municipal records.
41. Land acquisition proceedings.
42. Assessment record.
43. Arbitration.
44. Others.
45. *Illustrations* (*e*) and (*f*)—Postal business—General.
(*a*) Section 27 of the General Clauses Act *vis-a-vis* section 114 of the Evidence Act.
(*b*) Endorsement of refusal.
(*c*) Notice to quit.
(*d*) Certificate of posting.
(*e*) Money order.
(*f*) Illustrative cases.

Illustration (f)

46. General.
47. Presumption regarding post.
48. Others.

Illustration (g)

49. Scope.
50. Withholding of best evidence.
51. Non-production of witness by prosecution.
52. Non-examination of Investigation Officer.
53. Non-production of evidence by prosecution.
54. Non-explanation of injuries on accused.
55. Non-production of defence evidence.
56. Non-appearance of party as witness.
57. Non-production of witness.
58. Non-production of documents.
59. Non-production of accounts.
60. Non-production of other evidence.
61. Refusal to submit to medical examination.
62. Income.
63. Election record.
64. Non-production of evidence by Railways.
65. Illustrative cases.

Illustration (h)

66. Refusal to answer.

As to *illustration* (*b*)—A crime is committed by several persons. *A*, *B* and *C*, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating *D*, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;

As to *illustration* (*c*)—*A*, the drawer of a bill of exchange, was a man of business. *B*, the acceptor, was a young and ignorant person, completely under *A*'s influence;

As to *illustration* (*d*)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;

As to *illustration* (*e*)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances;

As to *illustration* (*f*)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;

As to *illustration* (*g*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;

As to *illustration* (*h*)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;

As to *illustration* (*i*)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

Illustration (i)

67. Document in obligor's possession.

Presumption in other cases

68. Accident.
69. Accounts.
70. Adoption.
71. Adultery.
72. Adverse possession.
73. Age.
74. Assessment.
75. *Benami*.
76. Citizenship/domicile.
77. Co-owners.
78. Corruption cases.
79. Criminal cases.
80. Customary right.
81. Customs Act.
82. Death.
83. Dedication to public.
84. Delegation of powers.
85. Drugs.
86. Easement.
87. Election.
88. Execution of documents.
89. Gift.
90. Husband and wife.
91. Idiocy/insanity, etc.
92. Impotency.
93. Insurance.
94. Joint family.
95. Knowledge of law.
96. Landlord and tenant.
97. Lost grant.
98. Maintenance.
99. *Mala fide*.
100. *Malicious prosecution*.
101. Marriage.
102. Mortgage/pledge.
103. Mahomedan law.
104. Negligence.
105. Negotiable instrument.
106. Partnership.
107. Paternity.
108. Personal law.
109. Pleader and client.
110. Possession.
111. Pre-emption.
112. Trust.
113. Undue influence.
114. Will.
115. Miscellaneous.

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1. Scope and applicability.—Section is not exhaustive: 46 P.L.R. 355. S. 114 includes but is not limited to, the presumption of "regularity": 160 I.C. 332: A.I.R. 1936 Cal. 1.

The principle laid down by S. 114 is one of very wide application, which covers, not merely the particular instances given in the illustrations to the section, but all sorts of analogous cases in which the actual facts are distinguishable from the facts presumed

by any one of the illustrations but are equally amenable to the general principle enunciated by the section itself: A.I.R. 1945 Bom. 292 (D.B.).

It cannot be said that before any initial presumption can arise or be raised, the Court must consider and weigh all the facts and circumstances of the case. S. 114 does not lay down any such rule: A.I.R. 1956 Bom. 633.

The section is wide enough to permit the Court to raise a presumption not only with regard to oral evidence, but also with regard to documentary evidence: A.I.R. 1959 Bom. 414: I.L.R. (1959) Bom. 1004 (D.B.). S. 114 does not enable the Court to draw one presumption based upon another presumption without any evidence: (1971) 73 Punj.L.R. (Del.) 145.

The language of S. 114 is not imperative; the Court is not bound to raise presumption even if the requirements of the section are fulfilled: (1983-2) 24 Guj.L.R. 1303.

It cannot be said that a Court should make a presumption under S. 114 on the materials before it. It is optional with the Court concerned to make a presumption under S. 114: 1948 All.W.R. (Rev.) 199: 1948 R.D. 348. Whether or not a presumption under S. 114 can be drawn in a particular case depends on the facts and circumstances of that case: A.I.R. 1961 Raj. 35: I.L.R. (1960) 10 Raj. 921: (1961) 1 Cr.L.J. 310.

S. 114 prescribes that the Court may presume a fact—Not that the Court must: (1963-64) 68 Cal.W.N. 786: 1963 Cal.L.J. 75; 1971 W.L.N. 317.

S. 114 allows the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Whether in given circumstances a presumption can be raised or not would depend upon the facts of each case. The words "may presume" in S. 114 leave it to the Court to make or not to make the presumption according to the circumstances of the case: (1975) 3 Chand.L.R. 224 (Del.); 1978 Cr.L.J. 1107 (S.C.); 1982 Cr.L.J. 1656 (Del.); A.I.R. 1943 F.C. 75: 45 Cr.L.J. 341; A.I.R. 1953 Mys. 48 (D.B.).

S. 114 uses the expression "may presume" and this expression has been defined in S. 4 of the said Act in the following manner: "Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it". In other words, even if such fact has not been disproved, the Court may instead of regarding it as proved, call for proof of it: (1983) 55 Cut.L.T. 531.

Presumption under S. 114, Evidence Act is presumption of fact while presumption under S. 27, General Clauses Act is one of law: 1969 All.W.R. (H.C.) 477: 1969 All.L.J. 849. And the only difference between such a presur. ption of law under S. 27 of the General Clauses Act and a presumption of fact under S. 114 of the Indian Evidence Act is that in the former case a presumption has got to be made by the Court, while in the latter case, *i.e.*, under S. 114 of the Indian Evidence Act it may or may not be made according to the facts and circumstances of each case. However, even a presumption of law is rebuttable unless it is made unrebuttable by some provision of law. A presumption of law to be raised under S. 27 of the General Clauses Act has not been made unrebuttable: A.I.R. 1970 All. 446: 1970 All.L.J. 336 (F.B.).

Presumptions arising under S. 28 of the M.P. General Clauses Act, 1957 are mandatory; the Court is bound to draw it; but presumptions under Ss. 16 and 114 of the Evidence Act are optional. [A.I.R. 1976 S.C. 869, Foll.]: A.I.R. 1981 Madh. Pra. 76: 1980 Jab.L.J. 285.

The presumption of fact is rebuttable: (1974) 1 Karn.L.J. (Jr.) 14 (S.N.) 45.

In considering the evidence on the merits even in the light of burden of proof, a party is entitled to seek the help of legal presumptions including those under the provisions of S. 114: (1986) 1 Hindu L.R. 62 (Ker.).

S. 114, Evidence Act does not lay down any hard and fast rule with regard to the circumstances in which any fact or facts may be presumed to exist nor does it contain an exhaustive list of such facts, though it gives few illustrations from various walks of life. The section, however, provides a guiding principle, namely, that the Court shall be guided by its own experience and knowledge of the common course of natural events, and public and private affairs: A.I.R. 1966 All. 214: 1965 All.W.R. (H.C.) 504.

S. 114 enables a Judge to infer one fact from the existence of another proved fact having regard to the common course of natural events or human conduct. The illustrations given to the section are not exhaustive. The Court may always rely on the main section in regard to a different set of facts or combination of facts to draw the presumption embodied in that section. The section gives an option to the Judge whether to draw such a presumption or not, having regard to the circumstances of each case: I.L.R. (1956) Andhra 173: A.I.R. 1957 Andh. Pra. 611.

Presumptions of fact are assumptions resulting from one's experience of the course of natural events of human conduct and human character, assumptions which one is entitled to make use of and has to make use of in the ordinary business of life as well as the business of Courts. A Judge of fact may raise such presumptions to assist him, if he thinks them likely in relation to the facts of the case with which he is dealing. It is always a question for the Judge of fact in any particular case whether he will make use of such an assumption, whether he will raise such a presumption of fact. His discretion in the matter is subject to re-consideration by an appellate Court if there is an appeal on facts. If the burden of proof lies upon one party, it is not reasonable to raise a presumption of fact which begs the question in favour of that party: 14 Mys.L.J. 491: 42 Mys.H.C.R. 163.

The effect of raising presumption is that it only shifts burden of proof: (1984) 4 Guj.L.H. 110: (1984-1) 25 Guj.L.R. 631.

Presumption under section—Essentials to be proved: 1966 Cr.L.J. 1357: A.I.R. 1966 S.C. 1762.

S. 114 applies not only to civil but also to criminal cases: 41 Cr.L.J. 401 (2): A.I.R. 1940 Sind 42. *See* also (1974) 1 An.W.R. 42.

Presumption under section—Duty of Court—Court has to be very cautious in scrutinising evidence: (1966) 8 Guj.L.R. 145.

The effect of S. 114 is to make it perfectly clear that Courts of justice are to use their own common sense and experience in judging the effect of particular facts and they are to be subjected to no technical rules whatever on the subject: 151 I.C. 473: A.I.R. 1934 Cal. 719 (F.B.). *See* also 164 I.C. 385: A.I.R. 1936 Rang. 332; I.L.R. (1937) Mad. 299: (1937) 1 M.L.J. 543: A.I.R. 1937 Mad. 182.

If facts are ascertained, presumptions arising from conduct cannot establish a right which the ascertained facts disprove, nor can they negative the right which the facts establish: A.I.R. 1960 Punj. 542.

Whether a general or a particular or special onus has been discharged is to be decided not only on the direct effect of oral and documentary evidence led but also from indirect inferences from proving or not proving easily proveable facts if they existed and presumption of law or fact could be drawn therefrom; presumptions under S. 114 cover a wide range of presumptions which the Courts may use to remove lacunae or fill a gap in the chain of direct evidence before the Court: A.I.R. 1977 S.C. 183: (1977) 1 S.C.C. 133: (1977) 1 S.C.R. 763: (1977) 90 Mad.L.W. (S.N.) 17.

The rules of presumption are deduced from enlightened human knowledge and experience; they are drawn from the connection, relation and coincidence of facts and circumstance: A.I.R. 1986 S.C. 1099: (1986) 99 Mad.L.W. (S.N.) 30: (1986) 2 S.C.C. 486.

If presumptions arising under S. 114, which is a general section come into conflict with presumptions arising from provisions, which can be called special provisions then presumptions arising under the general provisions must yield place to the presumptions arising under the special provisions: A.I.R. 1963 Mys. 115.

Presumptions of law are legal fictions. They are designed for the sake of convenience and justice and are based upon wide human experience of a connection between the fact proved and the fact to be proved. Truth may sometimes be not permitted to prevail over a presumption of law: 1969 All.L.J. 849: 1969 Ren.C.R. 849: 1969 All.W.R. (H.C.) 477.

Presumption and inference, difference between. *See* 25 All.L.J. 833: I.L.R. 50 All. 145: A.I.R. 1928 All. 16; I.L.R. 62 Cal. 956.

Inference of fact depends on mental process which is same all over the world: A.I.R. 1919 P.C. 11.

A presumption in itself is no evidence; it only makes out a *prima facie* case for the party concerned; it is a rule concerning evidence; it indicates the person on whom the burden of proof lies. If the presumption is conclusive, it obviates the production of any other

evidence, whether in support or in opposition. In case of a rebuttable presumption, the other party may produce evidence, fairly and reasonably tending to show that the real fact is not as presumed; the purpose of presumption is then over; then only the evidence of the parties will determine the true nature of the presumed fact: A.I.R. 1986 S.C. 1099: (1986) 99 Mad.L.W. (S.N.) 30: (1986) 2 S.C.C. 486.

The presumptions under the Evidence Act are only the inferences which a logical and reasonable mind normally draws. Facts and circumstances from which certain inferences follow are indicated in various provisions of the Act. Whenever the law permits the raising of a presumption, the Court can by reason of S. 4, raise the presumption for purpose of proof of a fact. If the presumption is available in one section, it can raise it under that section. If it is not available in one section and is available in another section, then the Court can raise presumption under that section. It all depends upon the circumstances available in the case as applicable to a particular document: A.I.R. 1980 All. 385 (F.B.).

Presumptive and conclusive proofs are basically different; while conclusive proof raises a conclusive presumption, presumptive proof raises a conditional, rebuttable presumption. A fact deemed to be proved, irrespective of the existence or non-existence of other facts possessing probative force in the opposite direction, raises a conclusive presumption and the law accepts the fact as conclusively proved. Presumptive or conditional proof, on the other hand, is acceptance of certain facts which, on all probabilities, the law assumes to have taken place; it is only a conditional proof, accepted so long as there exist no other facts amounting to its disproof; and it is called rebuttable presumption: (1989) 1 Hindu L.R. 558 (Ker.).

A legal fiction is one which is not an actual reality but which the law requires the Court to accept it as a reality. Legal fiction is nothing but a presumption of the existence of a state of affairs which in actual reality is non-existent. However, the legal fiction and a presumption are not wholly identical in all respects. A presumption may be conclusive or it may be rebuttable. A presumption gives rise to a legal fiction. It is conclusive if no evidence can be permitted to be led to deny it. In case of a presumption which is rebuttable, unless the contrary is established, a fictitious state of affairs is presumed to exist as if it is an actual reality. S. 4 of the Bombay Tenancy and Agricultural Lands Act (1948) creates a legal fiction as to "deemed tenancy" and not a presumption: A.I.R. 1978 Guj. 208: (1978) 19 Guj.L.R. 799 (D.B.).

The question of presumption has to be kept distinct from the question of proof. For the purpose of raising the presumption what one has to see is the state of affairs prevailing on the date on which the presumption is sought to be invoked. On the other hand, in order to prove a certain legal relationship between the parties, the Court is not concerned with the state of affairs prevailing at the time when the question arose, but also with the state of affairs prevailing when the alleged legal relationship is said to have arisen: 1954 All.L.J. 187: A.I.R. 1954 All. 441.

When the plaintiffs have failed to produce evidence they may not be permitted to rely on a presumption under S. 114 in place of the evidence that they could produce: I.L.R. (1957) 9 Assam 1: A.I.R. 1959 Assam 98.

A presumption is a rule of law that attaches definite probative value to specific facts or directs that a particular inference as to the existence of one fact not actually known shall be drawn from a fact which is known and proved. It furnishes *prima facie* evidence of the matter to which it relates and relieves the party of the duty of presenting evidence until his opponent has introduced proof to rebut the presumption. It raises such a high decree of probability in its favour that it must prevail unless clearly met and explained and overturned by explanatory proof to the satisfaction of the Court. Presumption hold the field in the absence of evidence, but when facts appear presumptions recede: (1957) 59 Punj.L.R. 501: A.I.R. 1958 Punj. 333: I.L.R. (1957) Punj. 1997.

S. 114 of the Evidence Act deals with presumption of facts. Presumption of facts are no more than logical inference of the existence of one fact drawn from other proved or known facts without the help of any artificial rules of law and they are always rebuttable. The provision gives a discretion to the Court to make or not to make a presumption and no party as of right can claim such a presumption being raised by a Court. When a presumption of fact will stand rebutted depends upon the nature and extent of evidence and circumstances of each case and

the credit which the Court gives to the rebuttal evidence. The use of words "in relation to facts of the particular case" in S. 114 are significant in this connection: 1968 All.W.R. (H.C.) 507: 1968 All.L.J. 707.

R. 141(2) of the Defence of India Rules, 1962, which lays down a rule of evidence contrary to the law contained in S. 114 of the Evidence Act, *held*, is saved by S. 43 of the Defence of India Act, 1962: A.I.R. 1970 S.C. 1829: 1970 Cr.L.J. 1644: (1970) 2 S.C.R. 270.

Where the facts are once ascertained, presumption arising from conduct cannot establish a right which the facts themselves disprove: A.I.R. 1959 S.C. 504.

Conflicting presumptions neutralise each other and leave the case at large to be determined solely on the evidence given: (1933-34) 38 Cal.W.N. 861.

Burden of proof and presumption—They have to be considered together—Their importance vanishes in the face of evidence given by both sides: A.I.R. 1970 All. 51: 1969 All.L.J. 657: 1970 Cr.L.J. 132 (F.B.).

Failure to draw presumption if error of law: A.I.R. 1965 Mys. 258.

Drawing presumption retrospectively—Whether allowable.*See* (1978) 1 Karn.L.J. 119.

2. "Common course of natrual events and human conduct".—Common course of conduct can only be that which is most common in the experience of the Judge who has to decide the point: 24 Nag.L.R. 87: A.I.R. 1928 Nag. 52.

Common course of natural events—Presumption: 1959 Cr.L.J. 712: A.I.R. 1959 Ker. 190.

Of two conflicting statements of witness, the statement against interest should ordinarily be preferred: A.I.R. 1930 Pat. 293.

It is one of the strongest presumptions based on human experience that a woman must be unchaste when her children say so in the Court. The very word "mother" carries with it a sense of highest reverence. No doubt said presumption is one of fact and is rebuttable by strong evidence: 1961 M.P.L.J. 979: 1961 Jab.L.J. 466: (1961) 2 Cr.L.J. 236.

The evidence about the conduct of an animal can be taken into account under S. 114 of the Evidence Act as being covered by the words "course of natural events." Hence, the conduct of a calf in going to the house of its master and in starting to lick the udders of its mother, being guided by natural instinct can be taken into account in determining the ownership of the calf. [A.I.R. 1940 Pesh. 47, Dist.]. Per *Gurtu* and *Sankar Saran JJ.* (*Obiter* in their opinion)—S. 114, Evidence Act itself does not consider the words "course of natural events" as interchangeable with "animal conduct." If the words are not so interchangeable then it is obvious that the facts relating only to human conduct can be taken into consideration. The conduct of an animal such as a calf does not appear to be covered by the term "course of natural events.": A.I.R. 1952 All. 481: 1952 Cr.L.J. 904. Human conduct, *see* A.I.R. 1954 All. 186: 1953 All.L.J. 689.

3. Illustrations to section 114—Scope of.—The illustrations appended to S. 114 are not statements of the law qualified only by particular exceptions. They are merely what they call themselves, illustrations or instances of the application of certain maxims out of many possible instances: 69 I.C. 257: 17 Nag.L.R. 113.

Illustrations in section are but illustrations and it is always open to the Court to see the main section and consider whether it applies to any given set of facts and draw inferences therefrom: A.I.R. 1947 All. 191 (F.B.).

The illustrations appended to S. 114 are not intended to lay down rules of law which are exhaustive of the presumptions that may be made under the provisions of the section itself nor are they intended to apply without exception. They are merely examples of circumstances in which certain presumptions may be made and other presumptions of a similar kind in similar circumstances may be made under the provisions of the section itself: 1944 All.L.J. 411: A.I.R. 1944 All. 281. *See* also (1944) 46 Punj.L.R. 355: A.I.R. 1944 Lah. 472; A.I.R. 1958 Ori. 106. The presumption to be drawn under that section is one of fact and whether it should be drawn or not in a particular case must depend upon the facts of that case: A.I.R. 1946 Pat. 1 (F.B.); A.I.R. 1961 Raj. 35. But onus on the prosecution to prove the guilt does not change: A.I.R. 1952 Assam 97.

The illustrations to S. 114 are not and, from the very nature of things, cannot be exhaustive; they are for understanding the scope and thrust of the section itself: (1989) 1 Bom.C.R. 156.

Presumption permitted under S. 114 is a presumption of fact and is one resting on the discretion of the Court. Illustrations are merely examples of circumstances in which certain presumptions may be made; they do not inhibit the Court from presuming other positions based on similar situations or circumstances. No hard and fast rule can be laid down about the extent of presumption which a Court can make in a given situation: (1992) 2 Ker.L.T. 129: (1992) 2 Ker.L.J. 112: I.L.R. (1992) 3 Ker. 309 (D.B.).

Illustrations appended to section—Principle of interpretation: I.L.R. (1960) Cut. 230.

The illustrations to S. 114 show the extent to which Court may draw presumptions and clearly S. 114 is no justification for a Court presuming without evidence that because a woman sleeps in a room with two cots, her husband, an inmate of the house, must have slept on the other cot on a particular night: A.I.R. 1939 Sind 130.

Illustration (a)

4. Constitutional validity.—The presumption raised under *Illus.* (*a*) of S. 114, Evidence Act, does not contravene the provisions of Art. 21 of the Constitution and as such is not unconstitutional or *ultra vires*: (1956) 58 Punj.L.R. 320: A.I.R. 1956 Punj. 224.

5. Scope and applicability of *Illustration (a)*.—Presumption under: 1959 Cr.L.J. 1271: A.I.R. 1959 All. 718.

Illus. (*a*) is enumerative and not exhaustive: A.I.R. 1967 Goa 21: 1967 Cr.L.J. 357 (F.B.).

The drawing of a presumption under S. 114, *Illus.* (*a*) is discretionary and a Court may refuse in the special circumstances of a particular case to draw such a presumption: I.L.R. (1957) Cut. 680: A.I.R. 1958 Ori. 51.

As *Illus.* (*a*) indicates, the Court may presume that the petitioner is either the thief or has received the goods, known to him to be stolen: (1985) 60 Cut.L.T. 134: 1985 Cr.L.J. (N.O.C.) 7.

Possession of stolen things—Presumption: A.I.R. 1958 Mys. 150: 1958 M.L.J. (Cr.) 341: 1958 Cr.L.J. 1489.

S. 114 provides, as mentioned in *Illus.* (*a*), that a person who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The presumption from recent possession of stolen property is an optional presumption of fact. It is open to the Court to convict an accused by drawing the presumption where the circumstances indicate that no other reasonable hypothesis except the guilty knowledge of the accused is open to the prosecution. The presumption permissible has to be read alongwith the important time factor: (1984) 58 Cut.L.T. 17; A.I.R. 1976 S.C. 1097.

It is permissible to presume that a person in possession of stolen article soon after the theft is either the thief or a receiver of stolen property. But if her explanation of such possession is plausible, no such presumption would be allowable: I.L.R. (1956) Andhra 538.

Where a person is found in possession of stolen goods soon after the theft, it may be presumed that he is either a thief or has received the goods knowing them to be stolen unless he can account for his possession, but there is no rule of law which permits from the possession of stolen goods, a presumption of an offence of lurking house-trespass by night, or house-breaking by night as is contemplated by S. 457 of the Indian Penal Code: 1960 Cr.L.J. 653: A.I.R. 1960 Punj. 286.

Presumption under *Illus.* (*a*)—When arises—Duty of Court to examine accused: A.I.R. 1958 Cal. 414: 1958 Cr.L.J. 1012.

Mere recovery of stolen property not enough to attract S. 411, Penal Code: I.L.R. (1964) Cut. 795: (1965) 2 Cr.L.J. 54: A.I.R. 1965 Ori. 114.

The question whether a presumption should be drawn under *Illus.* (*a*) of S. 114 is a matter which depends on the evidence and the circumstances of each case. The nature of the recovered articles, their manner of acquisition by the owner, the nature of the evidence about their identification, the manner in which the articles were dealt with by the accused, the place and the circumstances of their recovery, the length of the intervening period and the ability or otherwise of the accused to explain the recovery, are some of those circumstances. [A.I.R. 1978 S.C. 522, Foll.]: A.I.R. 1978 S.C. 1183: 1978 Cr.L.J. 1107: (1978) 3 S.C.C. 279; 1991 Cr.L.R. 105 (Madh. Pra.) (D.B.).

Before an inference could be drawn against the accused in accordance with the

provisions of S. 114, it must be established that the theft took place on a certain date and within a very short duration thereafter the accused was found in possession of the stolen property. Thus, where the prosecution failed to establish the time when the theft was committed and the time when the accused was in possession of the stolen property, *held*, the inference against the accused could not be drawn under S. 114: (1982) 1 Bom.C.R. 764.

The Court is entitled to presume that a person found in possession of property which had been stolen is either the receiver or the actual thief. The nature of the presumption in each individual case depends entirely upon the nature of the evidence adduced. Where a long interval has elapsed before the stolen property has been recovered, it is often unsafe to assume that the possessor is the actual thief: 184 I.C. 545: A.I.R. 1939 Rang. 361; 23 Cut.L.T. 18: A.I.R. 1942 Pat. 439; A.I.R. 1951 Kutch 10.

The presumption permitted by S. 114, *Illus.* (*a*) does not arise until the prosecution has established three facts, namely, the ownership of the article in question, the theft of those articles and their recent possession by the accused. No fixed time limits can be laid down to determine whether possession is recent or otherwise and every case must be judged on its own merits. The presumption of guilt varies according to whether the stolen articles are or are not calculated to pass readily from hand to hand and, therefore, the importance to be attached to possession must vary with the circumstances of each individual case: (1949) 51 Punj.L.R. 110: A.I.R. 1949 East Punj. 315.

Inability to account for possession of property satisfactorily—Property cannot be believed to be stolen property or one obtained by fraudulent means: 1969 Cr.L.J. 824 (Mad.).

A Court may, in appropriate circumstances, presume that a man who is in possession of stolen goods soon after a theft, is either the thief or has received the goods knowing them to be stolen unless he can account for his possession, because if he cannot account for his possession he is likely to be the thief or to have received the goods knowing them to have been stolen. This applies to property criminally misappropriated which is also "stolen property": A.I.R. 1945 Mad. 208: (1945) 1 M.L.J. 202. But *see* contra. *Illus* (*a*) to S. 114 relates only to stolen property obtained by committing theft. In the case of property obtained by criminal misappropriation, although such property would no doubt be stolen property, the inference that a person who subsequently got possession of such property must have known that it was "stolen property", cannot be drawn in the case of such property: A.I.R. 1944 Mad. 26: (1943) 2 M.L.J. 334. *See* also (1950) 1 M.L.J. 792; 1950 All.W.R. 203.

In order to rebut the presumption arising under S. 114(*a*) of Evidence Act from recent possession of alleged stolen articles, the explanation of the accused of such possession must be so reasonably convincing as to throw a doubt on his guilt; but a mere denial of the prosecution story or any assertion inconsistent with facts proved by the prosecution, cannot amount to an explanation to make the presumption unavailable to the prosecution under S. 114(*a*) of the Act: A.I.R. 1952 Mys. 83: 1952 Cr.L.J. 1522.

The words "receives" and "retains" are generally used together and though *Illus.* (*a*) to S. 114 of the Evidence Act, expressly refers to dishonest receipt of stolen property, a presumption about dishonest retention of the stolen property may equally be made by virtue of that illustration: I.L.R. (1958) Cut. 131: A.I.R. 1958 Ori. 106.

Though *Illus.* (*a*) to S. 114 only mentions a case of ordinary theft, it is well-established that its principle applies not only to ordinary cases of theft, but also cognate offences such as dacoity and robbery: I.L.R. 25 Pat. 262. S. 114 is general in its terms. *Illus.* (*a*) is only an illustration, and the fact that the section does not provide an illustration with reference to a dacoity does not mean that where the accused is in possession of property stolen at a dacoity, no presumption can be made either that he was one of the dacoits or that he had dishonestly received or retained the property, knowing or having reason to believe that the possession had been transferred by dacoity or knowing or having reason to believe that it was stolen property: (1944-45) 49 Cal.W.N. 392: A.I.R. 1945 Cal. 421; 1971 W.L.N. 317. It is undoubtedly true that the presumption of guilt from recent and unexplained possession of the stolen property is not confined to cases of theft but may be extended to graver offences also. No

invariable rules can be laid down when and what presumption may arise from recent exclusive and unexplained, possession of stolen property, and it depends upon the facts and circumstances of each case: 1977 Raj.L.W. 178: 1977 W.L.N. 218.

The essence of presumption that arises under S. 114, *Illus.* (*a*) is that when the facts relating to the ownership, theft and possession of the articles have been established, the Court may draw the inference that the accused was either the thief or that he had received the goods knowing them to be stolen. *Illus.* (*a*) to S. 114 of course, only mentions a case of ordinary theft; but it is well-established that its principle applies not only to cases of ordinary theft, but to cognate offences, such as, dacoity and robbery.

This rule of presumption has to be considered in the light of the circumstances of each case. Where the ownership of the articles produced by the accused, their removal in dacoity and the production of them by the accused have been established, the proper inference is that they were the dacoits and not receivers: 1960 B.L.J.R. 268: I.L.R. 39 Pat. 361.

The principle of *Illus.* (*a*) to S. 114, Evidence Act, applies not only to cases of ordinary theft but also to cognate offences like dacoity and when other necessary facts have been established, the presumption under S. 114, can be taken recourse to, to believe that possession of the stolen property was transferred by commission of dacoity and the accused was convicted under S. 412, Penal Code. Where an accused is charged under S. 412, Penal Code and the only circumstance proved against him is the recovery of stolen property soon after the commission of dacoity, the conviction may properly be only under S. 411: I.L.R. (1958) Cut. 131: A.I.R. 1958 Ori. 106.

The presumption under S. 114, *Illus.* (*a*) of the Indian Evidence Act, 1872, will not only apply to an offence of theft but also to other offences like murder, robbery and larceny connected with theft.

Observations regarding presumption held to be mistaken in view of the opinion of Supreme Court: (1970) 72 Bom.L.R. 830: 1970 Mah.L.J. 555; 1980 Chand.Cr.C. 121 (Del.); (1984) 2 Crimes 927 (Del.).

6. Conditions precedent for raising presumption.—The presumption permitted by *Illus.* (*a*) to S. 114, Evidence Act, does not arise until the prosecution has established three facts (*1*) the ownership of the articles in question, (*2*) their theft, and (*3*) their recent possession by the accused. When these essential facts relating to the ownership, theft and possession of the articles have been established, the Court may infer that the accused knew how they had been removed from the possession of the owner, that is to say, in a case of ordinary theft that they had been stolen, and in a case of dacoity that they had been stolen in the course of a dacoity: I.L.R. 25 Pat. 262. *See* also A.I.R. 1954 Manipur 13: 1954 Cr.L.J. 1713.

In order to draw the presumption under S. 114, it is necessary that the prosecution discharges the initial onus on it that the person charged with the offence had possession of the stolen goods soon after the theft. Thus, the two essential elements necessary to be established are his possession of the articles and that the possession is soon after the incident. So far as the possession is concerned, it implicitly suggests exclusive possession of the charged person, *i.e.*, to the exclusion of all others. Possession indicates both physical as well as a mental act so that the person who possesses has the consciousness of physical possession over the property. In other words, the two elements of possession, *i.e.*, both the *corpus* and the *animus*, are to be established by the prosecution before the presumption can be drawn. So far as concealment of the properties by the charged persons is concerned, it must be of such character that the accused had concealed the property in a manner so as to get exclusive control over the same with reasonable expectation that other would not be able to interfere with his possession. It follows that the place of concealment may not be necessarily his own house or land but may be a place otherwise accessible to the public, but if the concealment has been done in such manner so as to shield the articles from the public gaze and so hide it as to gain exclusive knowledge of the same, the element of possession can be taken to have been established: 1992 Cr.L.J. 2059 (Ori.).

A presumption under the section does not arise unless ownership of articles, theft and recent possession are established by the prosecution. In other words, before a presumption under S. 114, *Illus.* (*a*) can arise, it must be proved that the goods found in

possession of the accused have been stolen. The onus of proof regarding these aspects never shifts, it lies on the prosecution. Some of the settled principles that have emerged therefrom may be stated as follows: (*1*) Under *Illus.* (*a*) the Court may, but is not bound to draw the presumption. But in any case the onus of proof does not shift, it is still on the prosecution. (2) It is not the law that if the accused fails to account for his possession of the goods said to be stolen, he must be convicted, even if the other proved facts do not predicate guilt. (3) If the explanation given may reasonably be true, although the Court may not be convinced that it is true, the accused is entitled to an acquittal. Or if the explanation is not inherently improbable or palpably false and the Court finds it to be reasonably true, the adverse presumption shall be deemed to have been rebutted. (*4*) The words "reasonably true" mean that the explanation must be sufficient to cast a doubt of the guilt of the accused. (*5*) The accused is not required to prove his explanation by adducing substantive evidence. In many cases it may be impossible for him to do so. (*6*) The accused need not even give any explanation unless he is asked to account for his possession: (1985) 60 Cut.L.T. 134: 1985 Cr.L.J. (N.O.C.) 7.

In order to draw the presumption under *Illus.* (*a*) to S. 114 of Evidence Act, the prosecution must prove that the articles in dispute were stolen goods and that the person against whom the prosecution was drawn was in possession of the same soon after the theft. Where the factum of theft itself is doubtful and is not proved beyond all reasonable and probable shadow of doubt, the presumption under S. 114(*a*), *held*, could not be drawn and the accused cannot be called upon to explain his possession:1968 All.Cr.R. 417.

Applicability of illustration—Property found in possession of accused must be shown to have been property stolen: 1960 Cr.L.J. 1620: A.I.R. 1960 Madh. Pra. 395; 1964 Raj.L.W. 171: I.L.R. (1964) 14 Raj. 715.

The explanation required of an accused under *Illus.* (*a*) of S. 114 is an explanation of possession of stolen property. If he alleges that the so-called stolen property is not in fact stolen property but is the property of his relation, he offers no explanation of his possession of it, and the presumption under the section may be applied to him: (1944-45) 49 Cal.W.N. 392: A.I.R. 1945 Cal. 421.

Unless the connection between the articles said to have been stolen and those recovered from the house of the accused has been established, no presumption could be drawn under S. 114 (*a*) of the Evidence Act either that a person is the thief or receiver of stolen articles: A.I.R. 1957 Andh. Pra. 482: 1957 Cr.L.J. 939.

7. Presumption—When can be raised.—*Illus.* (*a*) of S. 114 does not say when the presumption that the person is a thief may be drawn and when the presumption that he is a guilty receiver may be drawn. This will depend on the facts and circumstances of each case and no hard and fast rule can be laid down. If there is some evidence to show that the accused was found nearabout the place of commission of theft, either immediately before or after the commission of the crime and was subsequently found in recent possession of stolen property for which he was unable to give a satisfactory explanation, he may be presumed to be the actual thief. But if the only evidence against him is his recent possession of stolen property for which he was not able to give a satisfactory explanation, the better presumption would be that he is a guilty receiver and not the actual thief: 24 Cut.L.T. 1: A.I.R. 1958 Ori. 51; (1978) 45 Cut.L.T. 124; (1979) 1 M.P.W.N. 257.

It would depend upon the facts and circumstances of each case whether the Court should draw the presumption that a person found in possession of stolen goods soon after theft and who has not been able to account for his possession is the thief or whether he is the receiver of the goods knowing them to be stolen. The fact that the accused was found soon after the theft in possession of a very large number of stolen articles, and not merely a very few of the stolen articles, *held*, shows that he was himself the thief and not only the receiver of stolen goods: A.I.R. 1972 S.C. 2501: 1972 Cr.L.J. 1696.

Presumption from possession of the stolen property—Conditions—It must be shown that the accused were near the place of theft or that they received articles from anybody else: 25 Cut.L.T. 454; 1978 Jab.L.J. (Note) 75.

Possession of stolen property—Presumption—When arises: 1959 All.L.J. 161: 1959 All. Cr. R. 205.

Where a person is found in possession of stolen property soon after the commission of a theft, the presumption that ordinarily arises is not that that person has received it knowing it to be stolen but that he has stolen it. The inference that he is a receiver of stolen property should not be drawn unless there are circumstances which go to show that he did not obtain it direct from the owner or person in possession but from some other person who was himself the actual thief, *e.g.*, when the person found in possession after theft is a woman who is not likely to have been the principal offender, or a pawnbroker, or some other similar individual to whom the actual thief may have turned for assistance in getting rid of his booty: A.I.R. 1951 Pat. 296: 52 Cr.L.J. 154. *See* also 1944 All.L.J. 411: A.I.R. 1944 All. 281.

In what circumstances the presumption under *Illus.* (*a*) may be drawn, depends upon the circumstances under which the discovery of the fruits of the crime are made with a particular accused, the time gap or the interval and the nature of the property involved, especially its quantity and character in the context. In some cases there may be other demerits also.

The question of raising a presumption arises only when the concerned accused cannot be connected with the crime in question except by reason of possession of goods concerned in the crime. [A.I.R. 1972 S.C. 2501 and A.I.R. 1956 S.C. 54, Foll.; A.I.R. 1963 Mad. 476, Rel. on]: (1973) 2 Mys.L.J. 348.

Presumption under—Effect—Proof of receipt from another not necessary: A.I.R. 1958 Ori. 51: 1958 Cr.L.J. 534.

The question what presumption arises from the fact of the accused having been found in possession of stolen articles must be answered after taking into account the entire situation which presents itself. A presumption of fact must be such as would naturally arise. This is quite clear from the language of S. 114 of the Evidence Act. Regard must be had to all the material circumstances before determining what presumption should justifiably be drawn. Thus, where it is clear that the person in possession of stolen property could not possibly have committed the theft, the only presumption that arises is that he received and retained it, either knowing or having reason to believe that it was stolen property and *Illus.* (*a*) to S. 114, is attracted to his case: 1962 Jab.L.J. 876: (1963) 1 Cr.L.J. 433: A.I.R. 1963 Madh. Pra. 106.

The presumption under S. 114 (*a*) is one of the fact. It is not a presumption of law in which case, the Court will be required to reach that conclusion in the absence of evidence to the contrary. No doubt, when a person denies altogether his possession of stolen goods not in common circulation which possession the Court finds to be proved, it is normally easier to draw an adverse inference as to the person's guilty knowledge. But when he accounts for his possession of the stolen goods, the question which arises for consideration is whether his explanation is inherently or palpably false or such as to cast a reasonable doubt as to his guilt. Thus, when the charge is under S. 411, Penal Code and the accused denies knowledge of the fact that the goods in his possession were stolen, the question is whether a prudent man ought, under the circumstances of the particular case, to act on the supposition that the accused had that knowledge: 1956 An.W.R. 282: A.I.R. 1957 Andh. Pra. 755.

If the explanation offered by an accused person is plausible although a Court or a jury may not be convinced of its truth, the accused is entitled to an acquittal. The prosecution must show the explanation to be false. The recovery of the money does not lead to the inference that the accused was associated with crime in any way and there is no evidence to show that the currency notes lost are the very same currency notes recovered from the accused. In the absence of such connection no presumption could be drawn under S. 114 (*a*) of the Evidence Act either that the person is the thief or receiver of stolen property.

Circumstantial evidence in order to furnish a basis for conviction in a criminal case requires a high degree of probability, that is to say, sufficiently high that a prudent man considering all the facts and realising that the life and liberty of the accused depend upon the decision feels justified in holding that the accused committed the crime. It must be consistent and consistent only with the guilt of the accused. If any rational explanation is possible then there is an element of doubt of which the accused must be given the benefit: 1962 M.L.J. (Cr.) 640: I.L.R. (1962) 1 Ker. 215: 1961 Ker.L.T. 1023.

The accused person was found in possession of a missing cycle. He pleaded that he purchased it. Hence, it could not be said that the burden was on him to prove conclusively that it was purchased by him. The accused in a case of theft is entitled to rebut the presumption under S. 114, namely, that he had stolen it by offering an explanation which is reasonable and probable. The prosecution must prove the guilt of the accused person. That does not mean that if the statute places the burden of proof on an accused he is not required to establish his plea; but when a presumption arises under S. 114, the degree and character of proof which the accused is expected to furnish in support of his plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case beyond the shadow of a doubt: 1977 Cr.L.J. 298 (Goa).

Under *Illus.* (*a*), a presumption may be justifiable against a person found in possession of stolen property but not against one who is found in the company of such a person when he is offering it for sale. Unless the prosecution prove circumstances in which by statute a person may be presumed guilty under a particular section of the Cr.P.Code, the question of presumption of guilt does not arise: 43 Cr.L.J. 353: A.I.R. 1942 Pat. 250.

8. Raising of presumption—Whether shifts onus of proof.—The onus of proving all the ingredients of the offence charged never shifts from the prosecution, even in cases in which a presumption under S. 114 (*a*), Evidence Act can be invoked: 1956 An.W.R. 286: A.I.R. 1957 Andh. Pra. 1006.

The presumption under *Illus.* (*a*) of S. 114 of the Evidence Act, is one of fact and whether the Court or the jury ought to draw it or not must depend on the circumstances of each case. But the onus on the prosecution to prove the guilt does not change. If an explanation is given by the accused, it is for the jury to say on the whole evidence whether the accused is guilty or not that is to say, if the jury think that the explanation may reasonably be true, the accused is entitled to an acquittal: 1952 Cr.L.J. 979: A.I.R. 1952 Assam 97.

The illustration does not mean that the burden of proof is shifted on the accused. If the accused gives any explanation which in the opinion of the jury may possibly be true, although they do not necessarily believe it, then the Crown cannot rely upon the presumption and must prove the guilt of the accused just as in any other criminal case: I.L.R. 56 All. 250: A.I.R. 1933 All. 893. *See* also A.I.R. 1955 All. 696.

The presumption under *Illus.* (*a*) to S. 114 of the Evidence Act is not available to the prosecution, if the accused gives a reasonable explanation of his possession of stolen property. It is not, however, a reasonable explanation on the part of the accused to deny the existence of the facts proved by the prosecution, as to the ownership of the articles alleged to be stolen, their theft or his possession of the same. The explanation, which would render the presumption unavailable to the prosecution is an explanation of how articles belonging to the complainant are found in his possession shortly after they had been stolen. It is only when he offers such an explanation with regard to his possession that the presumption does not arise: I.L.R. 25 Pat. 262: 27 Pat.L.T. 323: A.I.R. 1947 Pat. 205.

A presumption under *Illus.* (*a*) is one which can be rebutted by the accused giving a reasonable explanation of his possession of the property in question. He is not bound to establish beyond all reasonable doubt that he obtained the property innocently. There is no question of the onus of proof being shifted on to the accused. If the explanation given by the accused is an eminently reasonable one and one which may well be true, the Court is bound to acquit the accused, even if it is not satisfied affirmatively that it is true: 23 Pat.L.T. 18: A.I.R. 1942 Pat. 439; A.I.R. 1951 Kutch 10; I.L.R. (1951) Raj. 429: A.I.R. 1952 Raj. 97 [It is enough if the explanation is not inherently or palpably false]; I.L.R. (1958) Cut. 131: A.I.R. 1958 Ori. 106. *See* also A.I.R. 1941 Oudh 618: I.L.R. 17 Luck. 182; I.L.R. (1943) Kar. 371: A.I.R. 1944 Sind 113.

The onus in a criminal case always rests on the prosecution and never shifts on to the accused. Before raising a presumption of guilt under S. 114 (*a*), the jury or the Court will be entitled to take into consideration the explanation of the accused in defence, whether supported by evidence or not and to find out for itself whether the explanation given by the accused even though not believed in its entirety is such as to raise a reasonable doubt in the mind of the jury or the Court as to the guilt of the accused: A.I.R. 1941 Oudh 618: I.L.R. 17 Luck. 182.

Presumption under—Case under S. 411, Penal Code—If the stolen property is not recovered soon after theft the presumption does not arise—Even if the presumption arises but the explanation of the accused is possibly true, the onus is still on prosecution to prove the guilt of the accused: 1967 B.L.J.R. 304: 1967 Cr.L.J. 1181: A.I.R. 1967 Pat. 300.

If the explanation offered by an accused person as to how he came by the goods recovered from him, but alleged to have been the stolen property is plausible, although a Court or a jury may not be convinced of its truth, the prisoner is entitled to an acquittal. The prosecution must show the explanation to be false. Otherwise the Crown would fail to discharge the onus imposed upon it by the law of satisfying the jury beyond reasonable doubt of the guilt of the prisoner. In such case, the burden of the proof never changed. It always rested upon the prosecution: A.I.R. 1957 Andh. Pra. 482: 1957 Cr.L.J. 939: I.L.R. (1956) Andhra 538.

The burden cast on accused by *Illus.* (*a*) to S. 114 to satisfactorily account for his possession of stolen property is not as onerous as the burden of the prosecution to prove all the ingredients of the offence beyond reasonable doubt. Where the only evidence against an accused is possession of property recently stolen, a Court may infer guilty knowledge (*a*) if the accused offers no explanation or (*b*) if the Court is satisfied that the explanation is untrue; but if the explanation leaves the Court in doubt, the accused should be held not guilty: I.L.R. (1957) Cut. 680: A.I.R. 1958 Ori. 51.

When a presumption arises against the accused by reason of the proof of his possession of stolen property, he is no doubt required by law to account for his possession. But it does not necessarily mean that he should prove his plea to the hilt. It is enough if his explanation might reasonably be true and consistent with innocence: 1944 All.L.J. 445: A.I.R. 1945 All. 19; A.I.R. 1955 All. 696: 1955 Cr.L.J. 1553.

The following propositions regarding the burden of proof in criminal trials may be deduced from the decided cases: General—(*1*) That in a criminal case the onus of proving the main issue is always on the prosecution and it never shifts on to the accused. Conspiracy—(2) That in a case of conspiracy, it is not enough that the prosecution theory is one theory which will explain the fact but it has got to be shown that it is the only theory which in a reasonable sense is compatible with the facts. (*3*) That under *Illus.* (*a*) to S. 114 of the Evidence Act, the Court may, but is not obliged to, make the presumption therein mentioned. (*4*) That even if the Court makes the presumption under *Illus.* (*a*) to S. 114 of the Evidence Act, the onus on the general issue is still on the prosecution. (*5*) That it is not the law that if the accused fails to account for his possession of the goods said to be stolen goods he must be convicted, if the other proved facts of the case do not predicate guilt. (*6*) That the accused is entitled to acquittal if he can give an explanation which may reasonably be true although the jury may not be convinced that it is true. (*7*) That the accused is not required to prove his explanation by adducing substantive evidence. In many cases it may be impossible for him to do so; particularly, if he alone knows the facts, for he cannot give evidence on oath on his behalf. (*8*) That the accused need not even give any explanation unless he is asked to account for his possession (Query): I.L.R. (1944) 1 Cal. 595: A.I.R. 1945 Cal. 93.

9. Possession—What is.—In order to raise a presumption under S. 114, *Illus.* (*a*), it must first be proved that the stolen property was in the exclusive possession of the accused and that there were no circumstances which could accord with contrary view or which could create a reasonable doubt in a judicial mind about it: 1959 M.P.C. 638: 1959 Jab.L.J. 576: 1959 M.P.L.J. 862; A.I.R. 1929 Sind 9 (D.B.).

In order to raise a presumption under S. 114, *Illus.* (*a*) the possession must be shown to be exclusive as well as recent. The prosecution must establish not only that the property was recovered from the house or other place in occupation of the accused but also that he was fully aware of its presence there: (1991) 44 Del.L.T. 185.

One of the main conditions precedent for drawing a presumption under S. 114 (*a*) is possession of stolen property with the accused. Such possession has not only to be recent but also exclusive. Mere recovery of the articles from the house of the accused by itself without further materials, may not be sufficient to establish exclusive possession of the same with the accused: (1985) 60 Cut.L.T. 134: 1985 Cr.L.J. (N.O.C.) 7.

In cases of pointing out, especially of stolen properties, the real question is not so much whether the accused was in physical possession of the properties hidden somewhere or buried on some field, as whether he was the person that so hid the properties, for a person who buries treasure in a spot unknown to others is really in possession of it and it does not matter whether it is in a field not in his occupation or in his own house. A person is said to be in possession of a thing when the facts of a case are such as to create a reasonable expectation that he will not be interfered with the use of it. Thus, a person who hides a thing is in possession of it because he gains thereby a reasonable guarantee of the use of it. Then if the accused does not satisfactorily account for its possession, mere denial of theft or possession is not explanation and the presumption under S. 114, Evidence Act, can be drawn against him. The question, whether the person who has pointed out has not himself hidden, is purely a question of fact. If the Court comes to the conclusion on the facts that the accused has hidden the property in question, one important step in resorting to the aid of *Illus.* (*a*) to S. 114 of the Act is satisfied, *viz.*, possession. [Line of enquiry as to whether the accused person who pointed out the thing was the person who had hidden it, discussed]: 1958 All.W.R. (Supp.) 38; A.I.R. 1958 Mad. 384.

Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity to the object: A.I.R. 1953 Mad. 534. For possessing a material object two elements are necessary, *animus* or intention and *corpus*. A person is said to be in possession of a thing when the facts of the case are such as to create a reasonable expectation that he will not be interfered with the use of it: A.I.R. 1950 Madh. Bh. 104 (D.B.).

It would be a reasonable inference to presume that people had committed theft or burglary if they were seen the next day with the stolen property in circumstances which suggested division of the booty. Mere physical relating arising from the possession of the object is insufficient to amount to possession which connotes control over the object possessed. The possession of stolen property should be exclusive as well as recent: 35 Cr.L.J. 994: A.I.R. 1934 Rang. 80.

Missing cow found in the cow-shed of the accused—No evidence that the accused had received the cow-dishonestly—Mere act of possession by the accused will not give rise to the inference under S. 114 that he was the receiver of the stolen property: 1987 Cr.L.J. 956: (1987) 63 Cut.L.T. 245.

Cl. (*a*) to S. 114 contemplates the presumption that the person in possession of stolen goods may be presumed to be either the thief or a recipient of the stolen property knowing the same to be stolen. But the basic foundation for such a presumption is that such person must be in possession of the property in question. Thus, where at the time when accused were arrested they were sitting in a stolen taxi, *held*, the accused could not be said to be in possession of taxi, no presumption of theft could be raised against them: (1984) 1 Bom.C.R. 154: 1984 Cr.L.R. 18; 1983 Cr.L.R. 85 (Guj.).

10. Possession must be recent.—The question as to what period is covered by the expression "soon after" in *Illus.* (*a*) must vary according to the circumstances of each case. The Court is not bound to draw this presumption and the Court must always ask itself whether in the circumstances of a particular case the presumption is one which in fairness to the accused can be drawn: (1941) 43 Bom.L.R. 629: A.I.R. 1941 Bom. 325. *See* also (1945) 47 Bom.L.R. 63: A.I.R. 1945 Bom. 292; A.I.R. 1954 Mad. 433.

"Soon after" — Meaning of — Interval should not be much between theft and recovery. It is not obligatory on Court to draw inference particularly when accused offers fairly satisfactory explanation: 1968 Cr.L.J. 895 (1): A.I.R. 1968 Assam 13.

The presumption under *Illus.* (*a*) to S. 114, Evidence Act, can be raised only when the person is found in possession soon after the theft. Lapse of time is an important factor to be considered. Where the case is one of theft of a bicycle, it has to be borne in mind that it readily changes hands; when it is not of any great value, a person who is found in possession of it about 12 months after the alleged theft cannot safely be presumed to be guilty of theft or of possession of stolen property knowing it to be stolen, and he cannot be required to explain how he has come by it, in such circumstances no conviction under

S. 411, I.P.Code, can be sustained: 47 Cr.L.J. 599: A.I.R. 1946 Sind 153.

In case of recovery of stolen property from the accused long after the theft, *held*, no presumption can be raised: A.I.R. 1918 Cal. 243 (D.B.); A.I.R. 1928 Lah. 687; A.I.R. 1926 Lah. 528.

Where the incriminating thing is one which may change hands quite frequently or is commonly available and is recovered from the accused many months after the theft, *held*, no presumption that either the accused was thief or a receiver of stolen property, can be drawn against him: 1984 Raj.L.W. 225.

The question as to what amounts to recent possession sufficient to justify the presumption of guilt in a particular case varies according to whether the stolen article is, or is not likely to readily pass from hand to hand. But the weight and nature of such presumption must vary according to the gravity of the offence and nature of the property involved: 109 I.C. 801: A.I.R. 1928 Nag. 213; A.I.R. 1945 Nag. 1; A.I.R. 1952 Him. Pra. 68; A.I.R. 1959 J.&K. 105 [Efflux of a period of nearly eight months was held not sufficient to take the case out of ambit of illustration]. Articles like muskets and Police great coats are not likely to pass readily from hand to hand, and their possession within 10 weeks of the theft can well be said to be recent: 1945 Nag.L.J. 17: A.I.R. 1945 Nag. 1: I.L.R. (1945) Nag. 151.

Information leading to discovery—Accused telling Police that he concealed the ornaments of which he gave discovery—Statement admissible in evidence—Theft detected and accused gave recovery of ornaments next day—Interval being small, the accused to be presumed thief—If interval were to be long, the presumption would be that he received the stolen articles: 32 Cut.L.T. 1083; 1980 Jab.L.J. 30 [Where recovery was made within 36 hours of the occurrence from the field of the accused.]

From *Illus.* (*a*) under S. 114, it is clear that the recovery must be soon after the commission of the crime. Proximity of time gap between the commission of dacoity and recovery of looted properties is the essence. An inference under S. 114(*a*) should never be reached unless it is a necessary inference from the circumstances of the given case, which cannot be explained on any other hypothesis save that of the guilt of the accused.

Thus, where certain articles which were said to have been looted away in the dacoity were recovered from the accused after two days of the alleged offence and further the identifying witnesses were disbelieved regarding participation of the accused in the dacoity, *held*, the presumption as envisaged under S. 114 could not be made basis for conviction: 1990 Cr.L.J. (N.O.C.) 65: (1990-1) 38 B.L.J.R. 222.

Illustration has to be read alongwith time factor—Recovery of stolen goods from accused two days after theft—Nothing suggesting that somebody else had kept the articles at the place of recovery—Presumption of dishonestly receiving stolen property may be drawn: (1964) 6 Ori.J.D. 284.

Where the stolen goods—gold and silver ornaments—were recovered from the accused within two days of the theft and the accused offered no explanation for being found in possession thereof, *held*, they could be presumed to have committed the offence under S. 411 of the Indian Penal Code: A.I.R. 1974 S.C. 334: 1974 Cr.L.J. 277: (1974) 3 S.C.C. 565.

Where after five days of theft, stolen property was recorded from the accused, *held*, presumption could be raised that either he was a theft or receiver of stolen property: (1989) 2 Raj.L.W. 520.

Even though there was a lapse of 11 days, the discovery was from a place accessible to the accused alone and so the time factor cannot be said to be so long as to raise an inference about the article changing hands. Hence the accused can be safely held to be the offender: 1971 M.P.L.J. 498: 1971 Jab.L.J. 326 (D.B.).

If the interval between the commission of the offence and the recovery of the stolen article is of short period, the presumption can be raised that the person in whose possession the stolen property has been found is the thief. But when the interval is a longer one, the safer course is to draw a presumption that he is the receiver of the stolen property. Thus, where the interval between the commission of the offence and the recovery of the stolen wrist watch was of one month, *held*, a presumption could be raised that the accused was a receiver of the stolen property: 1986 Raj.L.W. 557.

Though there is no hard and fast rule to determine what is "recent" possession but where stolen watches were recovered from the accused four months after their theft, *held*, it could not be presumed that he was the thief or the receiver of stolen goods; what amounts to recent possession varies from the nature of the stolen goods; where goods cannot readily pass from hand to hand, a longer interval between the theft and recovery may be taken as recent: 1972 Ker.L.T. 608: 1972 M.L.J. (Cr.) 543.

The presumption under *Illus.* (*a*) to S. 114 can be drawn only when the accused is found in possession of the stolen property soon after the theft. Where the theft is alleged to have taken place earlier, and the recovery was made after 5 months of the alleged occurrence, it cannot be treated as "soon after the theft". Where the theft had taken in a busy place and the stolen articles could change hands quite rapidly in such a place, it would be illegitimate to call in aid *Illus.* (*a*) of S. 114 against the accused: 1973 B.L.J.R. 280.

Possession of stolen articles within six months of dacoity can be said to be recent in order to raise presumption under *Illus.* (*a*): 1960 M.P.C. 216: 1960 Jab.L.J. 356: 1960 M.P.L.J. 299; A.I.R. 1937 Nag. 17 (F.B.). But *see* 1978 Cr.L.R. (Raj.) 61 [Where the recovery was made more than six months after the report was lodged, *held*, no presumption under S. 114 could be raised]. *See* also (1979) 1 M.P.W.N. 10 [Recovery after one year].

Where the barrel of a numbered gun carried away by dacoits was recovered from the accused after more than 8 months and he had no explanation for its possession, *held*, the presumption under S. 114, *Illus.* (*a*) can be raised against him; the presumption can be raised if goods are found to be in possession of the accused soon after the theft though the Court may not be justified in drawing the presumption if long period had lapsed; but the lapse of time to justify raising the presumption would vary with the nature of the stolen property and facts of each case; if the stolen article is one frequently changing hands, much shorter period would be required but if it is such—as a gun barrel is—which does not normally change many hands, the presumption may be drawn after many months; the presumption is rightly drawn: A.I.R. 1974 S.C. 1830: 1974 Cr.L.J. 897: (1974) 4 S.C.C. 254.

When two idols with other properties stolen from a temple were recovered two and a half years after the theft from the accused, *held*, the nature of the stolen properties being such that they cannot be found in any other place than the temple from which they were committed theft of and there being no satisfactory explanation for his possession, a presumption could be drawn against the accused in accordance with *Illus.* (*a*) to S. 114, even after the expiry of the period of about two and a half years from the date of theft: 1985 M.L.J. (Cr.) 384; (1979) 1 M.P.W.N. 10 [Recovery after about five years of incident.]

11. Recovery from place accessible to others.—Generally speaking, where property is recovered from an open field at the instance of the accused the question whether the property was in his possession or not depends upon the actual words used by him when giving information to the Police. If the actual words used by him are such as to suggest that he had himself put the property there, the Court usually presumes that he was in possession of the property. But on the other hand, if the accused uses no such words when helping in the recovery of the property, it is not possible to presume that he was in possession of the goods for it is possible that he may be only knowing that the property was there without being in actual possession of it: 1952 Raj.L.W. 49. Whenever an accused person gets stolen things recovered from an open field, there are three possibilities always present, namely, (*1*) that the accused might himself have buried the things in the field, (*2*) that he might have seen some other person doing so, or (*3*) that he might have been told by some person who had seen somebody burying the articles. It is only when the Court can draw the first of these conclusions in a particular case that the Court can say that the accused was in possession of the articles found buried in an open piece of land. The mere recovery of the articles at the instance of an accused person and the absence of any explanation by him as to how he came to know that the articles were there is not sufficient for the Court to come to the conclusion that the articles must have been placed in that place by the accused and that he could not have acquired information about the presence of the articles at that place in some other manner: 1956 Raj.L.W. 165: A.I.R. 1957 Raj. 234.

Recovery of stolen property at instance of accused person from place accessible to all and sundry—Property cannot be said to be necessarily in possession of any particular person: 1966 All.W.R. (H.C.) 775; A.I.R. 1954 S.C. 39: 1954 Cr.L.J. 335; (1965) 2 Cr.L.J. 569.

Where the only incriminating circumstance against the two accused was that the stolen property was recovered from places not belonging to any of the accused as a result of simultaneous statements made by them to the Police, *held*, that in the absence of any other incriminating factor, mere discovery of the articles would not raise a presumption under S. 114, *Illus.* (*a*), Evidence Act, either of theft or of receipt of stolen property by the accused knowing it to be such: I.L.R. (1955) Nag. 169: A.I.R. 1955 Nag. 71; A.I.R. 1956 Bhopal 40. But see *infra*. Admitting that the place from which articles were discovered was accessible to others but the fact that the articles were lying buried and had to be dug out indicates that the accused must have buried them there: 8 Sau.L.R. 339: A.I.R. 1955 Sau. 93.

Stolen articles found in accused's unfenced compound which was accessible to all—Mere fact of knowledge of accused of existence of stolen articles in such place is not conclusive proof of possession of those articles by accused: 31 Cut.L.T. 396.

Conduct of the accused while in Police custody leading to recovery to certain house breaking materials and other stolen articles from a bush closed to land of another person—Place of recovery is an open place accessible to everybody—It is difficult to hold positively that the accused was in possession of these articles: (1971) 2 Cut.W.R. 499.

In a case of murder by poisoning, the recovery of incriminating articles from a place which is easily accessible to external agency and is not in exclusive possession of the accused or the articles are not in exclusive use of accused, cannot be treated as incriminating piece of evidence: (1965) 1 Cr.L.J. 321: A.I.R. 1965 Ori. 38.

12. Mere knowledge of place of concealment.—The question of raising a presumption under S. 114, *Illus.* (*a*) arises for consideration only after it is proved that the accused was in possession of stolen articles, after the commission of theft. If the accused merely points out a place where the articles are hidden and produces those articles therefrom, there are several possibilities; one possibility is that he had knowledge of the exact spot where the articles were hidden, as he himself was an author of concealment. The second possibility is that he may have gathered that information from a person who was the author of concealment. Another possibility that can be envisaged is that he may have actually seen a person concealing those articles. If seeing a thief concealing those articles may not be objected to by that thief, as a thief might happen to be his friend or relation. It cannot be necessarily deduced from these circumstances only that he must necessarily be a thief. His knowledge without he being a thief, from other sources cannot be necessarily ruled out.

In absence of any other evidence, on mere pointing of a place where the articles were concealed, and on account of the production of those articles therefrom, it cannot be necessarily deduced that that person must be either a thief or a receiver of stolen property. If it had been pointed out very soon after the commission of the theft, no doubt it is a circumstance which will raise a very strong suspicion against the man. But a strong suspicion cannot take a place of proof. In the absence of any other evidence and in the absence of any incriminating statements made, at the time of giving information, as for example, that he was the author of concealment, this circumstance, found against that person can be explained on any other rational hypothesis. The circumstantial evidence therefore, will not be such as to be incompatible with the innocence of the accused. That person, therefore, cannot be presumed to be a thief or a receiver of stolen property: 1969 Cr.L.J. 471: A.I.R. 1969 Guj. 100.

The mere fact that a person points out the place in which stolen property is concealed does not give rise to any presumption under S. 114, or justify his conviction for the offence of receiving stolen property, still less for the offence of theft: (1938) 40 Bom.L.R. 927: A.I.R. 1938 Bom. 463.

The mere fact that the accused person points out the place in which the stolen property is concealed does not give rise to any presumption under S. 114 or justify his conviction of the offence of receiving stolen property. But that presumption would arise when the accused is not able to account for his possession of such stolen article: (1930) 32 Bom.L.R. 574: A.I.R. 1930 Bom. 244.

An inference under S. 114, *Illus.* (*a*) should never be reached unless it is a necessary inference from the circumstances of the given case, which cannot be explained on any other hypothesis save that of the guilt of the accused. Where the stolen articles (drums) were recovered at the accused's instance from the compound of a Musafir-khana and it was not the prosecution's case that same were lying concealed or that the compound was under the lock and key of the accused, *held*, as it was possible that either it was the accused who had himself deposited those articles there or he only knew that they were lying there; the accused was entitled to benefit of doubt: A.I.R. 1976 S.C. 483: (1976) 1 S.C.C. 828: 1976 Cr.L.J. 481: (1976) 1 S.C.R. 715.

The condition precedent for the application of *Illus.* (*a*) to S. 114 is that the accused must be in possession of stolen goods. But the production of property by itself would not necessarily prove his possession. It would at the most show that the accused had knowledge where the property was kept or concealed. Where the accused, without stating that he had concealed stolen property, merely produces it from a place to which other people could have access, it would not be sufficient to establish his possession even though the property may be concealed, because it is consistent with any other person having done so and the accused might have merely knowledge of it. In the absence of any incriminating statement made by the accused leading to the discovery of property, its production alone from another man's property or place or from a place of which he had only joint possession would not be sufficient to establish his possession. The possession of the articles must be clearly traced to him in order to justify the presumption under the illustration: (1945) 47 Bom.L.R. 63: A.I.R. 1945 Bom. 292. *See* also A.I.R. 1952 Him. Pra. 68: 1952 Cr.L.J. 1495.

13. Recovery from house in occupation of joint family.—Where stolen property is found in a house belonging to a Hindu joint family consisting of some male members, *prima facie* the *karta* may be deemed to be in possession but this will not follow as an invariable rule. Where the house was in occupation of a joint family consisting of the accused and his father and during the Police search the accused pointed out the places of concealment in the cowshed and *bari* from where the stolen articles were recovered, then in the absence of evidence that the accused was in exclusive control of the cowshed or of the *bari*, the possession of the stolen property cannot be attributed to him. The mere failure of the accused to explain how he came to know about the place of concealment will not justify a Court in drawing an inference against him on the question of possession: I.L.R. (1957) Cut. 164: A.I.R. 1957 Ori. 287. *See* also A.I.R. 1914 Cal. 396 (S.B.); A.I.R. 1951 Pat. 296; A.I.R. 1953 Mad. 534; A.I.R. 1944 Lah. 339; A.I.R. 1957 Him. Pra. 758; 1975 Raj.L.W. 267.

Where in criminal proceedings against a postman under S. 52, Post Office Act, for secreting certain registered postal articles all that the prosecution had been able to prove was that those articles were found in an almirah of the house in which the accused lived jointly with his father and of which the key was furnished by the father, it would not be legitimate to infer that the almirah was in the accused's joint much less in his exclusive possession. The circumstances that the almirah contained, apart from the registered articles in question, certain other articles belonging to the accused cannot sustain an inference that the almirah was in the accused's possession exclusively or even jointly with his father. On the other hand, if the almirah also contained a large number of articles belonging to the father, since he had the key with him, it must be he who must be deemed to be in possession of the almirah and consequently of its contents, including the registered articles in question. The fact that the accused had the opportunity to get at the articles is not sufficient to infer exclusive possession of the accused of those articles. No presumption can, therefore, be drawn against the accused that he had secreted them from the mere fact that they were found in the almirah which, at best may be regarded as being in the joint possession of himself and his father. But even an inference of joint possession would not be legitimate. [(1961) 1 Cr.L.J. 595 (All.), Reversed]: (1963) 1 S.C.R. (Supp.) 408: (1963) 2 Lab.L.J. 667: A.I.R. 1963 S.C. 822.

14. Presumption in case of carrier.—A carrier or the transporter, who carries or transports goods cannot generally be ascribed with the knowledge about the source of the property. It is hazardous to presume that because a property is stolen, the carrier

or the transporter had the necessary knowledge that it was stolen property; presumption under *Illus.* (*a*) to S. 114 cannot be drawn in such a case. [1970 M.L.J. (Cr.) 59, (Mys.), Rel. on]: 1991 Cr.L.J. 2331 (Ori.).

15. Presumption of murder and robbery.—In murder cases, the Courts are reluctant to draw from the mere fact of the production by the accused of the property of the deceased, an inference that the accused committed the murder and have required the letting in of evidence to connect the accused with the crime. If there is no other linking evidence except the recovery of the property of the deceased at the instance of the accused, generally no such presumption for graver offence is drawn. Thus, where there was no evidence except the recovery of ornaments of the deceased in pursuance to the disclosure statement of the accused, to connect him with the murder of the deceased woman, *held*, a presumption of graver offence of murder could not be drawn against the accused under S. 114: 1984 Raj.L.W. 445 (D.B.); A.I.R. 1956 S.C. 54; A.I.R. 1963 Guj. 135.

The mere possession by an accused person of articles which were on the person or in custody of a murdered man at the time of his murder without any explanation for such possession cannot lead to an inference that he took part in the murder or that he was privy to it. The presumptions mentioned in the illustration to S. 114 of the Evidence Act cannot be stretched to that extent. One can very well imagine a case where a jewel on the person of a murdered individual came to be in the possession of another without any kind of reasonable explanation being offered by that individual. The fact that no rational explanation is possible, or that the explanation offered is unacceptable, should not militate against the innocence of the individual with regard to the offence of murder. Something more is necessary than mere possession of articles. Ordinarily, the presumption from the possession of articles, belonging to the deceased by accused persons immediately after the murder, or robbery that the accused took part in the murder, should be drawn only where some more evidence is present to show that the accused persons were seen with the deceased immediately before his death or that the deceased was last seen alive in the company of the accused persons. Unless some kind of connecting link, however, remote it may be, is made out, between the movements of the deceased and the accused at or about the time of murder, even if no reasonable explanation can be suggested or invented by the Court for the possession by the accused of the stolen articles, it would be unsafe to convict the accused person of the offence of murder. Usually some testimony should be forth-coming that the deceased was last seen alive in the company of the accused or that the accused were found somewhere in the vicinity of the scene of murder at a time which has sufficient proximity to the incident. Unless some such connection can be made out, the inference of murder should not be drawn. *Held*, that the evidence was sufficient to show such connection: I.L.R. (1954) Mad. 602: (1953) 2 M.L.J. 526: A.I.R. 1954 Mad. 152. Possession of property of murdered person, *see* A.I.R. 1954 S.C. 28: 55 Cr.L.J. 257; A.I.R. 1950 Madh. Bh. 76 (F.B.).

The presumptions mentioned in S. 114 are not exhaustive. Presumptions for graver offences may also be raised as the circumstances of the case would warrant. But no hard and fast rule can be laid down as to what inference can be drawn; it all depends upon the circumstances appearing against the accused in the case. It is for the prosecution, therefore, to establish other circumstances and show further material to justify an inference of a graver offence to the exclusion of the lesser one. Where no article of the accused was found at the scene of occurrence which might directly connect them with the acts of murder and theft but some of the ornaments recovered were on the person of the deceased and those ornaments were recovered from the accused shortly after murder, *held* that murder and theft indeed appeared to be the parts of the same transaction, and the presumption of graver offence under Ss. 302 and 380, Penal Code, could be drawn against the accused: 1957 M.L.J. (Cr.) 455: (1957) 2 An.W.R. 182: A.I.R. 1958 Andh. Pra. 255.

The presumption that a person in possession of goods obtained by theft is aware of that circumstances is not confined to charges of theft but extends to all charges, however penal, not excluding even murder: I.L.R. 9 Pat. 606: A.I.R. 1930 Pat. 513.

Bare circumstance that accused was found in possession of certain articles belonging to the deceased cannot lead to

inference that accused is the murderer. [A.I.R. 1956 S.C. 400 and A.I.R. 1978 S.C. 522, Disting.]: 1984 Mah.L.J. 709; (1986) 3 Crimes 350 (Madh. Pra.); (1979) 1 M.P.W.N. 172.

Mere possession of property belonging to the deceased is not sufficient to convict the accused under Ss. 302 and 380, I.P.Code; they could be convicted under S. 411, I.P.Code: 1984 Mad.L.W. (Cr.) 163.

Though drawing of the inference under S. 114(*a*) is in the Court's option, the silence of the accused found to be in recent possession of the article may be taken into account with the other circumstances appearing in the case; the mere possession by the accused of the article, which was on the person or in the custody of a murdered person with no explanation therefor would not by itself lead to the inference that he took part in the murder or was a party to it. But if some other evidence or circumstance connects the accused to the crime of murder, recent and unexplained possession of the article would invite the inference that the accused was guilty of murder and robbery: 1982 Ker.L.T. 692.

The fact that a person was found in possession of property proved to have been in the possession of the deceased at the time of murder does not by itself indicate that that person had committed the murder or participated in it, in the absence of any other circumstance to connect the accused with the offence. No hard and fast rule can be laid down as to what inference could be drawn from a particular circumstance, but, broadly speaking, the single circumstance relating to the possession of these articles cannot compel a Court to draw the inference that the culprit was guilty under S. 302, Penal Code. It is not safe to invoke S. 114 (*a*) of the Evidence Act for finding the accused guilty under S. 302, Penal Code, on that circumstance alone: 1957 M.L.J. (Cr.) 496: 1958 Cr.L.J. 600: A.I.R. 1958 Andh. Pra. 273: (1957) 2 An.W.R. 222.

No hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof. From the solitary circumstance of the unexplained recovery of the two articles from the houses of the accused the only inference that can be raised in view of *Illus.* (*a*) to S. 114 is that they are either receivers of stolen property or were the persons who committed theft, but it does not necessarily indicate that the theft and the murders took place at one and the same time: A.I.R. 1956 S.C. 54: 1956 Cr.L.J. 150, followed in A.I.R. 1958 Andh. Pra. 273: 1958 Cr.L.J. 600: 1957 M.L.J. (Cr.) 496: (1957) 2 An.W.R. 222.

There can be no hard and fast rule as to what inference should be drawn from a particular circumstance. Whether the presumption could be stretched under S. 114, Evidence Act, even to a case of murder depends on the facts of each case depending mostly on the time factor. Where the statement of the accused under S. 27, Evidence Act, as a result of which articles belonging to the murdered woman were recovered, was made 12 days after the occurrence, it may not be quite safe to draw the inference that the accused had committed the murder or was privy to it. The reasonable course is to draw the conclusion that either he was the thief or receiver of stolen property: 1958 An.L.T. 419.

In cases in which murder and robbery have been shown to form parts of one transaction, recent and unexplained possession of stolen property in the absence of circumstances tending to show that the accused was only the receiver of the property would not only be presumptive evidence against the prisoner on the charge of robbery but also on the charge of murder. The question whether in a given case a presumption in the sense referred to above can be drawn must depend upon the facts of the particular case: I.L.R. (1953) Trav.-Co. 514: A.I.R. 1953 Trav.-Co. 402; I.L.R. 32 Pat. 243: A.I.R. 1954 Pat. 109 (D.B.); A.I.R. 1950 Madh. Bh. 104; 1954 Ker.L.T. 344: A.I.R. 1954 Trav-Co. 466; (1984) 3 Crimes 228 (Madh. Pra.).

Where an article admittedly belonging to the murdered person is found with an accused and the latter is unable to account for it, the circumstance can be relied on as an incriminating one: 54 Mys.H.C.R. 237.

(Per *Desai, J.*).—The meaning of *Illus.* (*a*) to S. 114 of the Evidence Act is not that the presumption is in the alternative; its plain meaning is that both the presumptions are

possible and that which should be adopted in a case depends upon the circumstances. If the interval between the theft and the accused being found in possession is very small, the presumption can be that he is the thief. If on the other hand, the interval is relatively large, the presumption can be that he is the receiver. If the interval is very large, the Court may not draw any presumption. Possession is not an essential ingredient of the offence of murder and if a person cannot be convicted under S. 411, I.P.Code, because he is not found to be in possession, it does not follow that he cannot be convicted under S. 302, I. P. Code, also. If a person receives other articles, he may not suspect that the owner has been murdered, but if he receives clothes, and clothes of no particular value he cannot pretend not to know that the owner has been murdered. Other articles may be stolen on account of the value but used clothes of no particular value would not be stolen by any one. To say that unless there is evidence that the accused was seen near the place of the murder at or about the time of it, he cannot be convicted of the murder merely on account of his possession of the property removed from the deceased at the time of the murder, is fettering the discretion of the Court: A.I.R. 1955 All. 443: 1955 All.L.J. 468.

Where an accused is found in possession of the ornaments worn by the deceased at the time of the murder the question arises as to the inference to be drawn from this circumstance. When the accused does not offer any explanation of the possession but simply denies the fact, the question is whether this justifies an inference of robbery or whether in addition an inference that the accused has committed the murder of the deceased. The fact that an accused is not willing to admit that he took part in a robbery which is proved against him ought not to prejudice the question, whether he committed murder at the same time. In this respect, some theories in favour of the accused need to be considered and eliminated before drawing an inference of murder against the accused. The first is that it may be that some one merely committed the murder and went away leaving the ornaments. The second is that someone murdered the deceased and stole the property and then entrusted it to the accused. And the third is that the murderer who robbed the deceased of the ornaments was himself robbed by someone. After eliminating the possible theories suggested above, the Court is entitled, if it appears reasonable in all the circumstances of the case, to infer that an accused person committed a murder or took part in its commission, from the facts that he is found in possession of property proved to have been in possession of the murdered person at the time of the murder or is able to point out the place where such property is concealed and admits having concealed it there and fails to give any reasonable explanation of his possession: A.I.R. 1955 Sau. 93: 8 Sau.L.R. 339.

The presumption permitted to be drawn under S. 114, *Illus.* (*a*) of the Evidence Act has to be read alongwith the important time-factor. If ornaments or things of the deceased are found in the possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months expire in the interval, the presumption may not be permitted to be drawn having regard to the circumstances of the case: 1954 Cr.L.J. 225: A.I.R. 1954 S.C. 1 (Per *Desai, J.*)—The failure or refusal to offer an acceptable explanation is itself a circumstance, that is to be taken into consideration. As regards the effect of the failure or refusal to offer an explanation, the law makes no distinction between the inference of theft and that of murder. In every case in which an inference of theft can be made, an inference can also be made of murder, if it was committed in the same transaction as the theft, when the person offers no explanation, if one presumption can be drawn, the other also must be drawn: 1955 All.L.J. 468: A.I.R. 1955 All. 443.

It is well settled that on the stolen goods being recovered within a short time (on the fourth day in the instant case) after a murder and robbery are committed in a single transaction and the accused had no explanation for his possession of the looted property, *held*, it amounts to a presumptive evidence of the charge of theft or robbery with murder: 1977 Raj.L.W. 241 (D.B.); 1978 Raj.L.W. 272 (D.B.).

Where the prosecution succeeded in proving beyond any doubt that the commission of the murders and the robbery formed part of one transaction, *held*, recent and unexplained possession of the stolen property by the appellant justified the presumption that it was he, and no one else, who committed the murders and the robbery. [A.I.R. 1956

S.C. 400; A.I.R. 1974 S.C. 1830, Rel. on]: A.I.R. 1978 S.C. 522: 1978 U.J. (S.C.) 93: 1978 Cr.L.J. 646: (1978) 1 S.C.C. 588: (1978) 2 S.C.R. 594.

Where murder and robbery are proved to be integral parts of a single transaction, merely because discovery of articles was made after a long lapse of time, *held*, no presumption is permissible that the accused from whom the goods were recovered was only a receiver of stolen property and not guilty of murder: A.I.R. 1983 S.C. 446: 1983 Cr.L.J. 846: (1983) 1 Crimes 784: (1983) 1 S.C.C. 330: (1983) 2 M.L.J. 46 (S.C.).

Where soon after the murder of the deceased, the accused was found in possession of his gold ornaments but he could not satisfactorily explain its possession, *held*, presumption arose that he not only committed murder but also robbery: 1984 Ker.L.J. 550: 1984 Ker.L.T. 774: 1985 Cr.L.J. (N.O.C.) 3; 1983 Cr.L.J. 694; A.I.R. 1995 S.C. 1598 [On the very next day of the murder the accused sold some ornaments belonging to the deceased and within 3-4 days recovery of remaining ornaments was made from his house—He also could not give any plausible explanation for lawful possession of said ornaments—*Held* presumption that he not only committed murder but also robbery could be raised]; 1995 Cr.L.J. 1880: (1995) 1 Ker.L.J. 265 (D.B.).

Under S. 114, *Illus.* (*a*), the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing those to be stolen unless he can account for his possession. It has been authoritatively pronounced that this presumption does not rest there and can be extended to more aggravated offence such as murder. Such presumption is invoked if the Court is satisfied that the possession of the stolen property (in this case, ornaments) could not have been transferred from the deceased to the accused except by former being murdered. The presumption would be particularly applicable when there is a satisfactory proof that the ornaments were actually worn by the deceased immediately before the murder: (1965) 1 Cr.L.J. 317: I.L.R. (1964) Cut. 752: A.I.R. 1965 Ori. 33.

Though *Illus.* (*a*) appended to S. 114, Evidence Act, refers to cases of theft, that provision of law is no more than an illustration and the presumption arising thereunder extends to all charges, however penal, including murder. Thus, the fact that the accused were seen with the deceased immediately before the murder and that they were found in possession of the goats belonging to deceased soon after the crime, go to show that they were involved in the murder of the deceased: (1954) 56 Punj.L.R. 183: A.I.R. 1954 Punj. 201; A.I.R. 1956 S.C. 400.

Murder case—Accused in recent possession of property of deceased—Presumption is that accused is not only thief or receiver of stolen property but also a participator in murder of deceased: 1966 Cr.L.J. 683: A.I.R. 1966 Ori. 130; 1973 Ker.L.T. 886.

Robbery and murder—Unexplained possession of stolen articles soon after the crime will be evidence of murder also: 1960 Ker.L.T. 829.

Presumption—Presumption is one of fact and not of law and applies to all crimes—Illustration is enumerative and not exhaustive—Recent and unexplained possession of stolen property will be presumptive evidence against an accused on a charge of robbery as well as murder—Presumption is to be drawn with reference to time factor—Accused charged under Ss. 302, 397 and 201, Penal Code—He gave information while in custody, leading to the recovery of currency notes taken by him from the deceased—No explanation for possession of money is given by accused—*Held*, that presumption could be drawn against the accused for murder and robbery—Mere denial of possession could not help accused as the burden of giving reasonable explanation for the possession of money, soon after the crime, was on him, which he had not discharged: 1967 Cr.L.J. 357: A.I.R. 1967 Goa 21 (F.B.).

Charge of murder, robbery and receiving stolen property—Murder and robbery alleged to be simultaneous and part of same transaction—Finding of articles concerned in robbery in possession of accused—Nature of presumption to be drawn: I.L.R. 18 Pat. 450: A.I.R. 1939 Pat. 577.

Where gold ornaments worn by a lady who was murdered were recovered on the basis of the accused's discovery statement but there was nothing on record to connect the accused with the murder, *held*, no presumption of his being involved in the murder could be drawn merely because the accused remained silent; it is for the prosecution to prove its case affirmatively against the accused; however, the presumption that the accused was receiver of stolen goods could be drawn under S. 114; he could be convicted under S. 411 of the Indian Penal Code if its ingredients were proved: A.I.R. 1980 S.C. 1753: 1980 Cr.L.J. 1270.

In the absence of any evidence that the gold ornaments once pledged by the accused

with certain persons were found with the deceased immediately before her murder, *held*, no presumption could be drawn that he had stolen them from the deceased, after killing her, at her house: 1973 Sim.L.J. 195 (D.B.), affirmed on this point in A.I.R. 1973 S.C. 2773: (1973) 2 S.C.C. 808: 1974 Cr.L.J. 1.

Where certain ornaments which the deceased was wearing at the time of the incident were recovered at the instance of the accused and the time between commission of offence and recovery of ornaments was very short and a question arose as to whether the accused could be connected with the commission of the murder of the deceased-victim, *held*, the presumption for graver offences under S. 114, *Illus.* (*a*) could not be raised as there was nothing else on record to connect the accused with the murder but the recovery was sufficient to seek the conviction of the accused under S. 411, I.P.Code. [A.I.R. 1977 S.C. 1063; A.I.R. 1980 S.C. 1753; 1984 Raj.L.W. 445 (D.B.), Rel. on]: 1986 Raj.L.W. 280 (D.B.).

When the prosecution has no case that the robbery or dacoity was committed by the accused, the mere fact that the accused was found to be in possession of the articles of the deceased need not raise a presumption that he is one of the murderers. [A.I.R. 1954 S.C. 1; (1912-13) 17 Cal.W.N. 1077; I.L.R. 13 Mad. 426; A.I.R. 1956 S.C. 400, Rel. on]: (1992) 2 Ker.L.J. 112: (1992) 2 Ker.L.T. 129: I.L.R. (1992) 3 Ker. 309 (D.B.).

Recovery of blood-stained barcha from the house of accused at the instance of accused—Accused 17 years old—Father of accused also prosecuted as being one of the participators in the crime of which accused was charged—Father living in the same house—*Held*, that the recovery at the instance of the accused had no bearing on the guilt of the accused for it was possible for the accused to have knowledge of the place where the barcha was to be found without himself being guilty of any offence: A.I.R. 1954 Punj. 286: 56 Cr.L.J. 86.

Merely on the evidence of recovery of stolen property belonging to the deceased, from the house of the accused, and without any other evidence, the accused cannot be convicted of murder. Merely because the accused refused to give explanation about the possession of property stolen from a murdered person or gives unsatisfactory explanation, no inference can be drawn that the accused committed murder in the act of theft or robbery. The Court must be satisfied that the possession of the property could not have been transferred from the deceased to the accused except by the former being murdered: 1955 Cr.L.J. 1073: A.I.R. 1955 Madh. Bh. 119 (F.B.).

Where the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the property was taken from the deceased by the accused at the time of the murder, it is not safe to draw the inference that the person in possession of the property was the murderer: (1962) 3 Guj.L.R. 1052: (1963) 1 Cr.L.J. 755: A.I.R. 1963 Guj. 135.

Per *Mallappa, J.*—No doubt possession of stolen articles soon after theft raises a presumption under S. 114, *Illus.* (*a*), that the person in possession of the articles is the thief. But to draw a further presumption that persons found in the possession of stolen articles must have committed the murder of the owner of the stolen articles, other circumstances are necessary. In cases in which it has not only been shown that the stolen articles were in the possession of the deceased at the time of the murder but also that they could not have been removed without the deceased being murdered, the presumption of murder also would follow: I.L.R. (1954) Mys. 469: A.I.R. 1955 Mys. 17; I.L.R. (1951) Mys. 169: A.I.R. 1951 Mys. 1.

Where the valuables alleged to have been taken from the deceased were shown to have been recovered on the basis of the statements given by the accused after the lapse of one month of the disappearance of the deceased, *held*, this delay was fatal to the prosecution; if the recoveries put forth by the prosecution was relied on, it could lead only to the inference that they were either receivers of stolen property or were persons who committed the theft but it could not necessarily indicate that the theft and the murder took place at one and the same time. Even for drawing a presumption under S. 114, the possession of the stolen article by the accused must be soon after the theft: (1994) 2 Ker.L.J. 215 (D.B.). *See* also (1984) 1 Crimes 544 (Madh. Pra.).

Where as per evidence of an eye-witness, only three accused committed the murder

and the remaining accused had merely looted the property which was after very short time recovered from them, *held*, the latter could not be convicted for murder but only for possession of stolen property under S. 114: 1994 Cr.L.J. 3407 (Madh. Pra.) (D.B.).

Where there was no evidence against the accused connecting him with the murder except the recovery of the watch of the deceased at his instance, *held*, though the accused could not be convicted for murder of the deceased, he could be convicted under S. 411, I.P.Code, for keeping stolen property, by invoking illustrations to S. 114: 1993 Cr.L.J. 3901: A.I.R. 1994 S.C. 110; A.I.R. 1993 S.C. 199: 1993 Cr.L.J. 181; A.I.R. 1963 Mad. 476: (1963) 2 Cr.L.J. 651; (1973) 2 Mys.L.J. 490 [Mere recovery of the deceased's jewels cannot connect the accused with the murder.]

It is an established rule that, if murder and robbery form parts of the same transaction, a presumption may be drawn against the accused for murder if he is found to be in possession of the jewels worn by the deceased in the absence of a reasonable explanation by him. But great care should be taken before drawing a presumption particularly in the case of a serious offence on slender material. Unless, therefore, some definite fact connecting the accused with the murder is established, the Courts should be chary to draw the presumption of murder from the mere fact of possession of the articles which were worn or were in the possession of the deceased: I.L.R. (1956) Andhra 173: (S.) A.I.R. 1957 Andh. Pra. 611.

The law is well settled that where murder and robbery are proved to have been integral parts of a certain transaction, the presumption that can be drawn from the possession of the property may, consistent with all the facts proved in the case, be that the person to whom such possession was traced not only committed the theft thereof but also committed the murder which forms part of the same transaction as theft. It must of course be established that, before any such presumption can be drawn, the primary thing to be proved is that the accused had no satisfactory explanation to offer for his possession of property. Further, where the accused offers an explanation, the burden of proving the truth of that explanation affirmatively does not rest on the accused. It still rests on the prosecution to prove that the explanation is not true. But where soon after the murder, a huge quantity of jewellery belonging to the deceased is found in the possession of the accused, the conclusion that the latter was a receiver of the stolen property is not correct. The accused in the circumstances must explain how he came by the property of the deceased. Since the explanation given by him, namely, that he got it from co-accused was palpably false, the correct conclusion to come to was not merely that the accused was guilty of receiving the stolen property but that he was the murderer: 1958 Raj.L.W. 353: A.I.R. 1958 Raj. 338; A.I.R. 1966 Manipur 2: 1966 Cr.L.J. 767; A.I.R. 1950 Mad. 309; A.I.R. 1954 S.C. 28.

The possession by an accused person of jewels belonging to a murdered person if unexplained, is presumptive evidence that he was the murderer as well as the thief: 12 Mys.L.J. 353: 39 Mys.H.C.R. 996.

Where murder and robbery of the jewels on the deceased person are proved to have been integral parts of the same transaction, the presumption that can be drawn from the possession of property which was on the deceased person may, consistent with all the facts proved in the case, be that the person to whom such possession was traced not only committed the theft of those jewels but also committed the murder which formed part of the same transactions as theft. But before any such presumption can be drawn, the primary thing to be proved is that the accused had no satisfactory explanation to offer for his possession of such jewels. Where the accused offers an explanation, the burden of proving the truth of that explanation affirmatively does not lie on the accused. The burden still rests on the prosecution to prove that the explanation was not true, if it is on the falsity of that explanation that the prosecution relies to invite the Court to hold that the possession had not been satisfactorily accounted for. The scope of the evidence on which the Court could come to a conclusion that the explanation was not satisfactory, must depend upon the circumstances of each case: (1954) 2 M.L.J. 673: A.I.R. 1954 Mad. 1088.

The body of one Smt. Chandrani was found in a field and certain jewels she was wearing were found missing on her body. Some blood stains were present on the ground inside her house. The accused was found in possession of the above jewels soon

thereafter. *Held*, that under S. 114 (*a*) of Evidence Act, the accused could be presumed only to be either the thief or retainer of the same knowing or having reason to believe that they were stolen. No presumption could be drawn under S. 114 (*a*) as to where the deceased was murdered and when and at what place the jewels were stolen from her person: 1968 All.Cr.R. 417.

Where the only evidence against an accused is the recovery of stolen property, although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof: 1973 Cr.L.J. 1075: I.L.R. (1972) 22 Raj. 1323: 1973 Raj.L.W. 58 (D.B.); 1971 W.L.N. 317; A.I.R. 1992 S.C.W. 3357.

Where the accused is charged with murdering the deceased and with theft of articles on the person of the deceased, the inference or presumption of guilt for murder can safely be drawn, if the accused is in unexplained possession of articles of the victim after the crime, and if in addition, there is some evidence connecting the movements of the accused with those of the victim, either before or after the crime, thus in some manner or another establishing the nexus between the accused and the offence. The mere unexplained possession or production of articles of the victim by the accused would not be a safe basis to convict him for murder, when that is the only bare circumstance proved in evidence: I.L.R. (1966) Cut. 168: 1966 Cr.L.J. 789: A.I.R. 1966 Ori. 156.

Where only some of the robbed property was recovered from the accused and there was no direct evidence of the involvement of the accused in the commission of robbery, *held*, in view of presumption under the provisions of S. 114, the accused were liable to be convicted of offence punishable under S. 411, I.P.Code, only and not under Ss. 392 and 397, I.P.Code: 1989 Cr.L.J. 1066 (Del.).

Since the dead body of the victim was found in an open place, the presumption, which can be safely drawn, is that the accused is the receiver of the properties of the deceased; he is liable to be punished only under S. 411, I.P.Code: 1986 Cr.L.J. 103 (Raj.).

The mere circumstances of the trunk proved to have been taken away in the robbery having been recovered as a result of what the accused had said to the Police cannot connect him with any crime under S. 394 of the Indian Penal Code: 1959 Cr.L.J. 581: A.I.R. 1959 Cal. 280.

16. Presumption of dacoity.—Once stolen property is recovered from the possession of a person under circumstances mentioned in *Illus.* (*a*) of S. 114 of the Evidence Act, the presumption of the knowledge, cannot ordinarily be limited in its scope or dissociated from the nature of the possession or the manner in which the property was originally acquired. If a person is charged under S. 395 and also under S. 412 of the Penal Code, there are usually circumstances for presuming the knowledge of the accused. It may not, however, be appropriate to convict a man under S. 412 of the Penal Code when he is not charged under S. 395, in the absence of circumstances indicating or suggesting that he had knowledge that the property for the possession of which he has been charged had been obtained by dacoity. Then again the time after which the property was recovered may also be a relevant circumstances in fixing or presuming knowledge about the nature of the possession: 1954 Cr.L.J. 1439: A.I.R. 1954 All. 684.

Where the accused is found to be in recent possession of the property stolen in a dacoity, it can be presumed that he was one of the dacoits or that he had dishonestly received or retained the property knowing or having reason to believe that the possession had been transferred by dacoits or that he had dishonestly received or retained it knowing or having reason to believe that it was stolen property: A.I.R. 1945 Cal. 421; 1979 Cr.L.J. (N.O.C.) 2: 1978 All.Cr.R. 334.

Recovery of stolen goods from accused three days after dacoity—Possible presumption that (*1*) he took part in dacoity, or (*2*) received goods knowing them to be stolen in dacoity, or (*3*) received goods knowing them to be stolen—Choice must depend on facts of each case: A.I.R. 1970 S.C. 535: 1970 Cr.L.J. 601.

Mere recovery of ornaments cannot be said to have established that the accused was either one of the dacoits or receivers of stolen property: (1983) 2 Crimes 262 (Ori.).

The presumption under S. 114 is not confined to cases of theft. A like inference may be raised in the case of murder accompanied by robbery, in the case of burglary or in a case of dacoity. If some persons are found to be in possession of articles removed during the commission of dacoity immediately thereafter and they fail to explain their possession and take a false plea of denial recovery of properties from their possession which cannot be accepted in view of a large body of evidence from the side of the prosecution, a presumption can legally and legitimately be raised that they were the authors of the crime of dacoity: (1984) 58 Cut.L.T. 17: (1984) 2 Crimes 142; A.I.R. 1958 Ori. 106; 1960 B.L.J.R. 268.

Where the accused's statement led to the discovery of articles taken away by the dacoits, *held*, it raises a presumption under S. 114 that the accused had participated in the dacoity; his statement is admissible under S. 27: 1984 Cr.L.J. 1135 (Raj.); 1985 Cr.L.J. 1573; 1985 Cr.L.J. 1977 (Ori.).

Where valuable articles which were robbed after committing dacoity were possessed by the accused persons within a short time after the commission of dacoity, *held*, presumption under S. 114 clearly attracted that they themselves were the dacoits: 1994 Cr.L.J. 1042 (Kam.) (D.B.).

Where an article taken away by the dacoits was found in the possession of the accused after about two months of the dacoity and he was convicted under S. 395, Penal Code, *held*, that it would not be either fair or safe to draw the presumption that he took part in the dacoity, but that the circumstances of the case and his association with the other accused justified the presumption that he received the article with the knowledge that it had been removed in a dacoity and, therefore, his conviction should be altered into one under S. 412, Penal Code: A.I.R. 1957 Tripura 48: 1957 Cr.L.J. 1457.

Penal Code, 1860, S. 396—Prompt recovery of stolen articles from house of accused charged with dacoity—Strong presumption of complicity of accused arises: (1964) 2 Cr.L.J. 585: A.I.R. 1964 Tripura 54; 1982 Cr.L.J. 1656 (Del.); 1980 Cr.L.J. (N.O.C.) 131: I.L.R. (1980) Madh. Pra. 1053.

Presumption—Dacoity: 1958 An.L.T. 476.

The presumption to be drawn whether the accused were receivers of stolen property or dacoits depends upon the circumstances under which the discovery is made; if the gap of time is too large, the presumption of the accused being concerned with the crime itself gets weakened; the presumption is, however, stronger when the discovery is made soon after the offence. The obvious reason being that disposal of property requires finding a person ready to receive them; the shortness of time, the nature of the stolen property, its quantity and character, determine whether the person having the goods in his possession received them from another or was himself the thief or dacoit. Thus, where the goods stolen were a large quantity of cloth, looted from the cartmen by a score of persons after pelting stones, and immediately afterwards searches were made and the goods were recovered from various persons, *held*, the presumption was rightly drawn that the persons from whom the goods were recovered were dacoits themselves and not merely the receivers of the stolen property: A.I.R. 1971 S.C. 196: 1971 Cr.L.J. 260: (1970) 3 S.C.R. 720.

The factum of recovery of articles at the instance of the accused persons soon after the dacoity in the presence of police officers and panch witnesses, *held*, is itself sufficient to bring the case not under the provisions of S. 412, I.P.Code but under S. 395, I.P.Code with the aid of S. 114: A.I.R. 1985 S.C. 486: 1985 Cr.L.J. 753: (1985) 2 S.C.C. 533.

Where on the basis of the evidence on record, though the accused could not be convicted under S. 395, I.P.Code, but in view of the fact that the articles proved to have been stolen in the course of dacoity were recovered very soon after the dacoity, *held*, the accused could be convicted under S. 412, I.P.Code: A.I.R. 1982 S.C. 129: 1982 Cr.L.J. 610: (1982) 3 S.C.C. 214.

Where looted ornaments and other articles were not recovered from the possession of the accused shortly after the occurrence but were recovered two weeks thereafter and moreover the articles recovered were not of such nature as were not likely to change hands quickly, *held*, the only inference that could be drawn from the unexplained recovery of looted articles from their possession was that they were receivers of the stolen properties and not that they were the persons who had perpetrated the crimes punishable under Ss. 394, 397, 436 and 170, I.P.Code: 1977 Raj.L.W. 178: 1977 W.L.N. 218.

Where the only evidence against the accused was that ornaments stolen in dacoity were recovered from the house of the accused and there was no evidence that the accused was seen near the place of dacoity or of joining the gang, *held*, that it was not safe to convict the accused either under S. 395 or under S. 412; he could be convicted only under S. 411: 1958 M.P.L.J. 752: A.I.R. 1959 Madh. Pra. 125; (1989) 2 Rec.Cr.R. 641 (Del.) [Where only part of robbed property was recovered.]

Per *Desai, J.; Mushtaq Ahmad, J.*, contra.—A person who is in possession of goods carried away by dacoits soon after the dacoity can be presumed to be either the dacoit or to have received them knowing them to be so carried away: 1953 Cr.L.J. 848: A.I.R. 1953 All. 385; A.I.R. 1950 All. 398; 1980 Cr.L.J. (N.O.C.) 144 (Cal.) (D.B.). But where there was a time lag between dacoity and recovery, no presumption as to participation in dacoity was permissible: 1990 Cr.L.J. (N.O.C.) 65 (Pat.).

Where the accused was found in possession of radio-transistor immediately after dacoity, *held*, presumption could be drawn against the accused: 1985 W.L.N. (U.C.) 545.

Where property stolen in dacoity is recovered from the house in which the accused who was aged 17 years was living with his elder brother (who was also another accused) and it was not known whether some other persons were also staying there, it was incumbent on the prosecution to show that the accused was in exclusive possession of the house in circumstances on which it could be presumed that he knew of the presence of these stolen articles in the house. Where the prosecution has failed to lead evidence on these points it must take the consequences. In these circumstances, the conclusion that the suit-case containing the stolen articles was in the possession of the accused cannot be arrived at, without there being a reasonable doubt about it. The benefit of that doubt must go to the accused: A.I.R. 1958 Tripura 40: 1958 Cr.L.J. 1549.

Certain articles which were stolen in a dacoity were found in the house of *D*. At the time of the recovery of these articles, the accused who was brother of *D*, made a statement that the articles were handed over to *D* by him. *Held*, that actual possession was that of *D*. The mere fact that the accused had knowledge about their existence with *D* could not be enough to draw a presumption under S. 114, *Illus.* (*a*) of the Evidence Act against the accused: 1960 M.P.L.J. (Notes) 197.

When an accused was convicted under S. 412, of the Penal Code, and the Judge holding that under S. 114, he must be presumed to have known the nature of the dacoity, awarded him the maximum penalty, *held*, that as the presumption alone would not justify fixing the accused with knowledge that the goods recovered from him had been obtained by dacoity, the sentence was excessive: 59 I.C. 204: 32 C.L.J. 89.

17. Deaf and dumb accused.—From the mere fact that a deaf and dumb mute was found in possession of articles stolen and obtained by house-breaking, an inference under S. 114, that that person should have committed the offence of house-breaking and theft cannot be drawn, because such a person cannot be made either to understand what he is asked or to give an explanation. It is only on failure to explain the possession when an explanation is asked for that the presumption under S. 114, arises. No conviction on such a presumption of guilt can be sustained: A.I.R. 1946 Mad. 60: (1945) 2 M.L.J. 407.

In order to raise the presumption under *Illus.* (*a*) to S. 114, the accused must first be given an opportunity to account for his possession. When that has not been done, the accused cannot legally be convicted under S. 380 or 411, I.P. Code. The fact that the accused is dumb does not do away with the necessity to get the explanation of the accused, especially when he is able to express his thoughts through signs. In such cases the Court should get the aid of an interpreter and get the explanation of the accused. If that is done the conviction based on the presumption from the mere fact of possession is unsustainable: 53 Mys.H.C.R. 162.

18. *Illustration* (*a*)—Illustrative cases.—The accused from whom the stolen properties were recovered had not been able to give account for his possession of this property, but he gave three explanations at three different stages and it could safely be presumed that he was aware of the fact that neither he, nor his mother nor his father could have honestly acquired this property. There was direct evidence that the accused was in possession of this property shortly after they were stolen from the complainant's house, though

they were recovered from him more than four years after theft. *Held*, that the accused must have known fully well that this property, which was in his conscious possession, was stolen property, and that his conviction under S. 411, Penal Code, was proper: I.L.R. (1960) 10 Raj. 921: (1961) 1 Cr.L.J. 310: A.I.R. 1961 Raj. 35.

Accused proved to have disposed of property stolen—No evidence as to theft—Conviction not sustainable: I.L.R. 54 Bom. 171: A.I.R. 1930 Bom. 155.

An accused was sentenced under S. 411, Penal Code under the following circumstances. The stolen buffalo in the case was seized from the *gher* belonging to the family consisting of his father himself and two brothers. It was at a distance of above 2 furlongs from his house. It had no gate under lock and key. It was open for anybody to enter; it was in an abandoned state. Near the *gher* was living a bad character. The accused had admitted the seizure from the *gher* but stated he did not tie it there and somebody else must have done it. Presumption of recent possession was raised and he was convicted. *Held*, the presumption under S. 114, *Illus.* (*a*) of the Evidence Act can be raised only if the person found in possession is unable to account for his possession. In the circumstances, it could not be held that he was in possession of the buffalo recovered and his version that somebody might have tied it there is not unreasonable. It cannot be said that he had not accounted. There is no question of a burden being shifted on the accused in the case. On the facts and in the circumstance the presumption under S. 114, *Illus.* (*a*) could not and ought not to have been raised: 1952 All.L.J. 736: A.I.R. 1953 All. 136.

Where the accused who were alleged to have stolen complainant's bullocks in the night, were found carrying the bullocks in the next morning at a distance of about six miles from the residential village of the complainant and the complainant and other persons were beaten by the accused when they were challenged, and there was neither any oral evidence nor any circumstances established on the record which could indicate that the accused had committed the theft, the only presumption which could be drawn from the facts would be that the accused were found to be in possession of the stolen property knowing them to be stolen and not that they had stolen them: 1966 All.W.R (H.C.) 549: 1966 All.Cr.R. 324.

Penal Code, 1860, S. 411—Stolen bullock recovered from accused little less than a year of theft—Presumption under *Illus.* (*a*) cannot be drawn against him: 1964 Cur.L.J. 155: (1964) 2 Cr.L.J. 338: A.I.R. 1964 Punj. 400.

Merely because a cow, gone for grazing, was lost and later found in cowshed of the accused with a newborn heifer, *held*, no presumption as to dishonest intention could be drawn from the mere act of possession in the absence of any evidence: 1987 Cr.L.J. 956: (1987) 1 Crimes 687: (1987) 63 Cut.L.T. 245.

Where an accused receiver of a stolen cycle pleaded to have obtained it under pledge but the document in support of transaction of pledge did not mention the pledger nor was it proved for want of witnesses and several other cycles were also recovered from his possession, and it was not shown that the accused or his family members were maintaining any books without which the business of pawn-broking cannot be carried, *held*, the possession of cycles not having been accounted for, a presumption under S. 114, *Illus.* (*a*) may be raised that the accused had received the goods knowing them to be stolen. [(1971) 3 All E.R. 881; A.I.R. 1943 P.C. 211 and (1914) 84 L.J. (K.B.) 396, Rel. on]: A.I.R. 1972 S.C. 1561: 1972 Cr.L.J. 1048.

Where the accused were found in unexplained possession of the property belonging to the deceased but it was not known whether his movable property were removed from the possession of the deceased during his life time or after his death, *held*, the accused could not be said to be guilty of theft or even receiver of stolen property by resort to S. 114, *Illus.* (*a*) of the Evidence Act; proper section applicable to such a case was S. 403, I.P.Code: 1989 Cr.L.J. 1425 (Madh. Pra.).

Disclosure statement by accused—Discovery of articles in consequence of that statement—Possession of stolen articles with accused could be presumed: (1964) 2 Cr.L.J. 293: A.I.R. 1964 Him. Pra. 27.

The production of stolen property as a result of pressure or inducement by the Police does not stand on the same footing as an improperly obtained confession. When an involuntary confession leads to the recovery of stolen property, the recovery as regards its

admissibility stands on the same footing as a recovery without an accompanying voluntary or involuntary confession and, in the absence of an explanation by the possessor is subject to the presumption that the possessor is either the thief or a knowing receiver if the production is shortly after the theft: (1942) 44 Punj.L.R. 545: A.I.R. 1943 Lah. 5.

Stolen property—Receiving or retaining of—Husband storing looted property in house—His wife barely acquiescing in keeping such property in house—Such passive partnership is not enough to sustain charge under S. 412 against wife: (1963) 1 Cr.L.J. 344 (All.).

Accused found in possession of property taken in robbery soon after commission of robbery—Accused presumed to be guilty under S. 411, Penal Code, unless he could explain possession thereof: 1964 M.P.L.J. (Notes) 78; (1978) 2 M.P.W.N. 16.

Possession must be exclusive and recent—Stolen articles found in fenced compound of accused after ten days from theft—Accused not accounting for possession—Accused liable under S. 411, I.P. Code: 31 Cut.L.T. 396.

Presumption whether person is thief or receiver of stolen property depends on facts and circumstances of each case—Telegraph wires found in possession of accused—Accused denying recovery but giving no satisfactory explanation of their possession—Accused can be presumed to be receiver of stolen property: 31 Cut.L.T. 1022: A.I.R. 1965 Ori. 123.

Where certain electric goods stolen from an Electricity sub-Station were seized from house of the accused and such goods were not commonly available in the market, *held*, a presumption that possession thereof was unlawful could be made; conviction under Ss. 379 and 411, I.P.Code, upheld: 1992 Cr.L.J. 121 (Ori.).

Ghee stolen from tins in a train was found in a railway wagon occupied by five porters and a policeman—No presumption can arise: A.I.R. 1929 Sind 7: 23 Sind L.R. 5.

Accused found to be in possession of stolen articles two days after theft—No evidence to show that accused committed the theft—No explanation by accused about possession of stolen articles—Accused must be presumed to be receiver of stolen properties and as such is liable for punishment under S. 411, I.P.Code—There is no legal bar to conviction of accused under S. 411, even though he was charged only under S. 380, I.P.Code in view of S. 237, Cr.P.Code: (1964) 6 Ori.J.D. 12: I.L.R. (1964) Cut. 323: (1964) 1 Cr.L.J. 602.

Theft of revolver in October—Revolver found with accused in following May—Presumption: 1933 All.L.J. 523: A.I.R. 1933 All. 461.

Where one of the accused was found to be liable for the offences under Ss. 380 and 454 read with S. 34 of the Indian Penal Code by breaking open a godown and stealing copper wire bundles therefrom and trucking them away for sale to the brokers at a weigh bridge and though the accused's presence at the godown was not proved yet he was found in possession of duplicate stolen keys of the godown at the weigh bridge, *held*, having no explanation for the custody of the duplicate keys, a presumption under S. 114, *Illus.* (*a*) could be raised against him of the probable facts which rendered him guilty; conviction upheld but sentence reduced. [A.I.R. 1956 Bom. 186; A.I.R. 1948 Mad. 261; A.I.R. 1950 Mad. 714, Disting.]: A.I.R. 1974 S.C. 514: 1974 Cr.L.J. 469: (1974) 4 S.C.C. 544.

Where an accidented truck allegedly stolen and found soon thereafter in possession of the accused who explained his possession as having received it from the owner for repairing and plying and thereby recover the expenses incurred on the repairs, *held*, the explanation, fortified by the owner's writing, is reasonable; no presumption under S. 114, *Illus.* (*a*) could be raised; conviction under S. 411 of the Indian Penal Code upheld by the High Court even when no charge thereunder was framed, set aside: A.I.R. 1976 S.C. 1097: (1976) 1 S.C.C. 882: 1976 Cr.L.J. 842: (1976) 2 S.C.R. 747.

It is more than doubtful if any presumption under S. 114 can arise against any person merely because his finger-prints were found upon a piece of stolen property: 196 I.C. 679: A.I.R. 1941 Cal. 479.

Where a person found in possession of stolen property shortly after it was stolen presumption under S. 114, *Illus.* (*a*) arises, and hence Sessions Judge cannot expunge the charge under S. 379, I.P. Code, without going into the evidence: 150 I.C. 558: A.I.R.

1934 All. 455. *See* also (1935-36) 40 Cal.W.N. 1090; A.I.R. 1937 All. 47; A.I.R. 1957 All. 678; 17 Mys.L.J. 158; 41 Cr.L.J. 44: A.I.R. 1939 Rang. 361; A.I.R. 1936 Nag. 200; 17 Pat.L.T. 754 [Possession of stolen articles after lapse of a long time]. *See* also I.L.R. (1937) Nag. 315: A.I.R. 1937 Nag. 17 (F.B.); 10 O.W.N. 47: A.I.R. 1933 Oudh 117; A.I.R. 1938 Mad. 477; (1938) 40 Punj.L.R. 58: A.I.R. 1938 Lah. 252.

Production of currency notes—No marks of identification—Conviction on basis of production—Legality: A.I.R. 1958 Ori. 51: 1958 Cr.L.J. 534.

Illustration (*b*)

19. Accomplice's testimony.—(*See* **Notes under S. 133,** ***infra*****).**

Illustration (*c*)

20. Presumption regarding consideration.—(*See* also Note 31, Ss. 101-104, *supra*). Under S. 118(*a*) of the Negotiable Instruments Act, until the contrary is proved, the presumption that every negotiable instrument was made for consideration shall be made. The presumption is rebuttable one: (1966) 32 Cut.L.T. 994. While the statutory presumption under S. 118, Negotiable Instruments Act is mandatory, the presumption under S. 114, Evidence Act is permissive depending upon the exercise of discretion by the Court: A.I.R. 1962 Mad. 219.

While *Illus.* (*c*) to S. 114 is confined to the acceptance or endorsement of a bill of exchange, S. 118, Negotiable Instruments Act, applies to the making or drawing of it also: A.I.R. 1935 Lah. 599 (D.B.).

Consideration is presumed in the case of negotiable instruments and need not be proved independently as in the case of an ordinary suit founded upon contract. Circumstances may, of course, exist which would weaken the ordinary presumption that a negotiable instrument has been executed for value received and when all the facts are before the Court presumption raised by S. 118, Negotiable Instruments Act may be rebutted and the burden of proof shifts back to the plaintiff: A.I.R. 1939 Rang. 334 (F.B.).

Irrespective of any recital in the instrument or any allegation in the plaint regarding consideration, the law presumes that the instrument was made or drawn for consideration. The presumption is that there was consideration and not that there was any particular consideration, that which might be recited in the instrument or that which might be alleged in the plaint. The presumption arises as soon as the execution of the instrument is proved and the presumption continues until "the contrary is proved", that is, until it is proved that there was no consideration. It must be proved that there was no consideration at all for the instrument. Mere proof that the particular consideration recited or alleged did not exist may not suffice, though such proof must naturally be a circumstance to be considered in deciding whether there was no consideration at all. Therefore, a plaintiff who, quite unnecessarily, adduces evidence to prove a certain consideration but is unable to prove that consideration, need not necessarily lose his action for that reason. The burden of proving that there was no consideration is on the defendant and the burden has to be discharged irrespective of the failure of the plaintiff to prove a particular consideration which he sets out to prove: (1987) 100 Mad.L.W. 925.

In a suit on a bond the primary burden is on the plaintiff. He must prove execution and consideration. But once he proves or it is admitted, that the signature or thumb-mark (it does not matter which) is of the defendant's then the presumption arises and the burden shifts to the defendant. He can then either prove that he cannot be charged because of fraud, etc., or that the presumption under S. 114 cannot on the facts fairly arise. If he succeeds in doing that, then the burden shifts back: I.L.R. (1939) Nag. 160: A.I.R. 1939 Nag. 78.

Presumption that negotiable instrument is supported by consideration arises and burden of rebutting this presumption is on defendant: (1969) 1 Mys.L.J. 217.

It is open to the Court to consider in its proper setting, the fact that the drawer of a bill of exchange was a man of business, and the acceptor was a young and ignorant person completely under the former's influence. This is one illustrative fact which the Court may consider in raising the presumption. There may be other circumstances which may also justify the Court in declining to raise the presumption. S. 114 of the Evidence Act is a general provision which enables the Court to presume though not obliged to do so, that a bill of exchange or a promisory note was founded on a good consideration. S. 118

of the Negotiable Instruments Act, however, enacts a special rule of evidence which operates between parties to the instrument or persons claiming under them in a suit or proceeding relating to the bill of exchange and does not affect the rule contained in S. 114 of the Evidence Act, in cases not falling within S. 118 of the Negotiable Instruments Act: (1965) 2 M.L.J. (S.C.) 152: A.I.R. 1965 S.C. 920; A.I.R. 1988 Cal. 59 (D.B.).

The difference between S. 114, Evidence Act, and S. 118, Negotiable Instruments Act, consists only in this, that under the first the Court has a discretion to make the presumption or not, whereas under the second the Court is bound to start with presumption, but once the presumption is made, there is no difference between the two cases: (1987) 100 Mad.L.W. 925.

Under S. 118 of the Negotiable Instruments Act there is a presumption that every negotiable instrument is executed for consideration: A.I.R. 1977 Pat. 98: 1976 B.B.C.J. 338: 1976 B.L.J.R. 235 (D.B.).

Presumption under S. 118, Negotiable Instruments Act, 1881—Rebuttal—Nature and onus of rebuttal: (1965) 78 Mad.L.W. 573: 1965 Mad.W.N. 293; (1971) 2 Mys.L.J. 407; A.I.R. 1961 S.C. 1316.

Presumption is not rebutted simply because of some variation between recital in the pronote and the evidence led by the plaintiff regarding the payment of consideration: (1971) 1 A.P.L.J. 252.

Negotiable Instruments Act, S. 118—Presumption under—Shifting of onus. *See* A.I.R. 1957 Madh. Bh. 82.

Presumption as to consideration of negotiable instrument — Distinction between S. 118(*a*), Negotiable Instruments Act and S. 114, Evidence Act: A.I.R. 1960 Punj. 500.

Negotiable Instruments Act, 1881, S. 118 —Presumption under—Mandatory—Presumption rebuttable—No presumption regarding quantum of consideration—Comparison with presumption under S. 114, Evidence Act: (1962) 1 M.L.J. 193: A.I.R. 1962 Mad. 219.

Despite the failure of the plaintiff to establish that consideration passed in cash for the promissory note, he may get a decree on the basis of admission or evidence placed on record from the other side provided the same establishes that there was some other kind of consideration in lieu of which the promissory note could be executed. The presumption under S. 118 of the Negotiable Instruments Act that the promissory note was made for consideration does not fail on account merely of the consideration being shown to be not the same as indicated in the promissory note: A.I.R. 1985 All. 12. *See* also (1979) 20 Guj.L.R. 195.

Where the loan and the promissory note are contemporaneous, the presumption under S. 118(*a*) of the Negotiable Instruments Act, 1881 cannot be excluded except where the executant is dead and his brothers and sons are sued on the pronote on the ground of the debt having been contracted for the joint family; however, the presumption under S. 114(*c*) may even then be raised provided the payment of consideration is proved. [A.I.R. 1937 Mad. 182, approved in A.I.R. 1965 S.C. 920, Rel. on]: A.I.R. 1974 Raj. 96: 1973 W.L.N. 778.

Suit against son on promissory note executed by Hindu father leading immoral life—Presumption is not available: 1961 All.L.J. 681.

In a suit on a promissory note, the initial burden is on the plaintiff to prove execution of the pro-note and only when this burden is discharged, the Court raises a presumption of passing of consideration for the instrument in the plaintiff's favour: 1986 Ker.L.J. 882.

Promissory note by Hindu father—Suit after father's death against sons—Burden of proof—Presumption as to consideration—If any—Presumption under S. 114—Power of Court to raise from omission to adduce available evidence. *See* I.L.R. (1937) Mad. 299: A.I.R. 1937 Mad. 182: (1937) 1 M.L.J. 543.

Once the defendant shows either by direct or by circumstantial evidence or by use of other presumptions of law or fact that the promissory note is not supported by consideration in the manner stated in the promissory note or in the manner stated in the suit notice or in the pleading, the evidential burden shifts to the plaintiff and the legal burden of the plaintiff is revived, *i.e.*, to prove that the promissory note is supported by consideration and at that stage, the presumption of law covered by S. 118 of the Negotiable Instruments Act, 1881, "disappears" and no longer subsists. [A.I.R. 1949 Bom. 253;

A.I.R. 1973 Ker. 210; A.I.R. 1935 All. 509; A.I.R. 1936 Nag. 130; A.I.R. 1936 Pat. 498 and (1911) 21 M.L.J. 1013, Dissent. from; A.I.R. 1973 Andh. Pra. 103, Overruled]: A.I.R. 1987 Andh. Pra. 139: (1987) 1 An.L.T. 1: (1987) 1 A.P.L.J. (H.C.) 241 (F.B.).

Where execution of the suit pronote was admitted, *held*, a presumption could be drawn that it was supported by consideration: (1994) 3 An.L.T. 240.

To raise presumption, due execution of pronote must be established—Initial burden lies on plaintiff—Mere admission of signature and thumb-marks on blank sheet is not admission of execution: 1968 All.L.J. 480.

Hundi—Presumption as to consideration—Onus of proof—Shifting of onus: 1968 Cur.L.J. 824: A.I.R. 1968 Punj. 552.

Illustration (d)

21. Presumption regarding continuance of state of things.—Presumption that things remain in their original state. *See* 11 M.I.A. 309: 11 I.C. 472; 9 I.C. 322.

The presumption mentioned in S. 114, *Illus.* (*d*) is a permissive presumption and Court of fact cannot be compelled to raise the presumption in favour of either party: 194 I.C. 428: A.I.R. 1941 Pat. 536. *See* also 1931 Mad.W.N. 1312 (a case of conviction under S. 69, Provincial Insolvency Act).

If any state of facts can reasonably be conceived to sustain a classification so as not to come within the bar of Art. 14 of the Constitution of India, the existence of such state of facts must be assumed: 1954 All.L.J. 618: A.I.R. 1955 All. 33.

S. 114 does not go so far as to enable the Court to presume that a certain state of things existed in the past without any proof from the party who is required to satisfy the Court on the point: (1930-31) 35 Cal.W.N. 133: A.I.R. 1930 Cal. 815.

The inference, that a given fact or set of facts whose existence at a particular time is one established in evidence, continues to exist as long as such facts usually exist, may be carried upwards or downwards where a state of facts for long period of years has been satisfactorily proved to have existed, in the absence of evidence to the contrary, *presumitur retro*. This is particularly the case where a party to the suit could have produced documentary evidence in its possession to rebut the presumption: 1955 An.L.T 624: 1955 An. W.R. 734. But *see infra*. The rule of evidence is in favour of presuming the continuity of things shown to exist at a prior date. There is no rule of evidence by which one can presume backwards: I.L.R. (1951) Pepsu 373: A.I.R. 1951 Pepsu 18; (1933-34) 38 Cal.W.N. 763: A.I.R. 1934 Cal. 707.

If a thing or a state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and backwards may sometimes be drawn. The presumption of future continuance is noticed in *Illus.* (*d*), S. 114. In appropriate cases, an inference of the continuity of a thing or state of things backwards may be drawn under this section, though on this point the section does not give a separate illustration. The rule that the presumption of continuance may operate retrospectively has been recognised in India. This is rule of evidence by which one can presume the continuity of things backwards. The presumption of continuity weakens with the passage of time. How far the presumption may be drawn both backwards and forwards depends upon the nature of the thing and the surrounding circumstances. *Held*, in the circumstance of the case, that the High Court rightly refused to draw the inference from the state of things during 1892 to 1909 that the ancestors of the plaintiffs held frontier plots in 1863: 1966 S.C.D. 485: (1966) 1 S.C.A. 35: A.I.R. 1966 S.C. 605. *See* also 1995 Punj.L.J. 337.

No presumption can be made that a state of things that once existed continued to exist when that would militate against the fundamental presumption of law in favour of innocence. So merely because a person is shown to have been a member of an assembly before it was declared unlawful, he cannot be presumed to have continued as a member thereof after it was declared unlawful, because the initial presumption of law is in favour of innocence and lawful conduct: I.L.R. 55 Bom. 484: (1931) 33 Bom.L.R. 90: A.I.R. 1931 Bom. 121.

When a certain state of affairs has been proved an inference of continuity backwards may sometimes be drawn: 1968 Ker.L.R. 327: A.I.R. 1969 Ker. 21.

Things continuous in nature may be presumed to have continued until contrary is shown: A.I.R. 1921 Cal. 661 (D.B.); A.I.R. 1926 P.C. 41; 1978 Cr.L.J. 86 (D.B.).

Applicability—Applicants and their predecessors in possession of deity's properties as marfatdars by hereditary right of succession for 100 years preceding application and no outsider ever holding such trusteeship—*Held*, presumption backward should be invoked that applicants were in possession of marfatdari right in such character even since time of founder: 34 Cut.L.T. 1111.

If the subject is hillock the presumption backward can be stretched upto, say a few years. But if the subject is a soap bubble it would be inept to presume that the bubble remained like that even for half an hour prior to the time. A backward presumption regarding existence of lease even for a few months prior to the date of proof of its existence may not be found in law: (1990) 2 Ker.L.T. 388: (1990) 2 Ker.L.J. 245: (1990) 2 Ren.C.R. 552.

Inference of continuance whether backwards or forwards is an inference of fact and may, therefore, be rebutted. Accordingly, a decision in S. 145, Criminal Procedure Code, proceedings in regard to possession of any specific plot of land can be taken forwards or backwards, within reasonable limits to the appointed date but it is always subject to rebuttal: (1977) 44 Cut.L.T. 615.

A state of affairs which is shown to exist at one time in the past is presumed to continue as it was: (1962) 64 Bom.L.R. 322: 1962 Nag. L.J. 428: I.L.R. (1962) Bom. 417: A.I.R. 1963 Bom. 100; A.I.R. 1923 Cal. 247 (D.B.).

A presumption under S. 114, *Illus.* (*d*) can be drawn only on the existence of acceptable evidence of possession upto a particular time and there is no sufficient evidence of possession anterior to that date; this "presumption backwards" should be drawn on reasonable probabilities and legal inferences from proved and admitted facts alone, not on speculation and conjectures. [A.I.R. 1977 S.C. 409, Rel. on]: (1985) 1 An.W.R. 139: (1984) 2 An.L.T. (N.R.C.) 101.

Where the plaintiff and before him his father were shown by documentary evidence, to have been in possession of the land as tenants till *rabi*, 1973 but the defendants contended that the land stood in his name in the revenue records and was in his possession since 1971 when the plaintiff's father had surrendered it to them, *held*, the burden lay on the defendants to displace the presumption of the plaintiff and his father continuing to be in cultivating possession of the land; in the absence of evidence on the record as to how and under what circumstances the plaintiff's father had surrendered the land and on what basis the entries in favour of the defendants were made in the revenue records, the plaintiff is presumed to have continued in possession in 1972 when he sued the defendants; the lower appellate Court's decree reversed and that of the trial Court's restored: 1986 Punj.L.J. 19.

Suit for declaration of right of drainage of irrigation water—Evidence showing long user of drainage by plaintiff—*Held*, once long user was established user must be presumed to be as of right until contrary was proved: (1966) 79 Mad.L.W. 705.

Coconut, arecanut, jack, rubber, mango trees and pepper vine in existence in 1936-37 will be presumed to be in existence in 1939-40: 1966 Ker.L.J. 313: 1966 Ker.L.T. 333: A.I.R. 1966 Ker. 286.

In the case of land like jungle land, waste land, sand bed, hill top, etc., where actual cultivation and acts of possession of similar nature are not to be expected, possession would follow title. But *Illus.* (*d*) to S. 114 of the Indian Evidence Act would not apply to the land such as one covered by pepper garden which can never be called jungle land. A momentary delivery of possession, even of real possession and not symbolic possession, not followed up by subsequent possession and enjoyment, will not raise, in the case of such cultivated land, the presumption that it is continued for years together till the filing of the suit, in the absence of evidence on the part of the claimant that he and his people continued on the land after the delivery of possession and continued the cultivation: A.I.R. 1957 Mad. 463.

Presumption of continuance of relationship of landlord and tenant after decision in rent suit, *see* 71 Cal.L.J. 100. On this illustration, *see* also A.I.R. 1941 P.C. 11.

Where it was clear from the documentary evidence that the premises was being used as residential premises before and after the purchase by the petitioner, *held*, in the absence of evidence that he converted the building into non-residential building, the presumption under S. 114, *Illus.* (*d*) came into play and the burden was on him to show that the state of affairs had changed: (1989) 2 M.L.J. 164.

Where a plaintiff proves that he got into possession of a land by settlement from the landlord and got a receipt from him, his possession would be presumed to continue till he is dispossessed: 1956 B.L.J.R. 108: A.I.R. 1957 Pat. 92.

A civil Court's decree for possession in favour of a tenant is admissible as presumptive proof of his possession; the tenancy rights having become more valuable than the proprietary right, no tenant would surrender the possession of his tenancy land; there is a strong presumption of his continuing in possession: 1985 Cr.L.J. 1463: I.L.R. (1985) Him. Pra. 823.

Once the ownership is proved its continuance has to be presumed under S. 114 unless it is shown that either the owner or his successor-in-interest in any way transferred the property or abandoned it: 1979 All.L.J. (N.O.C.) 52.

Continuance of jurisdiction or power vested in officer by statute should be presumed unless it is ousted by statute expressly or by necessary implication: 1971 Tax.L.R. 648 (Andh. Pra.) (D.B.).

Where assets of plaintiffs were proceeded against in order to recover sales tax dues and the plaintiffs contended that defendants alone were liable as there was a dissolution of firm on 19-8-1977 but there was no public notice regarding dissolution and no notice to the sales tax authorities was given, and further the evidence showed that for the preceding assessment year the firm was continuing with plaintiffs also as partners, *held*, in the absence of evidence, the presumption must be in favour of continuance of the partnership with all the partners: A.I.R. 1987 Ker. 239: 1987 Ker.L.J. 205.

Illustration (e)

22. Scope and applicability of *Illustration (e)*.—The section read with the illustration, only raises a presumption, but that presumption must naturally be a rebuttable presumption; and a presumption is only a mode of proof which has to be considered alongwith other evidence. If there is evidence to the contrary, which the Court believes, the presumption can be of little avail: 1955 B.L.J.R. 583: A.I.R. 1956 Pat. 161.

It is to provide for cases which on account of lapse of time, may not admit of clear and direct proof, that the presumption under S. 114 is sanctioned. There is no scope for presumption when facts are known: A.I.R. 1953 Trav.-Co. 392.

Illus. (*e*) to S. 114, Evidence Act permits a presumption to be drawn in matters of procedure. That provision does not permit a presumption to be drawn where the question does not relate to the manner of doing an official act but goes to the root of the validity of that order: A.I.R. 1956 All. 689; A.I.R. 1958 Madh. Pra. 71: 1958 M.P.L.J. 8.

S. 114, *Illus.* (*e*) involves a mere formality or a detail of procedure in the routine of litigation or of a public officer's action. A presumption does not extend to the competence or the authority of person or body performing the particular act. The words "regularly performed" means "performed in accordance with the formal procedure": (1968) 1 Mys.L.J. 352: 13 Law Rep. 729.

Illus. (*e*) to S. 114 cannot and does not apply where the point at issue is not whether an official act was properly performed, but the point at issue is whether such an act was in fact performed, and (2) where evidence has been led on behalf of the Government or the concerned authority to prove that a particular official act had been regularly performed and that evidence clearly shows that such performance had not taken place. In either of these cases, there is no place or scope for drawing any presumption under S. 114. [A.I.R. 1945 Bom. 368 and A.I.R. 1968 S.C. 1413, Rel. on]: A.I.R. 1982 Bom. 284: (1981) 83 Bom.L.R. 586: 1982 Mah.L.J. 229.

There is no presumption in law that official act has been regularly performed when the act itself is shown on the face of it to be unauthorised or not legal: A.I.R. 1989 Del. 51.

S. 114 is the source of presumptions of regularity to be invariably drawn in respect of public documents which form the acts or records of the acts of the sovereign authority, official bodies and Tribunals and of public officers—legislative, judicial and executive [Case law exhaustively discussed]: A.I.R. 1983 Bom. 1: 1983 Mah.L.J. 339.

23. Presumption is discretionary.—The presumption under *Illus.* (*e*) of S. 114 is discretionary one. The Court may or may not raise such a presumption. When a statutory authority makes an order, a presumption can be raised that it had followed the prescribed procedure. *Illus.* (*e*) permits a presumption to

be drawn only in matters of procedure. It does not permit a presumption to be drawn where the question does not relate to the manner of doing an official or judicial act, but cuts at the root of the validity of the Act: 1973 Cr.L.J. 1749; (1989) 2 Raj.L.R. 755; (1992-1) 12 Guj.L.H. 253: (1992-1) 33 Guj.L.R. 434; A.I.R. 1989 Cal. 14: (1988) 1 Cal.H.N. 219: (1987-88) 92 Cal.W.N. 929 (D.B.).

The presumption is only an optional presumption. The Court is not bound to make it and the counter-illustration itself indicates a case in which the Court would not draw it, *e.g.*, where there are some exceptional circumstances surrounding the doing of the act: (1942) 44 Punj.L.R. 300: A.I.R. 1942 Lah. 214.

S. 114 is not mandatory but leaves it to the Court in any particular case to raise a presumption as to the validity of official acts. The Court cannot raise a presumption as to a very essential ingredient constituting an offence in a case, where the liberty of the subject is either restricted or taken away. Where the offence consists in the contravention of a valid order, the validity of the order contravened has itself to be established by the prosecution and the prosecution cannot ask the Court to presume that the order is valid: (1950) 52 Bom.L.R. 223: A.I.R. 1950 Bom. 330.

24. Regularity of judicial acts.—The expression "regularly performed" in *Illus.* (*e*) to S. 114, Evidence Act, can only mean performed in accordance with form and procedure. The presumption mentioned in *Illus.* (*e*) is not to be drawn as a matter of course in the case of judicial acts of a special or contingent jurisdiction. Further, the presumption under *Illus.* (*e*), is only that judicial and official acts have been regularly performed. If a judicial or official act is proved to have been performed it may be presumed to have been regularly performed but not to raise a presumption that any act has been performed. It is so because the emphasis is on the word "regularly" and not on the word "performed".

The general rule in Courts of law is that only those acts can be taken to exist which are proved unless there be a legal presumption of their existence in the circumstances of the case. A Panchayat Court exercising powers under the Madras Village Courts Act is an inferior Court of a very limited jurisdiction. Its jurisdiction, as provided in S. 13, is confined to certain suits of valuation not exceeding Rs. 50. A special power is also conferred on it by S. 14 to hear and determine suits of value not above Rs. 200, in a particular contingency, *viz.*, when both the parties to the action have expressed their consent thereto in writing executed before the Court. A party basing his right on a decree passed by such Court has to show that the decree made in the exercise of the special power was *intra vires* the Village Court and for that purpose to prove the essential requisite to the Court's special jurisdiction positively. He cannot avail of the legal presumption under S. 114, *Illus.* (*e*), Evidence Act: 1962 Ker.L.J. 743: A.I.R. 1963 Ker. 9. *See* also (1968) 1 Mys.L.J. 352; (1978) 2 M.P.W.N. 64.

Although there is no presumption of law that a particular act required to be performed has been done, judicial act must be presumed to have been regularly performed: (1912) 16 Cal.L.J. 404 (D.B.).

S. 114 read with *Illus.* (*e*) in substance provides that where any judicial act is done in a manner substantially regular, a presumption in law arises that all formal requisites for its validity were complied with. There is no presumption in law in favour of irregularity, and it is well settled that in such case the party alleging irregularity must prove it by cogent evidence: A.I.R. 1957 Pat. 487.

The High Court can safely presume that the official act of the transferor Court in sending the case direct to the Sale Officer instead of sending it to the Collector of the district was done in a regular manner and that the Court of the Sale Officer was seized of the jurisdiction to proceed with the execution of that case: A.I.R. 1953 All. 467: I.L.R. (1953) 2 All. 381 (F.B.).

No presumption under S. 114, *Illus.* (*e*) can be drawn about the order of transfer having been made by the Court which passed the decree to the transferee Court in cases covered by Cl. (*d*) of S. 39(1), C.P.Code. A presumption which is permitted by *Illus.* (*e*) to S. 114 is only in regard to procedure and not that an order, like the one under Cl. (*d*), has been made by the Court in its discretion. The *Illus.* (*e*) does not authorise a presumption, without any evidence, that a particular judicial act has been performed. All that it authorises is the presumption that a particular judicial act, which has been performed, has been performed regularly. [A.I.R. 1981 S.C. 416, Rel. on]: A.I.R. 1982 All. 82.

There is a presumption under S. 114 of the Evidence Act that every Court does its duty by properly following the correct procedure. This presumption extends to saying that the appellate Court in its judgment dealt with all the points which had been urged before it by mentioning as points for decision and also by giving decision on each point. This presumption is rebuttable. One way of rebuttal is by an affidavit by an advocate appearing for the appellant in the lower appellate Court to the effect that he actually urged a contention which would necessitate the framing up of a point on that contention though the judgment makes no reference to such contention. In the absence of any such rebuttal the above presumption stands. On the other hand, there is no presumption that the advocate for the appellant pressed and urged every one of the grounds mentioned in the memo. of appeal. It is open to an advocate at the time of argument to press or not to press any of the grounds which are mentioned in the memo. of appeal. The advocate is presumed to know the strength or weakness, regarding such ground mentioned in the memo. of appeal, its having or not having an adequate support in the evidence or in law and the necessity or desirability of pressing such ground or of abandoning it.

Where in the case the presumption had not been rebutted by filing affidavit, it could not be contended that the lower appellate Court had failed in its duty and committed an error of law: (1968) 1 An.W.R. 374: A.I.R. 1968 Andh. Pra. 223.

It is not of great consequence as to whether a competent Court or authority follows the procedure prescribed in the Wilkinson's Rules or one prescribed in the Code of Civil Procedure for the disposal of a dispute before it. But if it is known whether a particular authority has the power to try such a suit, there is inherent lack of jurisdiction in the authority or the officer to try such a suit, and in the face of this inherent lack of authority, his authority cannot be presumed: I.L.R. 45 Pat. 503.

Presumption is that Judges did their proper duty: A.I.R. 1923 Lah. 124 (D.B.); A.I.R. 1945 P.C. 151.

Presumption as to ordinary course of business—Where a Judge signs a decree, the presumption is that he had satisfied himself that it had been prepared in accordance with the judgment: 10 O.W.N. 884: A.I.R. 1933 Oudh 466.

It is well established that the factual recitals or observations made in a judgment or order are taken to be correct unless rebutted. The burden to rebut it is on the person who challenges it. One of the methods to rebut such observation is to file the affidavit of the person who was present in the Court and to produce such material which may satisfy the Court that the recital in the judgment crept in inadvertently or it was erroneous: A.I.R. 1995 S.C. 350.

Mere statement of a party without any affidavit cannot be preferred to a fact recorded by Magistrate in his order: 1965 B.L.J.R. 582: (1965) 2 Cr.L.J. 530: A.I.R. 1965 Pat. 442.

Statements made in course of judicial proceedings—Report of Magistrate on transfer application—It is administrative and not judicial matter—Value to be attached: (1963) 1 Cr.L.J. 820 (Madh. Pra.).

Judicial and Official Acts—Sale proclamation signed by munsarim of Court is valid: I.L.R. (1960) 10 Raj. 1088.

The Court must be satisfied that a Court peon's return is genuine before a presumption can be raised that all things had been done properly: (1949-50) 54 Cal.W.N. 810.

Order of remand not mentioning provision of law—Presumption is that it is passed under O. 41, R. 23, C.P. Code: A.I.R. 1969 Andh. Pra. 216.

Every judicial tribunal set up by a statute must be deemed to act properly and within the powers conferred upon it by the Legislature. If a member of the Commission under Taxation on Income (Investigation Commission) Act, 1947 discharges functions which may be delegated to him by the Commission, the Courts must presume that there was a proper authorisation: A.I.R. 1954 Bom. 184 (F.B.).

It is a well established rule of law that in a case fully fought out between the parties and well represented by eminent Counsel on both sides if a point available on the face of it is not argued or pressed then the presumption is that that point is without substance: I.L.R. 36 Pat. 1027: A.I.R. 1959 Pat. 89.

When there is no mention of a contention in the judgment of the Court, the

presumption is that that contention was not put forth and urged: I.L.R. (1961) 1 Punj. 363: A.I.R. 1961 Punj. 178.

Where a point is definitely raised in the grounds of appeal and the Court makes no mention thereof in its judgment, it must still be presumed to have performed the judicial act of writing a judgment regularly and properly: A.I.R. 1928 Lah. 94. Where a committing Magistrate writes at foot of the deposition that the cross-examination is being reserved he does not mean that it is being reserved by him and that the accused has not been given an opportunity for cross-examination: 120 I.C. 524: A.I.R. 1930 Sind 54.

Trial of offence under S. 20, Cattle Trespass Act—Jurisdiction of Magistrate—Presumption is that Magistrate must have taken the proceedings in accordance with law: 1967 Cr.L.J. 1354: A.I.R. 1967 Ori. 150; 1983 M.P.W.N. 128 [Presumption regarding correctness of confession recorded].

Judicial acts—Regularity of: 1957 M.P.L.J. 89.

Correctness of facts recorded in order of Court: (1961) 1 Cr.L.J. 621 (Assam).

Where the wife objected to the execution of a consent divorce decree passed by the Family Court on the ground that her signatures on the consent and the petition therefor was obtained by the husband by force and coercion, *held*, the matters of judicial record being unquestionable and not open to doubt, the consent decree cannot be quashed on that ground: A.I.R. 1995 Bom. 30.

Where the appearance of a legal practitioner had been noted by the Judge in his own handwriting but the legal practitioner denied his appearance, such denial being neither supported by the record, nor proved by any independent evidence, *held*, that both on principle and authority it is the record made by the Presiding Judge that is conclusive on the point and not what the practitioner chooses to state after four years: 12 Mys.L.J. 311: 39 Mys. H.C.R. 461.

Allegation of denial of right to assistance by legal practitioner—No mention of request for such assistance on record—*Prima facie* order-sheet to be taken as representing correct state of affairs—*Held*, there was no such request and that article was not violated: 1968 Cr.L.J. 121 (Ori.).

Appointment not challenged as irregular on the ground that minor had attained age of majority or on any other ground by the said minor or by proposed guardian. *Held*, presumption was that appointment was made in accordance with procedure laid down in O. 32, R. 3(4) of C.P.Code and decision given in proceeding was binding on all—Minor could not challenge that decision specially when it was given against the guardian who was also the head of family: 1966 All.L.J. 697: 1966 All.W.R. (H.C.) 515.

Failure of Court to record finding under S. 476, Cr.P.Code, that it is expedient in interests of justice to enquire into offence—No presumption can be drawn that Court had formed requisite opinion regarding expediency to enquire into matter, even if Court making complaint may be Court before which offence was committed. [A.I.R. 1962 All. 251, Dissent.]: A.I.R. 1970 Andh. Pra. 119: 1970 Cr.L.J. 443.

Where sums are paid before the Presiding Officer of the Court at the time when a receipt was given for them, the presumption under S. 114 is that the ordinary course of business was followed in the case in question. The mere statement by appellant's Counsel that these sums are not always paid at the time when the receipts are given was sufficient to throw the onus on the prosecution of proving that the plea was wrong: A.I.R. 1923 Lah. 566.

Judicial act—Revision petition—Filing of—Delay—Tribunal hearing case on merits after it had once postponed decision on question of limitation—Tribunal is presumed to have condoned delay in presentation of petition: (1969) 1 Mys.L.J. 391: 18 Law Rep. 1.

When the order of the Magistrate is assailed on revision, then the High Court has to go into the question on the material on the record and the permissive presumption under S. 114, *Illus.* (*e*), Evidence Act, can by no means be conclusive in favour of the legality of the order: 1969 Cr.L.J. 1370: A.I.R. 1969 Del. 304.

Where the Court dispenses with the requirement of serving a notice under S. 80(2) of the Code of Civil Procedure when urgent relief against the Government or a public officer is sought, *held*, the legality of the Court order is to be presumed under

S. 114(*e*): (1987) 100 Mad.L.W. 240: A.I.R. 1987 Mad. 187.

Presumption from entry of service of notice in order sheet of Court: (1941-42) 46 Cal.W.N. 967: I.L.R. (1943) 1 Cal. 22: A.I.R. 1943 Cal. 114.

An entry in the order sheet of a suit to the effect that summons was served on the defendant raises a presumption under S. 114, *Illus.* (*e*), Evidence Act that the service was in accordance with Rules prescribed and that the judicial and official acts were duly performed in the particular case: 3 D.R. 82; I.L.R. (1956) Trav.-Co. 1130.

The certificate in the order sheet of the Court in the proceedings for commutation of rent, showing service of notice on the landlord raises a presumption that the notice was validly and properly served upon him. This presumption, however, is rebuttable and the onus to rebut it lies heavily upon the landlord: A.I.R. 1958 Pat. 577.

No evidence about non-affixation of prohibitory order—Presumption that Court proceedings were validly done would apply: A.I.R. 1968 Pat. 370.

Presumption of regularity of service of summons—Rebuttal of—Order refusing permission to examine witnesses in rebuttal of presumption held not justified: I.L.R. (1953) Madh. Bh. 222: A.I.R. 1953 Madh. Bh. 82.

Where affixation of notice on the disputed property under S. 145(3) of the Code of Criminal Procedure was not denied, *held*, it could legitimately be presumed under S. 114, *Illus.* (*e*) that all requisite legal formalities had been completed: A.I.R. 1971 Manipur 1.

Where there was no personal service but substituted one as notice was said to have been affixed at the outer door of the plaintiff and even the process server was not examined, *held*, service of notice could not be held to be valid merely on the presumption under S. 114. [A.I.R. 1943 Cal. 114, Rel. on]: A.I.R. 1981 Cal. 273.

Service of summons under O. 5, R. 20, C.P.Code—Presumption of correctness attaches to such act: (1973) 2 Cut.W.R. 1413.

Where the mandatory notice required under Ss. 37-A and 59 of the Madras Revenue Recovery Act, 1864 was not served when the property of a dead owner was auctioned to effect recovery thereunder, *held*, since the official and judicial act was *ex facie* contrary to the law, the Courts below could not have drawn the presumption of their having been regularly performed: (1972) 85 Mad.L.W. 724: A.I.R. 1973 Mad. 234: (1972) 2 M.L.J. 423.

It is not possible for a Court to ignore the evidence afforded by the Court officials to the effect that delivery in execution has been effected, on the mere allegation that there was no actual delivery. In order to reject the official records such as the bailiff's endorsements, there must be a definite and specific plea of fraud. In the absence of a plea of fraud with full particulars as are necessary to support the same, the Court shall not direct an enquiry as to whether there is actual delivery. In every case the judgment-debtor is interested in stating that there is no physical delivery in order that he may obtain an order of stay in the appellate Court. A bare allegation that the delivery is a paper delivery and the appellant continues in possession is hardly sufficient to direct an enquiry whether there is physical delivery: (1991-1) 107 Mad.L.W. 244.

Delivery of symbolic possession—Formalities—Burden of proving that formalities required by law were not complied with, at the time of giving symbolic possession of plaintiff is on defendant and not on plaintiff: 1965 Kash.L.J. 1: A.I.R. 1965 J.&K. 31.

Presumption that delivery of possession in execution is according to law—Onus is on the defendant to disprove it: A.I.R. 1928 Lah. 910: (1929) 31 Punj.L.R. 1001.

Where Tahsil Court delivered possession in revenue case, *held*, action may be presumed to be correct unless otherwise proved: (1979) 2 M.P.W.N. 6.

Where the Court accepted deposit by the tenant under S. 30 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, *held*, it would be deemed that the Court was satisfied that requirement of S. 30 had been fulfilled; the burden to rebut that presumption would be on the landlord: 1981 All.L.J. 844.

Judgment referring only to some of the witnesses—No presumption that Court was unmindful of other evidence can arise: 1967 Cr.L.J. 1042: A.I.R. 1967 Pat. 254.

There is presumption under S. 114 of the Evidence Act that the evidence was read

over to the witness, interpreted and admitted by him to be correct in view of the endorsement certified by at the bottom of the deposition. When the witness denies the factum that the deposition was read over, it is for him to displace the statutory presumption, and that the testimony of a witness put forth is found by the Court to be not believable the matter ends there. Further, S. 278(2), Cr.P.Code contemplates making a memorandum as regards the objection raised by the witness when the evidence was read over and found by him to be not correct but not re-recording or correcting the evidence already recorded. Thus, there is no power in the Court to re-record the evidence of a witness: 1989 Cr.L.J. 2265 (Andh. Pra.).

Presumption of correctness of a certified copy of a deposition in a suit of Cutch Court: (1928) 30 Bom.L.R. 1519: A.I.R. 1929 Bom. 24.

Presumption that oath was duly administered. *See* 11 All.L.J. 933: I.L.R. 35 All. 575.

Record of deposition of witness — As there is presumption in law that Court proceedings have been regularly conducted, it must be presumed that oath had been duly administered to the witness when he had appeared in the witness box for giving his evidence: 1968 B.L.J.R. 436: 1968 Cr.L.J. 213: A.I.R. 1968 Pat. 74.

Where the record showed that there was no examination of the complainant on oath before issuing process, *held*, non-examination of the complainant on oath and non-signing the same by the complainant as well as the Magistrate being in direct violation and in equal disregard to the mandatory provisions of S. 202 of the Cr.P.Code, *held*, no presumption could be raised that the Magistrate must have acted according to his duties: (1982) 1 Bom.C.R. 117.

In the absence of evidence judicial or quasi-judicial, tribunal can base its conclusion on notorious facts—Amount paid as bonus to employees—Conclusion that it cannot be recovered even if not allowable, is valid: 1967 B.L.J.R. 690: (1967) 2 I.T.J. 251.

Where there is no evidence that a non-compoundable offence was compounded, it is to be presumed that criminal Court acted according to law and the presumption is that the criminal case was withdrawn and not compounded: 116 I.C. 749: A.I.R. 1929 All. 456. The very fact that the Magistrate convicted and sentenced the accused raises a presumption that he was not a minor at the date when he was convicted and it is for him to rebut that very strong presumption: A.I.R. 1956 Bom. 582.

Furnishing copies of documents to accused—Obligation on Magistrate to enquire—No complaint from accused as to non-supply—Presumption arising for: 1966 Cr.L.J. 990: A.I.R. 1966 Guj. 217.

Though it may be desirable and advantageous to have concessions recorded under the signature of the maker in order to avoid confusions and difficulties, such a procedure may not always be possible on account of practical difficulties. During the course of argument, Counsel may be making concession on factual and legal questions. It may not be possible or practicable to get these concessions recorded under the signature of the maker. In some cases the argument notes of the Presiding Officer may be the only record, other than the judgment or order, from which the correctness of the concession could be verified later in case of doubt or dispute. In some cases such a record also may not be available and what is contained in the judgment or order and the memories of the Presiding Officer or the Advocate alone could be looked upon. A party may resile from a concession on the ground that it was made on a wrong appreciation of the law or fact and had led to gross injustice and the appellate Court may permit him in rare and appropriate cases. But he may not be permitted to call in question the very fact of making the concession recorded in the judgment: 1989 Cr.L.J. 2464: (1989) 2 Hindu L.R. 381 (Ker.).

Compromise decree—Presumption as to its validity: A.I.R. 1965 Pat. 345.

It must be assumed that a Court which passed a decree on a compromise assented to by a pleader of one of the parties, satisfied itself that the pleader was authorised to effect a compromise on behalf of his client unless the contrary is established: (1936) 38 Punj.L.R. 467: A.I.R. 1937 Lah. 91.

Where a compromise was recorded by the Court in the manner provided in O. 23, R. 3 of the Code of Civil Procedure, carrying the Court's endorsement that it was read and recorded and the parties, having accepted it, put their signatures; the compromise stands on the same footing as a contract; if impugned by any party thereto, heavy burden would lie on that party to prove that the

compromise was not explained to her and its admission in the compromise was procured by fraud; the Court's endorsement is a judicial record made in discharge of judicial duties and is to be taken as authentic and in itself a true evidence; the presumption under S. 114 would also arise in its favour: (1986) 1 Bom.C.R. 81.

Order sheet shows that a memorandum expressing that the complainant had no objection to the petition for withdrawal filed by the C. S. I. was filed—Such memorandum not available in the record—The statement in the order-sheet must be taken to be erroneous: (1971) 1 Cut.W.R. 600.

25. Happening before Court.—When there is a dispute as to what happened before a Court or tribunal, the statement of the Presiding Officer regarding it is generally taken to be correct: A.I.R. 1957 S.C. 882: (1958) 1 M.L.J. (S.C.) 67: 1958 S.C.R. 499; I.L.R. (1958) Punj. 274; (1964) 1 Lab.L.J. 644: (1963) 65 Punj.L.R. 901. The best evidence of the fact as to what happened before the Court is what is recorded by the Judge in his order. The parties are precluded to challenge the correctness of the statement made by the Court in the order. It can only be changed if the Judge himself says that he incorrectly recorded the order or it did not so hapen but by mistake that was recorded or if both the parties agree that what is recorded by the Court is not correct: A.I.R. 1971 Pat. 102; 1983 Punj.L.J. 402 (D.B.).

Contradiction in affidavits of parties regarding what happened in Court, *held*, Judge's note should be preferred—Judge had no interest or motive in supporting allegations of one side or the other and it must be presumed that he acted properly: A.I.R. 1928 Mad. 625 (D.B.).

Where a statement appears in the judgment of a Court that a particular thing happened or did not happen before it, it ought not ordinarily be permitted to be challenged by a party unless, of course, both the parties, to the litigation agree that the statement is wrong, or the Court itself admits that the statement is erroneous: A.I.R. 1982 Ori. 245; A.I.R. 1971 Pat. 102.

The orders recorded by the Court are the final word as to what transpired between the parties in the Court at a particular point of time and the subsequent assertion of a party that some facts were wrongly recorded in the impugned order are of no help especially when no such objection was got recorded before the trial Court at the time of passing the relevant order. Thus, where the plaintiff or his Counsel did not object to passing of the order by the trial Court on the ground that the consent of the plaintiff was wrongly recorded therein and actually he did not consent to treating defendant as minor or to the appointment of his guardian, *held*, the order of the trial Court become final and could not be interfered with: (1989-1) 95 Punj.L.R. 314: (1988) 2 Rev.L.R. 477.

Where the High Court while dismissing a criminal revision against the trial Court's refusal to summon the Chief Minister for trial on corruption charges for want of the Government's prior sanction, directed on concession by the Government that the sanction for such prosecution should be dealt with not by the Law Minister but by the Governor in his individual discretion, and in the Special Leave Petition, the Government Counsel denied having made any such concession, *held*, the Supreme Court declined to launch into an inquiry as to what transpired in the High Court; it is simply not done; public policy bars and judicial decorum restrains the Supreme Court; matters of judicial record are unquestionable; they are not open to doubt; Judges cannot be dragged into the arena; judgments cannot be treated as mere counters in the game of litigation; it is well settled that statements of fact as to what transpired at the hearing recorded in judgment are conclusive; no one can contradict them by affidavit and other evidence; a party claiming wrong recording is bound to call the attention of the very Judges, while the matter is still fresh in their minds, that the statement recorded was made in error; that is the only way to have the record corrected: A.I.R. 1982 S.C. 1249: 1982 Cr.L.J. 1581: (1982) 2 S.C.C. 463.

Where the arbitrator had mentioned in his award that the parties had paid him Rs. 100 each on account of his fee, *held*, this statement of the arbitrator, like a statement of a Judge as to what took place before him in relation to a proceeding should be regarded as almost conclusive and at any rate its correctness has to be presumed unless there is strong proof to the contrary: A.I.R. 1970 All. 525 (F.B.); A.I.R. 1924 Mad. 274.

26. Regularity of attachment and sale in execution.—The presumption under S. 114 regarding regularity of performance of judicial and official acts can be raised when the formalities regarding attachment are complied provided attachment is actually proved by the Amin's report or otherwise: [A.I.R. 1934 P.C. 217, Foll.; A.I.R. 1961 Ori. 22, Rel. on; A.I.R. 1928 P.C. 139, Expl.; A.I.R. 1948 Mad. 191; (1966) 1 M.L.J. 413, Disting.]: A.I.R. 1977 Ker. 119: 1976 Ker.L.T. 102: I.L.R. (1976) Ker. 361 (F.B.).

An order of attachment before judgment under O. 38, R. 5 of the C.P.Code does not by itself prove that the attachment was in fact effected; the presumption under S. 114, *Illus.* (*e*), therefore, is of no avail; that presumption can be drawn only if the factum of the property having been attached is established; it is only thereafter that the presumption of attachment having been regularly made can be invoked: A.I.R. 1995 Karn. 35 (D.B.).

Where after an attachment before judgment under O. 38, R. 5 of the C.P.Code, the plaintiff obtained the decree and obtained another attachment in execution, *held*, the second attachment did not thwart the effect of the first attachment; it continued to subsist and effective; it would be presumed to have been done in regular course; in fact, the second attachment is redundant: (1975) 88 Mad.L.W. 28.

Presumption about compliance of O. 21, R. 46(2), C. P. Code. *See* A.I.R. 1954 Bhopal 30. Attachment before judgment—Proof of—Presumption—When can be made. *See* I.L.R. (1954) Ori. 345: A.I.R. 1954 Ori. 222.

Applicability—'*A*' filing suit against *B* for recovery of money for property sold—Order for attachment before judgment—Notice in Form No. 5 of App. *F* pursuant to O. 21, R. 5 issued but prohibitory order pursuant to O. 21, R. 54 in Form No. 24 of App. *E* not served on *B*—After alleged attachment and long before Court's sale *B* selling property to *C*—*Held*, attachment was not effective and therefore, *A* could not make use of provisions of S. 64 to defeat rights of *C*—*Held*, further that since there was clear evidence as to what exactly was done, recourse, could not be had to presumption under S. 114: (1969) 17 Law Rep. 482: (1969) 1 Mys.L.J. 234.

When property is attached in execution of a decree, it can be presumed that the property was attached by the Amin in accordance with the law. An official act can be presumed to have been done correctly: 1959 All.L.J. 781: A.I.R. 1960 All. 453.

If the only evidence available is an order of the Court showing that attachment had been made, it would no doubt be presumed that all the necessary formalities were complied with. But where the execution record is available and the process-server's report regarding the attachment does not show that any copy of the order was pasted on a conspicuous part of the Court-house, the initial presumption is that what is not mentioned therein was not done: (1939) 41 Punj.L.R. 149: A.I.R. 1939 Lah. 284.

Where all other modes of publication had been adopted by the Court and the Court had also been careful to send a copy of the attachment order for the publication on the notice Board of the Collector's Office, the Court would be justified in raising a presumption under S. 114 regarding the judicial and official act having been done as prescribed by law. [A.I.R. 1934 P.C. 217, Rel. on; A.I.R. 1948 Mad. 191, Disting.]: A.I.R. 1974 Guj. 1: (1973) 14 Guj.L.R. 280.

Where the suit land was sold in auction by the Revenue Court for arrears of rent and the same is settled with the appellants as auction-purchaser, in the absence of any evidence, the normal inference in such a case under S. 114, would be that the Court auction sale was done in a regular manner, and that the arrear list had been accepted by the Revenue Authorities according to the rules of the State: (1960) 2 Ori.J.D. 82.

Where a Court auction sale was challenged on the ground that it was for a grossly inadequate consideration but no application was made under O. 21, R. 90 of the C.P.Code for setting aside the sale, *held*, it could be presumed that the price fetched at the auction sale was the best price that the property sold could fetch. [1966 All.L.J. 107 (F.B.), Disting.]: A.I.R. 1980 All. 63: (1979) 2 All.L.R. 431.

Where the Report of the Court auctioneer averred that the auction was postponed for less than 30 days to facilitate higher bids which was announced on the spot and the endorsement thereof was made on the bid sheet, *held*, his record *per se* being legal evidence as per S. 114, *Illus.* (*e*), his non-examination as a witness is immaterial; no adverse

inference could be drawn for his non-examination. [A.I.R. 1983 Del. 317, Affirm.]: A.I.R. 1985 N.O.C. 181 (Del.) (D.B.).

Certificate against decree-holder under S. 15(1)—Effect—Presumption as to issue of certificate—Application for execution of decree—Creditor held entitled to exclude time of pendency of conciliation proceedings as also time during which debt remained unpaid—Application not barred by limitation: 1962 M.P.L.J. 213.

Where the same Presiding Officer was acting as Munsif as well as Judge of Small Cause Court and in respect of a suit decreed as Small Cause Court a sale certificate was issued which was clearly purported to have been issued by the Court of the Munsif, *held*, the mere fact that below the signatures, the Presiding Officer was described as Munsif and Judge, Small Cause Court, does not detract from the validity or correctness of the sale certificate. In the face of the sale certificate, it was not necessary to establish that the decree had in fact been transferred for execution by the Court of the Judge, Small Causes to the Court of Munsif, as official acts must be presumed to have been performed regularly: A.I.R. 1978 All. 413: 1978 All.L.J. 629: (1978) 4 All.L.R. 564.

Where the property in question was put to public auction under the provisions of Displaced Persons (Compensation and Rehabilitation) Act, 1954 and a certificate of sale was issued as per the Rules framed thereunder, *held*, it could be presumed under S. 114, *Illus.* (*e*) that the property sold including the property in question must have been a part of the compensation pool as the act done by a public officer in his official capacity is taken as rightly done: A.I.R. 1976 Raj. 91: 1975 W.L.N. 563: 1975 Raj.L.W. 561.

Tenant must apply before relief under S. 49-N of Bihar Tenancy Act can be given—Court not bound to grant the same *suo motu*—Sale in execution not invalid on that account: 1967 B.L.J.R. 606.

Applicability—Application for setting aside sale held under provisions of Partition Act—Who can apply—Provisions of O. 21, R. 89 are attracted in view of S. 7(*b*) of Partition Act—Estoppel: I.L.R. (1963) Punj. 665: A.I.R. 1963 Punj. 531.

"Official and judicial acts"—Order of the certificate officer showing that the holder had been in arrears of land revenue even from an earlier date—Court cannot, under S. 114, presume that the sale must have taken place in pursuance of such order since sale might have taken place subsequently: A.I.R. 1967 Tripura 19.

Service of notice to J.D.—J.D. cannot be presumed to have information about defective proclamation of sale: I.L.R. (1969) 1 Mad. 781: (1969) 2 M.L.J. 421: A.I.R. 1969 Mad. 5.

The return of the process-server regarding publication of the sale proclamation is an exhibit. There is a presumption that official acts have been duly performed. The onus is upon the judgment-debtor to show that there was no publication of the sale proclamation as alleged. Suspicion is not proof: (1956-57) 61 Cal.W.N. 468.

Auction sale of property—Certificate of sale granted to purchaser—Presumption that sale took place in accordance with formalities prescribed by law can be made: 1961 M.P.L.J. (Notes) 286: 1961 Jab.L.J. 72.

27. Regularity of official acts.—There is a presumption of regularity in respect of official acts but the said presumption is neither unrebuttable nor can it be applied without regard to the facts and circumstances of the case: 1990 Cr.L.J. 2124 (Del.); 1983 M.P.W.N. 243; I.L.R. (1971) 21 Raj. 654: 1971 W.L.N. 108.

Public records which are maintained with regularity in the ordinary course of routine must be presumed to show official acts regularly and correctly performed until the contrary is proved: (1958) 2 M.L.J. 110.

There is a presumption that every person whether in his private or official character does his duty and unless contrary is proved it is presumed that all things are rightly and regularly done. This presumption applies with greater force to official acts: A.I.R. 1971 Pat. 43 (D.B.).

There is a presumption of legality and constitutionality of the acts done by the Officers of the State in the course of performing their official duties. This presumption is, however, rebuttable and it is open to a citizen to challenge and prove the legality and constitutionality of the act done or proposed to be done: (1984) 4 Guj.L.H. (N.O.C.) 26.

Presumption under in favour of State—Availability: A.I.R. 1967 Guj. 257.

Presumption as to official acts: 1968 Lab. I.C. 1173: A.I.R. 1968 Punj. 406.

The Court must assume, in the absence of proof to the contrary, that official acts are done in accordance with rules and regulations governing them: 1955 An.W.R. 290: A.I.R. 1955 Andhra 192.

Things prescribed by statute may be presumed to have been properly done: A.I.R. 1926 All. 369 (F.B.).

Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done: I.L.R. 24 Pat. 29: A.I.R. 1945 Pat. 307. *See* also (1945) 47 Bom.L.R. 431: A.I.R. 1945 Bom. 368.

Where a statute—U. P. Agricultural Income-tax Act (III of 1949), S. 6(1), Proviso—has conferred the privilege of exercising a discretion on a responsible officer, the Court can legitimately make a presumption that he has not acted capriciously: 1952 All.L.J. 557: A.I.R. 1953 All. 25: I.L.R. (1953) 1 All. 817.

Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution: A.I.R. 1978 P.&H. 68: 1978 Lab.I.C. 123 (F.B.).

As to presumption of regularity of official acts, *see* A.I.R. 1954 Cal. 578; (1953-54) 58 Cal.W.N. 324: A.I.R. 1954 Cal. 254; A.I.R. 1957 Madh. Bh. 130; 1957 M.P.L.J. 89; A.I.R. 1959 All. 393; (1981) 1 M.P.W.N. 393.

Presumption—Regularity of official acts. Onus of rebuttal: A.I.R. 1966 Guj. 62.

The Court will assume that public servant is discharging his duty and attempts to do certain things in the course of discharge of duty: 1971 Mah.L.J. (Note) 39.

The presumption provided for in *Illus.* (*e*) to S. 114 is only a presumption as to procedure that the necessary procedure in doing all official acts has been followed. There is no presumption that in carrying out public works the Government takes necessary precautions to see that no injury is caused by negligence to the public: (1968) 70 Bom.L.R. 554: I.L.R. (1969) Bom. 564: A.I.R. 1969 Bom. 127.

Public officers are presumed to act fairly. But this presumption holds good only as long as the aggrieved person is not able to adduce facts proving the likelihood of discrimination. The presumption will be rebutted as soon as facts are placed before the Court showing that the officials, in spite of every desire to do justice, may be placed in a position where it is difficult for them to hold the balance fairly between rival claimants: A.I.R. 1960 All. 45: (1959-60) 17 F.J.R. 290: (1960) 1 Lab.L.J. 745.

The normal presumption that all official acts are properly performed must be always recognised and given effect to in the absence of evidence to the contrary: 1960 Cr.L.J. 212: A.I.R. 1960 Andh. Pra. 96.

In absence of specific proof to the contrary, regularity of official act must be presumed: 1970 Lab.I.C. 443 (Cal.).

There is a presumption that official acts have been regularly performed that they have been performed in accordance with the rules and regulations bearing on the subject. But this is a rebuttable presumption. In fact it is left to the Court to raise that presumption or not depending in the peculiar facts of each case. When officials who are required to perform their official acts regularly depose that they have failed to do so, that evidence is bound to be looked with suspicion particularly when it is self-serving or when it is given by their subordinates who are likely to be eager to have their grace or to avoid their displeasure: (1965) 1 Cr.L.J. 565: A.I.R. 1965 Mys. 128.

No act can be said to be an "official" act within the meaning of *Illus.* (*e*) under S. 114, when it is forbidden by a statute: (1958) 1 An.W.R. 527.

Before entries in official records can be presumed to have been made in the discharge of official duties, entries must be proved by calling person who had made those entries or even some one who could say about the person having made those entries: 1969 Kash.L.J. 27 (J.&K.).

The presumption that official acts were rightly carried out applies to the return of a process under O. 21, R. 22, C.P. Code, as duly served so that the burden of proving that the record is wrong lies heavily on the judgment-debtor: (1931-32) 36 Cal.W.N. 242: A.I.R. 1932 Cal. 627. *See* also (1938) 40

Punj.L.R. 142; 1938 R.D. 883; A.I.R. 1938 Mad. 705: (1938) 2 M.L.J. 266; (1947) 2 M.L.J. 310.

There is no presumption that just because an official of a Department of the Central Government files an affidavit deposing to certain facts, which are not known to him personally the affidavit is true: A.I.R. 1990 Mad. 312.

Whatever is published in a Government owned paper correctly represents the actual state of affairs relating to Government business unless it is successfully challenged and the real state of affairs is shown to be different from what is stated in the publication. [A.I.R. 1981 S.C. 361, Rel. on]: A.I.R. 1986 S.C. 2045: 1986 Cr.L.J. 1922: (1986) 2 S.C.C. 716: (1986) 88 Bom.L.R. 260.

The Constitution is intended to endure for succeeding generations to come; the founding fathers could not visualise the pitfalls in the political governance; Art. 356 has so far been used 90 times and one may even wish that it might not be "put to operation" or be a "dead letter" and at best may be used sparingly; but nevertheless the settled law remains that while interpreting the Constitution neither motives nor bad faith nor abuse of power be presumed except in individual cases; S. 114, *Illus.* (*e*) raises a statutory presumption that official acts are regularly performed. [A.I.R. 1990 Karn. 5 (F.B.), Affirmed]: A.I.R. 1994 S.C. 1918.

It is well settled that a recital in a statutory order about the necessary conditions precedent for the exercise of statutory power having been fulfilled raises a presumption about its validity; the burden would then be on the other party that the conditions were not fulfilled; however, in the absence of such a recital it would be for the authority passing the order, if challenged, to prove that the conditions were satisfied. Thus, where a suspension order did not state that the Governor was satisfied that it was necessary or desirable, as required under R. 3(1) of the All India Services (Discipline and Appeal) Rules, to suspend the official and no objection was taken to the validity of the suspension on the ground of the want of satisfaction by the Governor, such satisfaction would be presumed and need not be proved: A.I.R. 1994 S.C. 1262.

Suspension-order against Government servant—Question if proper authority in fact passed the order—Legal presumption attaches that official act of passing suspension-order was regularly performed. (Per *Das, J.*): (1966) 8 Ori.J.D. 249: A.I.R. 1966 Ori. 150.

Mala fide action or malice in law are not to be easily presumed. A party alleging these has to satisfy the Court that there are such facts and circumstances on which malice or *mala fides* could legitimately be found. The mere non-adherence by a departmental inquiry committee to the strict procedure followed by a judicial tribunal does not amount to either acting *mala fide* or acting contrary to natural justice: A.I.R. 1957 All. 671. There is a presumption that public officials will discharge their duties honestly and in accordance with the rules of law: 1957 Ker.L.T. 971: A.I.R. 1958 Ker. 33.

Where vacant posts of lecturers under Regn. 6(1) framed under the U.P. Intermediate Education Act were required to be filled up by promotion from lecturers in lower grade having a minimum of 5 years' continuous substantive service on the date, the vacancies occurred and certain lecturers holding the higher posts were found to be having no such service, *held*, the presumption would be that those vacancies were filled up by direct recruitment and not by promotion: A.I.R. 1993 S.C. 2592: (1993) 2 U.J. (S.C.) 665.

Appointment of Chairman of Election Tribunal—Presumption. *See* I.L.R. (1953) Raj. 768: A.I.R. 1954 Raj. 129.

Where a blind person, otherwise qualified, had been appointed as the member of State Public Service Commission, and had been functioning as such and there was nothing to show that his initial appointment was illegal, *held*, there was a presumption of regularity of his appointment, which had not been rebutted: A.I.R. 1993 Pat. 22: 1992 B.B.C.J. 225: (1992) 2 B.L.J. 122: (1992) 1 Pat.L.J.R. 636 (D.B.).

Regularity of official acts—Original order appointing *G* as consolidation officer not produced by State—There is a presumption that *G* must have been so appointed because he would not act without a proper appointment: (1967) 69 Punj.L.R. 27: (1967) 2 S.C.R. 143: A.I.R. 1967 S.C. 856.

Where while being the Chairman of a Housing Board, the respondent also functioned as member of the Legislative Council and no sanction as required under S. 7 of Bihar State Housing Board Second

Ordinance, 1978 to undertake the work unconnected with the office of the Chairman of the said Housing Board was obtained, *held*, no implied sanction in relation to orders passed by the State Government could be inferred: A.I.R. 1980 Pat. 54: 1980 B.L.J.R. 228: 1980 B.B.C.J. (H.C.) 32 (D.B.).

Once it is proved that an officer was lawfully invested with the power to carry out his duties, there may arise a presumption so far as the question of the manner of performing those duties is concerned. But there is no justification in presuming the very investment of those powers in the absence of evidence altogether and particularly when such appointment is categorically challenged in the cross-examination of the said officer. [A.I.R. 1946 Bom. 492, Rel. on]: (1987-1) 7 Guj.L.H. 407: (1987-2) 28 Guj.L.R. 725.

Where the Governor's subjective satisfaction about unsuitability of a candidate for a judicial post in civil services, entitled on merits to such appointment, was alleged by him to be based on his political affiliations with the R.S.S. and Jan Sangh and the denial of the ground based on political affiliations by the Government was found to be not credible but since the satisfaction was claimed to be based on other matters which the Government did not, and could not be forced to, disclose, *held*, the exercise of discretion by the Governor could not be said to be *mala fide*; the Courts normally presume that a discretion vested in a Government functionary is exercised fairly, and even more strongly when it is exercised by the Governor, the highest executive authority in the State; abuse of power is not to be easily assumed where the discretion vests in the Government and not in a minor official: A.I.R. 1961 All. 361.

Where the Tehsildar granted permission under S. 3 of the U.P. Rent Control and Eviction Act, 1947 to file eviction suit, *held*, the presumption is that the District Magistrate must have duly authorised the Tehsildar to grant such permission: A.I.R. 1973 All. 24: 1972 All.W.R. (H.C.) 628.

It is open to the Commissioner of Police to permit a Deputy Commissioner to exercise and perform any of the powers, functions and duties to be exercised by him. Where the authority which was given to the Sub-Inspector was an authority signed by the Deputy Commissioner of Police, but the authority has been issued by the Commissioner of Police, though signed for him by the Deputy, the authority cannot be held to be invalid: A.I.R. 1956 Bom. 168: 1956 Cr.L.J. 382.

Presumption—Powers of requisitioning by State given to Collectors—Satisfaction about necessity by Collector—State presumed to be satisfied: A.I.R. 1969 Punj. 376.

Where a certificate issued under S. 3 of Revenue Recovery Act not by the Collector but by a person who signed it "for Collector" was impugned as invalid, *held*, there is a general presumption that the official acts had been regularly performed and so, it could be presumed that the person authorised to sign "for Collector" must have signed the certificate: A.I.R. 1978 Andh. Pra. 420: (1978) 2 An.W.R. 443.

Where a contract is *ex facie* executed on behalf of the Governor by an officer in the course of official business and discharge of his executive functions, *held*, it has ostensibly to be taken to be in conformity with the requirement of Art. 299 of the Constitution; and if the State contends that the officer executing the contract had no authority, the burden to prove the same would rest on the State itself: A.I.R. 1977 Pat. 258 (D.B.).

Where by an open advertisement, the Collector acting on behalf of the President of India and in association with the Department of Tourism invited tender for lease of land and construction thereupon of a good and accomplished restaurant and eventually a completed contract between the parties was executed, construction was raised and the restaurant partially started functioning when the Government cancelled the contract on the ground of want of authority in the Collector, *held*, in so far as the petitioner were concerned, who were the other party to the agreement, they would certainly presume that the said official act of execution of document by the Collector was done regularly and that the Collector was acting officially for which he was authorised to do so and that would create legal lease-hold rights in their favour, more so, in view of all the events and the positive recitals in the lease deed and also by subsequent acts of the Collector and other officials: (1989) 2 Bom.C.R. 261 (D.B.).

Acting as Presiding Officers and Polling Officers in elections is *prima facie* evidence of their appointment; the law presumes in favour of regularity of acts and against misconduct and bad faith; and also because invalidity of an act or appointment of a public nature is more susceptible to detection than if it is of private nature; it is inherently improbable that a person would act officially unless he in fact held the office or appointment: A.I.R. 1982 N.O.C. 113 (Gau.).

Circular by a public servant stating that it was made on the authority of the superior officer—Presumption: 146 I.C. 572: A.I.R. 1934 Mad. 27.

Existence of industrial dispute—Reference reciting satisfaction of Government—Regularity of reference must be presumed: A.I.R. 1969 Madh. Pra. 248.

Where the State Government refused to make reference of a dispute under S. 10 of Industrial Disputes Act, 1948, *held*, so as high authority as the State Government should be presumed to act with complete propriety and without any bias while exercising a statutory function unless contrary was proved: A.I.R. 1971 Mys. 22: (1970) 2 Mys.L.J. 244 (D.B.).

Applicability—Order purporting to have been made under S. 3, U.P. Industrial Disputes Act, 1947—No expression of compliance of condition precedent—Presumption as to such compliance: A.I.R. 1956 All. 689.

Where special appeals were filed under S. 18, Rajasthan High Court Ordinance, 1949, and R. 134 of the Rules for High Court of Judicature for Rajasthan by Additional Advocate General, Rajasthan, *held*, it could be presumed under S. 114, Evidence Act, 1872, that he was duly authorised to file the said appeals: A.I.R. 1993 Raj. 76: (1992) 2 Raj.L.W. 344.

Tauzi ledgers being official documents, the Court repose great confidence on their fidelity and accuracy as being official papers kept in due course of business, properly and regularly. There is, therefore, a presumption that the kist dates, mentioned in them are the correct dates, and the onus is on a party disputing the same to prove the contrary: 226 I.C. 393: A.I.R. 1947 Cal. 283.

Endorsement by the Notary Public "document subscribed and sworn before him" raises a presumption of regularity of official acts, that he must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person: A.I.R. 1971 S.C. 761: 1971 U.J. (S.C.) 379: (1971) 73 Punj.L.R. 314: (1971) 1 S.C.R. 38.

The presumption is that the public purpose of the Eviction Act for which the person was sought to be evicted from the public land was duly specified in the notice in compliance with the requirement of the Act. The maxim is *omnia praesumuntur solenniter esse acta* (meaning all things are presumed to have been done rightly): 1979 All.L.J. 714.

Permission to file suit for ejectment—Contention that permission granted by Rent Controller and Eviction Officer was invalid —Defendant not raising express plea that Rent Controller was not the officer duly authorised under S. 2(*d*) to grant such permission—*Held*, Court could presume that Rent Controller was duly authorised to grant such permission: 1967 All.L.J. 371.

Suit for ejectment—Plaintiff proving authority of Rent Control and Eviction Officer granting permission under S. 3 of U.P. Temporary Control of Rent and Eviction Act (III of 1947), by documentary and oral evidence—Defendant neither challenged such authority at the time of granting permission nor adduced, any evidence to disprove the authority—Presumption would be that Rent Control and Eviction Officer had such authority: 1964 All.W.R. (H.C.) 413: 1964 All.L.J. 788.

Where the Registrar of the society passed order of supersession against the petitioner society and the said order recited that a notice was served to the petitioner but it failed to respond, *held*, there is a presumption of regularity attached to an official act, therefore, if the order of supersession stated that the notice was served there was presumption that it was actually served: A.I.R. 1981 J.&K. 85 (D.B.).

Even during the strike period, although case record, due to non-availability of staff, is not put up before the Presiding Officer, still the requirement of preparing and signing the Daily Cause List is followed and one copy of the Daily Cause List is hung up on the Court's notice board and another copy is sent to the Bar Association. Thus, when there is no assertion that this was not done during the strike period, *held*, it must be presumed that the Daily Cause List was duly signed

and hung up on the Court's notice board and also sent to the Bar Association: (1992-1) 40 B.L.J.R. 151.

Where a party challenged the grant of land by the Tehsildar, an official act, *held*, there is a presumption that he did so in accordance with proper procedure; obviously, the burden is on the party to call for necessary records, implead the Tehsildar in the suit and show that the procedure followed by the Tehsildar was vitiated by want of notice or violation of the principles of natural justice: A.I.R. 1984 Karn. 45: (1983) 2 Karn.L.J. 409.

Where a Mouzadar, while on leave, resigns and the Government orders the Deputy Commissioner to fill the vacancy after inviting applications and to allow the officiating Mouzadar to continue till the permanent appointment was made, the presumption would be that the Deputy Commissioner acted in accordance with the Government's order and the order was communicated to the officiating Mouzadar: A.I.R. 1954 Assam 12: I.L.R. (1953) Assam 447.

Allegation against Collector of Customs that he ante-dated his order under S. 110(2) of Customs Act—Non-production of affidavit denying the same—Effect: A.I.R. 1968 Mys. 89.

Where a candidate was not admitted in the Medical College in the quota reserved for the Scheduled Tribes though his father's service record showed that he belonged to a backward caste but not to a Scheduled Tribe, *held*, reasoning was obviously incorrect; the Scheduled Tribes are one of the recognised species of the genus "backward classes"; the entry in the service record, the genuineness whereof was not challenged, could not be disregarded: (1987) 3 Bom.C.R. 615 (D.B.).

28. Presumption to be raised only when official act has been done.—S. 114, *Illus.* (*e*) simply raises a presumption as to the regularity of the procedure, if the official act is as a matter of fact proved to be done and not otherwise: (1940-41) 45 Cal.W.N. 44: A.I.R. 1941 Cal. 353. *See* also (1944) 46 Punj.L.R. 266: A.I.R. 1944 Pesh. 34.

There must be proof that the act was done—No presumption without such proof: I.L.R. 8 Pat. 1: A.I.R. 1928 Pat. 600; 151 I.C. 337: A.I.R. 1934 Rang. 207 (a case of attachment); under S. 114(*e*) if an official act is proved to have been done, it will be presumed to have been regularly done: I.L.R. 8 Pat. 1; A.I.R. 1934 Rang. 207; A.I.R. 1939 Pat. 364. *See* also I.L.R. 7 Pat. 733: A.I.R. 1928 Pat. 459; I.L.R. 58 Cal. 598: A.I.R. 1931 Cal. 753.

Though the law enables a presumption to be drawn that official acts have been done in accordance with law, the presumption can be drawn only if a particular act is proved to have been done. There is no presumption that any particular act is done: I.L.R. (1979) 1 Karn. 1326.

S. 114, *Illus.* (*e*) only means that if an official act is proved to have been done, it will be presumed to have been regularly done; but it does not raise any presumption that an act was done of which there is no evidence and proof which is essential to the case: (1945) 47 Bom.L.R. 431: A.I.R. 1945 Bom. 368; A.I.R. 1956 Bom. 680: 1956 Cr.L.J. 1294; A.I.R. 1955 Andhra 107: (1954) 2 M.L.J. (Andh.) 220; I.L.R. 36 Pat. 989; (1989) 2 Raj.L.R. 755.

It is not, therefore, permissible to presume that a statutory notice was duly issued, and served on the plaintiff in the absence of any evidence that a notice was as a matter of fact, issued and served on him: A.I.R. 1955 Andhra 107: (1954) 2 M.L.J. (Andh.) 220.

Under S. 114, *Illus.* (*e*), in respect of an official act which has been done, it is presumed to have been done in the proper manner. But when the act itself has not been done, there is no presumption. Thus, when there was no conclusive proof regarding factum of service of registered notice, *held*, presumption of due service cannot be raised from the mere factum of issuance of such notice with correct address and its registration with postal authorities: (1987) 100 Mad.L.W. 750.

29. Presumption regarding Acts, Orders and Notifications of Government.—(*See* also S. 57, Note 2). Constitutionality of Act—Presumption in favour of. *See* A.I.R. 1957 J.&K. 32 (F.B.).

Constitutionality of statute—Presumption: I.L.R. (1961) 1 Punj. 283: A.I.R. 1961 Punj. 24.

Whereas presumption of constitutionality will remain attached to a statute which has been challenged on the ground that it violates Art. 14 of the Constitution, and the burden to prove the contrary by pleading the necessary facts would be on the petitioner, the onus to prove that the restriction imposed on a fundamental right guaranteed to

a citizen under Art. 19(1) is reasonable, will be on the State, once it is shown that the right has been taken away or even abridged by the impugned legislation. [A.I.R. 1964 S.C. 925, Foll.]: A.I.R. 1983 J.&K. 100.

Presumptions—Good faith of a Legislature in enacting a statute must be presumed: (1966) 2 M.L.J. 68: I.L.R. (1966) 2 Mad. 437: A.I.R. 1967 Mad. 57 (F.B.).

Presumption as to official acts—Legislature must be presumed to know the facts and conditions rendering a statute expedient and beneficial: (1966) 2 M.L.J. 68: I.L.R. (1966) 2 Mad. 437: A.I.R. 1967 Mad. 57 (F.B.).

In view of S. 114, it would be presumed that the rules which are required to be placed before the each house of the Parliament must have been placed accordingly. It is for the party making such a challenge to bring on the record material date in support of such challenge: (1972) 12 Guj.L.R. 725.

The statement of facts contained in the Official Gazette on private affairs or historical facts in some cases is the best evidence of facts stated therein; though entitled to due consideration, it is not conclusive of the matters requiring judicial adjudication; in an appropriate case where the evidence on record is not sufficient to prove the fact in issue, the statement of such facts in the Official Gazette may be relied upon without further proof as corroborative evidence. Thus, where the question in issue was whether Dhangars (by caste) of Bombay Province, were governed by the Banaras School of Hindu Law, *held*, the facts stated in the Indore State Gazette regarding their social status and habitation may be relevant and may in an appropriate case be presumed to be genuine but not conclusive; however, in complete absence of evidence to prove the party's family or ancestors' migration from Mathura area, the Indore State Gazette could not be accepted as sufficient to prove such migration for connecting Holkars of Indore with Dhangars of Bombay Province: (1990) 1 Hindu L.R. 306 (S.C.).

Presumption under Ss. 81 and 114 (*e*), Evidence Act apply to publication—S. 5(2) of Madras General Clauses Act complied—Effect of—Gazette held published on date it bore—Assuming publication sometime later—Act not rendered unconstitutional or invalid: I.L.R. (1961) 1 Andh. Pra. 296.

Notice of rule under Defence of India Rules—Absence of evidence as to direction on manner of publication under R. 119(1)—No presumption of knowledge arises. *See* (1945) 47 Bom.L.R. 431: A.I.R. 1945 Bom. 368. *See* also A.I.R. 1945 Pat. 307. But see *infra*. Where a Provincial Government's order regulating export of ghee is published in the provincial Gazette, it may be presumed that the publication of the order by the Government is sufficient publication and it may be further presumed that publication was made in the Gazette in compliance with all the provisions of R. 119 of the Defence of India Rules including the provision as to the determination of the most suitable form of publication. [I.L.R. (1945) Pat. 781, Appl.]: I.L.R. (1951) Nag. 775: A.I.R. 1952 Nag. 10.

Publication of Regulations—Validity—Presumption as to regularity in publication—Burden to prove otherwise is on party challenging validity: 1964 B.L.J.R. 160.

There is a presumption that the Legislature intends its enactment to have prospective effect only, as the settled or closed matters a e not to be unsettled or reopened. Therefore, in the absence of any indication in the statute that the Legislature intends it to operate retroactively, it must not be given retrospective effect. This principle is not different under the Portuguese system of law based on Code: A.I.R. 1968 Goa 3.

Where neither the language nor necessary intendment as revealed by the words used under S. 40 of Patna University (Amendment) Ordinance, 1982 lead to an inference of retrospectivity, *held*, the presumption that the legislation was prospective was applicable: A.I.R. 1982 Pat. 163: 1982 Pat.L.J.R. 230: 1982 B.B.C.J. (H.C.) 382 (D.B.).

It is possible for a section or a provision of different statutes to be in *pari materia* but to label two different statutes as in *pari materia* (unless they are pure carbon copy of each other) is inherently erroneous and inferences from such a presumption would necessarily lead to error. In matters of construction similarity is not identity, and no presumptions with regard to the purported policy of different statutes can be safely inferred or raised: A.I.R. 1986 Pat. 218: 1986 Pat.L.J.R. (H.C.) 373: 1986 B.B.C.J. (H.C.) 249: 1986 B.L.J.R. 344 (F.B.).

Adoption of laws of another State—Presumption as to: 1957 M.P.L.J. 1 (N.).

Presumption as to repeal of a provision: A.I.R. 1969 J.&K. 9 (F.B.).

There is a presumption against repeal by implication. This is on the assumption that the legislation enacts law with a complete knowledge of all existing laws pertaining to same subject and the failure to add a repealing clause indicates that the intent was not to repeal existing legislation. Where the provision of a special statute are wholly repugnant to the general statute, it would be possible to infer that the special statute was repealed by the general enactment: (1988) 2 Bom.C.R. 127 (D.B.).

Promulgation of order—There is a presumption of its due promulgation: 1968 Cr.L.J. 946: A.I.R. 1968 Madh. Pra. 138.

An order or notification, containing a recital, technically correct on the face of it, raises an optional presumption of fact under S. 114, *Illus.* (*e*) which can be displaced by circumstances indicating that the power lodged in an authority or official has not been exercised in accordance with the law. The recital, if it is not defective, may obviate the need to look further. But, there may be circumstances in the case which impel the Court to look beyond it. And, at that stage, S. 106 can be invoked by the party assailing an order or notification. It is most unsafe in such cases for the official or authority concerned to rest content with non-disclosure of facts especially within his or its knowledge by relying on the sufficiency of a recital. Such an attitude may itself justify further judicial scrutiny: A.I.R. 1977 S.C. 183: (1977) 1 S.C.C. 133: (1977) 1 S.C.R. 763: (1977) 90 Mad.L.W. (S.N.) 17.

It clearly follows from Ss. 37, 78, 81 and 114 (*e*) that the issuance of a notification is in the eye of law either notice or imputed knowledge of its contents to the citizens in general. This obviously cannot be so in the case of a mere order. The line which divides a mere order or decision of the Government or authority from formal notification is sharp and the dividing point thereof would be the publication or the formal declaration to the public or otherwise of the same. An order derives its sanction or source when the authority vested with the lawful power to pass the same appends its signature thereto and it is only the factum of proclamation or publication in the Gazette or other prescribed modes of publicity which alone would give such an order or decision, the indicia or the necessary stamping of a notification. Till then it would remain merely an order or decision and it may not travel beyond the knowledge of its author and might well remain completely cloistered. [A.I.R. 1963 S.C. 1019; A.I.R. 1937 Pesh. 52, Rel. on]: A.I.R. 1984 P.&H. 87: (1983) 85 Punj.L.R. 741: 1983 Punj.L.J. 1: 1984 Rev.L.R. 1: I.L.R. (1984) 1 P.&H. 78 (F.B.).

It has to be presumed that the statutory power is validly exercised by Government in issuing a notification: 1971 M.P.L.J. 403 (D.B.).

Presumption of publication of official notification. *See* 18 I.C. 651: (1912-13) 17 Cal.W.N. 531; 49 I.C. 171: 3 P.L.J. 636; 39 P.L.R. 187; A.I.R. 1937 Pat. 14. *See* also I.L.R. 37 Bom. 415; I.L.R. 19 All. 493; I.L.R. 9 All. 920; I.L.R. 18 Cal. 129; A.I.R. 1937 Pat. 14; 8 Mys.L.J. 257.

The presumption that the facts stated in a Government notification are correct is not an absolute presumption and may be rebutted by proper evidence: A.I.R. 1953 Pat. 321: I.L.R. 32 Pat. 181.

The presumption under *Illus.* (*e*) to S. 114, is that of the regularity of the official acts, whether judicial or executive, and not that of the acts themselves being done. Where a notification is issued under the power given by law, there is a presumption that it was regularly published and promulgated in the manner it was required to be done. But there is no presumption that it was issued according to the terms of the section which empowers it. Where the Central Government issues a notification under S. 14 of the Hoarding and Profiteering Prevention Ordinance, empowering the Controller-General of Civil Supplies to sanction a prosecution for an offence under that Ordinance, it cannot be presumed that the Controller-General is given a rank not below the rank of a District Magistrate as required by S. 14. The fact that the officer is of a rank not below that of a District Magistrate must be proved by the prosecution, and it cannot be presumed by recourse to S. 114, *Illus.* (*e*): (1946) 48 Bom.L.R. 379: A.I.R. 1946 Bom. 492: I.L.R. (1946) Bom. 762.

Though ordinarily it may be presumed that a Government notification purporting to have been published in a Gazette of a certain date, was in fact so published, yet where the interval between the issue of a notification

and action taken on it is so short, *e.g.*, a night, a Court might require stricter proof that all the formalities requisite to the act of notifying, or in other words, publishing the notification, had actually been carried out: (1931) 33 Bom.L.R. 82: I.L.R. 55 Bom. 356: A.I.R. 1931 Bom. 132.

Order having been made by State Government in exercise of powers entrusted to it under the Notification issued by the Ministry of Home Affairs—Presumption as to regularity of public acts would apply—Court is entitled to presume that order has been made by State Government in due course: (1965-66) 70 Cal.W. N. 82: A.I.R. 1966 Cal. 552.

Official acts—Notification—By State under S. 36(1), Motor Vehicles Act—Previous approval of Central Government recital as to—Presumption: I.L.R. (1965) 15 Raj. 413: A.I.R. 1965 Raj. 175.

There can be no presumption against the expressed provisions of law which are embodied in any statutory enactment or in any rules made under such enactment or even against such principles enunciated in judicial precedents. Therefore, where the notification was found against the provisions of the Assam Land and Revenue Regulation, it could not be presumed to have been legally issued nor could it be held to be binding on the parties. S. 46 of the Regulation has no application in such a case: A.I.R. 1957 Manipur 18.

An action taken by a properly constituted authority should always be held to be legal unless it is demonstrably not so. When, therefore, a rice mill is notified under S. 193(1), Local Boards Act, it must be taken that the President of the Panchayat Board issued that notification in conformity with the law and cannot be said to be invalid: 138 I.C. 583 (1): A.I.R. 1932 Mad. 508.

Notification by Gujarat Government declaring that the acquisition of certain land was urgently necessary for public purposes—Satisfaction of Government on the question of urgency—Proof—Constitutional protection under Art. 166(2)—Presumption of regularity of official acts—Affidavits filed along with petition questioning notification, containing bare denial that Government had not formed an opinion—Necessity of counter-affidavit—Proper approach by Court: A.I.R. 1958 S.C. 870.

Where all formalities as to the requisite notification under S. 6-A (as in West Bengal) of the Land Acquisition Act, 1894 having been duly published had been completed but the Official Gazette where the notification had been published was missing and could not be procured from any other source and the party had even offered to put into the witness box an officer to prove publication, *held*, the Court could presume that all official acts required under the statute must have been regularly performed: A.I.R. 1976 Cal. 149.

Notification imposing tax under Gram Panchayat Act—Court can always draw an inference, until otherwise is proved that necessary and prescribed procedure therefor was followed before issuing the notification: 1979 Tax.L.R. (N.O.C.) 9 (Guj.).

A shop is where goods are sold; when the authorities issued a notification under S. 2(13) of the W.B. Shops and Establishments Act, 1963 declaring depots used for storage of tea not sold there as shops without affording an opportunity of hearing to their owner nor did the authorities placed on record any materials on which the presumptions of law could be raised, *held*, the notification could not be given effect to: A.I.R. 1984 Cal. 109: (1984) 1 Cal.H.N. 6.

Where a notification under S. 4(1) of the Kerala Land Acquisition Act was published on 15-9-1987 in the Official Gazette, on 24 and 28-8-1987 in the local newspapers and its substance in the locality on 12-10-1987, and the subsequent declaration under S. 6(1), made on 7-10-1988, was published on 11-10-1988, in the Official Gazette, on 11-10-1988 in the local newspapers and on 7-10-1988 in the locality, *held*, the official acts would be deemed to have been regularly performed; the declaration was valid, having been published within one year of the notification under S. 4(1). [(1989) 2 Ker.L.T. 71, Rel. on; A.I.R. 1985 S.C. 1622, Disting.]: A.I.R. 1992 Ker. 136.

30. Regularity of registration proceedings.—When a document is accepted by the Sub-Registrar as duly presented, there is an initial presumption that the document was duly presented and that the person presenting it was duly authorised to do so: I.L.R. 15 Lah. 694: A.I.R. 1934 Lah. 452.

A sale deed executed before the Sub-Registrar carries a presumption of genuineness

and the burden to prove that it was *benami* is on the person who alleges it: A.I.R. 1979 All. 47.

Where the original deed of a private trust was indisputably executed and registered and there was evidence of its having been lost, *held*, a presumption under S. 114(*e*) could be raised about its certified copy having correctly and regularly been prepared from the original deed: A.I.R. 1975 Cal. 381.

Where the certified copy of a sale deed was actually obtained from the volume book maintained in the Sub-Registrar's office, it bore the official seal and the certificate of its having been copied, compared and found to be true and the scribe of the original deed also deposed having written it, *held*, the correctness of the certified copy rightly presumed; the sale deed stood proved: A.I.R. 1994 Gau. 67.

Where a gift deed was challenged on the ground that the donor was not mentally competent to execute the same and the document was registered also, *held*, the certificate of registration would not enable the Court to presume *animus et factum* on the part of the executant of the document: A.I.R. 1977 Ker. 54: I.L.R. (1976) 2 Ker. 137 (D.B.).

Where the Sub-Registrar endorsed on the mortgage deed a certificate as required by S. 60(1) of the Registration Act, 1908 containing the word "Register" together with the number and page of the book in which the document stood copied, *held*, it would be proper to infer that in the ordinary course of business the certificate and the endorsement must have been copied in the margin of the register-book for proving a completed registration: A.I.R. 1973 Raj. 173: 1972 Raj.L.W. 310 (F.B.).

Endorsement of Registration Officer—Presumption of requisite thing being done—Deed executed by ignorant and illiterate person—No presumption—Onus to prove deed lies on him who relies on the deed: 1962 M.P.L.J. (Notes) 26.

Registration of document—Proper presentation—Presumption from endorsement—When to be raised: A.I.R. 1958 Assam 56. Registration under S. 23-A of Registration Act—Presumption that it was in time: 1933 Mad.W.N. 1148.

Endorsement by Registrar on sale deed is presumed to be correct unless rebutted: (1980) 2 M.P.W.N. 96.

A document once exhibited without objection cannot be objected to later on. Thus, where the lower appellate Court rejected registered documents, 80 and 73 years old, respectively, which were exhibited during trial without objection, *held*, the lower appellate Court erred in holding that presumption of their due execution or genuineness could not be raised under S. 90; S. 90 is a solution to the difficulty in proving documents more than 30 years old by witnesses which may well be impossible; though presumption under S. 90 is discretionary; the Court could raise the presumption under Ss. 4 and 114; S. 60 of the Registration Act also provides for raising such presumption of execution and correctness of the contents of a duly registered document: A.I.R. 1988 All. 57: (1988) 14 All.L.R. 174.

Registration of will—Registrar's certificate containing recital that testator admitted execution—Thumb-impression of testator affixed—Recital in endorsement mentioning that signature could not be affixed because of testator's physical incapacity—Fact that testator was duly identified mentioned—But no signatures of identifying witnesses taken because soon after testatory became unconscious—Endorsement held was admissible to prove execution—Fact recorded therein could be presumed to be correct—Fact that no deposition of testator why he could not sign, was taken as required by standing order 675 of the Madras Registration Manual, was at most an irregularity curable under S. 87—No adverse inference could be drawn because of the non-examination of the Sub-Registrar: A.I.R. 1962 Andh. Pra. 178.

An endorsement by the Sub-Registrar on a registered Will that its execution was admitted by the executant being an act performed by him in official capacity, it should be presumed that he would not make such an endorsement unless the execution was admitted before him by the testator: 1958 M.P.C. 351: 1958 M.P.L.J. 513: A.I.R. 1958 Madh. Pra. 261.

Proposition that execution and registration of deed of adoption, in case of illiterate person, is insufficient proof of adoption is erroneous and contrary to S. 16—Law relating to sanctity attaching to registered documents does not make distinction between literate or illiterate executants: (1968) 70 Punj.L.R. 535.

31. Sanction for prosecution.—When the Government accords sanction for prosecution of a Government employee on corruption charges, S. 114(*e*) raises a presumption that the official acts have been regularly performed and the burden is heavier on the accused to rebut that statutory presumption. Once that is done then it is the duty of the prosecution to produce necessary record to establish that after application of mind and consideration thereof to the subject, the grant or refusing to grant sanction was made by the appropriate authority. Where investigation into the offence under S. 6(1)(*b*) of the Prevention of Corruption Act had been completed before the sanction for prosecution by the Government was accorded and the sanction order specifically stated that material papers like case diary and statements of witnesses had been carefully examined in respect of each accused though no separate file for each of them was maintained, *held*, the sanctioning authority could not be accused of non-application of mind; according sanction is an administrative and not a *quasi* judicial act; presumption under S. 114(*e*) is attracted: (1992) 1 An.W.R. 16: 1993 Cr.L.J. 558.

Where consent order for prosecution under the Prevention of Food Adulteration Act, 1954, showed that the competent authority had considered the report of the public analyst before issuing said order, *held*, presumption could be drawn that consent was given by the competent authority after perusing the material: 1992 Cr.L.J. 2289 (Andh. Pra.).

Where order of sanction for prosecution for offences under Prevention of Food Adulteration Act, 1954, expressly mentioned application of mind, *held*, presumption as to validity of sanction could be raised: 1984 Cr.L.J. 1224: 1984 F.A.J. 99 (Raj.).

Sanction to prosecution under S. 137, Customs Act, 1962—Prosecution should establish that the fact constituting offence has been considered by the authority before sanctioning prosecution—Presumption in favour of regularity of official acts arises: 1979 Cr.L.J. 1265 (Goa).

Officer according sanction not examined as witness—His signature proved but no evidence to establish that he had applied his mind to the case—*Held*, presumption was that sanction was duly accorded in absence of evidence to the contrary: A.I.R. 1970 Del. 102: 1970 Cr.L.J. 674.

Sanction—Presumption as to Official acts. *See* 1953 All.L.J. 660: A.I.R. 1954 All. 223.

Sanction by administrator of municipality—Presumption is that it was given on date on which it was shown to have been given—Allegation that it was antedated not made in grounds of appeal nor taken before trial Court—Appellate Court should not deal with allegation and hold that it was antedated: (1961) 2 Cr.L.J. 152: A.I.R. 1961 Tripura 18. *See* also (1989) 2 Raj.L.R. 755.

Where sanction for bye-laws has been accorded by the Government there will be a presumption in favour of the legality of those bye-laws: 1957 Raj.L.W. 506.

Where there was no evidence to show that the application of mind by authority according the sanction could not be and was not made, *held*, a presumption could be drawn that consideration of material and application of mind were duly made: 1989 Cr.L.J. 1797 (Cal.) (D.B.); 1989 Cr.L.J. 1793 (Cal.) (D.B.).

Form of sanction—Official communication—Letter intimating that sanction had been granted—Presumption as to: 1963 M.L.J. (Cr.) 434: A.I.R. 1963 S.C. 666.

Sanction, form of—Section of Act need not be specified—Sanctioning authority to apply its mind before granting sanction: I.L.R (1963) 13 Raj. 996: (1963) 2 Cr.L.J. 527: A.I.R. 1963 Raj. 233.

32. Proceedings under the Prevention of Food Adulteration Act, 1954.—In a case under the Prevention of Food Adulteration Act, the presumption of regularity under S. 114, *Illus.* (*e*) arises only when all the steps required to be taken for obtaining the Public Analyst reports are proved to have been duly taken. If there is a failure in performing any one of the required steps, the *lacuna* cannot be filled in by taking recourse to S. 114 (*e*).

Where the lower appellate Court found that there was non-compliance with the mandatory requirements of Rr. 7 and 18 of the Rules under the Prevention of Food Adulteration Act, the legal presumption could not be taken in aid to bring home the charge against the accused. [1968 B.L.J.R. 308, Foll.; 1970 Cr.L.J. 238, Expl.]: 1975 Pat.L.J.R. 464: (1976) 1 F.A.C. 99: 1976 Cr.L.J. 421: 1976 B.B.C.J. 500 (D.B.).

Public Analyst must be presumed to have performed his official acts regularly: 1968 Cr.L.J. 1554: A.I.R. 1968 Ker. 330.

No doubt the Food Inspector and the Public Analyst are expected to follow the procedure laid down in the Rules but absence of direct evidence in proof of compliance with the requirements of the rule does not justify the conclusion that the requirements were not complied with. If the principal requirement of the provisions of Adulteration Act and the Rules as to the taking of the sample, sealing the sample, sending of the sample and analysis of the sample have been clearly made out, the procedural details as to the prescribed manner of doing these acts may be presumed depending on the facts of the case. The presumption is not mandatory but permissible. Whether or not to raise a particular presumption will, therefore, depend upon facts proved and the nature of the fact to be presumed as proved: (1970) 11 Guj.L.R. 530; (1988) 2 Rec.Cr.R. 236 (Guj.) (F.B.).

Raising presumptions does not depend upon the mandatory character or otherwise of the legal provisions whereunder the official acts are performed; once the acts are proved, the presumption of their having been regularly or properly performed may be raised; however, raising of the presumption is at the Court's option; it is not bound to raise it in every case. Thus, though under the Prevention of Food Adulteration Act and the Rules, the Food Inspector and the Food Analyst are undoubtedly expected to follow the prescribed procedure but a mere absence of direct evidence thereof does not mean that they were not complied with. If the basic facts of taking samples, wrapping, fastening, sealing and sending them to the Food Analyst and their analysis are clearly made out, the procedural details may well be presumed to have been done, depending on the facts and circumstances of the case: (1981) 22 Guj.L.R. 404: 1982 Cr.L.J. 754 (D.B.).

The principle embodied in *Illus.* (*e*) under S. 114 of the Evidence Act is that when any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that the formal requisites for its validity have been complied with. If the statute (Prevention of Food Adulteration Act) itself had provided that certain regulations and formalities must be complied with before the report of the Public Analyst could be admitted in evidence, the position would have been different, for, in that case, it would be necessary to specifically establish that those regulations and formalities were duly observed. In the absence of such a provision, what purports to be report signed by a Public Analyst is, without any other proof, admissible in evidence and the presumption arising under S. 114 of the Evidence Act to the regular performance of official acts also applies to it. The accused is not thereby prejudiced. He may rebut the presumption by cross-examining prosecution witnesses or leading other evidence. He has also been given under sub-S.(2) of S. 13 of the Act the right to show, if possible, that the report is incorrect.

The presumption under S. 114 of the Evidence Act and *Illus.* (*e*) thereunder in relation to regular performance of official acts applies to the report of a Public Analyst. It is, however, a rebuttable presumption. Thus, such a report is not rendered inadmissible only because it has not been specifically established by evidence *aliunde* that the requirements of Rr. 7 and 18 of the Prevention of Food Adulteration Rules, 1955, were duly complied with.

The distinction between relevancy or admissibility of a piece of evidence and the value to be attached to it is obvious. S. 13(5) of the Prevention of Food Adulteration Act refers to admissibility of the report and leaves it to the Court to determine in the light of the circumstances of the case, what value ought to be attached to it. There is nothing in this provision to indicate that the report would be admissible only if it is obtained in the manner prescribed by the rules made under the Act. [1967 Cr.L.J. 1723 (Madh. Pra.), Reversed]: 1969 M.P.L.J. 732: 1970 Cr.L.J. 238: A.I.R. 1970 Madh. Pra. 29 (F.B.).

Where the petitioner was prosecuted for selling adulterated milk and he contended that R. 7(1) of the Prevention of Food Adulteration Rule, 1955 regarding comparison of seal on the container and the outer cover with specimen impression received separately by the Public Analyst was complied with, *held*, the presumption as to due comparison of seals by the Public Analyst was available to the prosecution and it was not open to the petitioner to make any grievance on the ground of non-examination of the Public Analyst. [A.I.R. 1970 Madh. Pra. 29 (F.B.), Rel. on]: 1987 M.P.L.J. 559.

It cannot be laid down as a general proposition of law that if once the Public Analyst issues a report regarding the result of the analysis, it may also be presumed that the Public Analyst or the person authorised by him has discharged his duty in compliance with R. 7(1) of the Prevention of Food Adulteration Rules, 1955: 1985 M.L.J. (Cr.) 80: (1985) 1 Kam.L.J. 1: I.L.R. (1984) Karn. 752. *See* also I.L.R. (1971) 21 Raj. 654: 1971 W.L.N. 108.

The official function of the Court under S. 11(1) of the Prevention of Food Adulteration Act, 1954, is to despatch under its own seal to the Director of the Central Food Laboratory, the sample of food produced by the local authority on its application. The Court has to take the necessary steps provided therein; S. 11(2-B) of the said Act does not require the Court to contemporaneously or subsequently record the steps taken by it. The official acts having indisputably been performed by the Court, it can unhesitatingly be presumed under S. 114 (*e*) that they were regularly performed, more so because it was a Court. [1986 Ker.L.T. 1267; (1987) 2 Ker.L.T. 87; (1987) 2 Ker.L.T. 577, Overruled]: A.I.R. 1988 Ker. 60: 1988 Cr.L.J. 898: 1987 Ker.L.J. 1355: (1987) 2 Ker.L.T. 165 (F.B.).

Offence under Prevention of Food Adulteration Act—Presumption that official acts are regularly performed extends to sending of bottles for analysis and not to other details like bottling, sealing, etc.: 1967 Ker.L.J. 887: 1967 M.L.J. (Cr.) 901: A.I.R. 1968 Ker. 66.

Where the accused contended that the Food Inspector failed to show that the bottles in which the samples were taken were clean and dry as per R. 14 of Prevention of Food Adulteration Rules, 1955 though the Food Inspector had deposed that the samples were taken according to the Rules, *held*, in the absence of his cross-examination on this point, there was presumption that the bottles were dry and clean and were sealed properly. [A.I.R. 1978 S.C. 933; 1969 C.A.R. (S.C.) 15, Rel. on]: 1982 Raj.L.W. 432: 1982 Cr.L.J. 2325.

Where there was no evidence on record to suggest that the Director of Central Food Laboratory had compared the seals on the container and the outer cover of the packet received by him separately from the Court, *held*, no presumption under S. 114 can be drawn that the official act was followed. Comparison of the seal assumes greater significance in cases under the Prevention of Food Adulteration Act because the fate of the accused depends upon the certificate issued by the Director, the contents of which are final and conclusive evidence of the facts stated therein and which are not open to challenge by the accused in any manner whatsoever.

Therefore, non-comparison of the seal affected the evidentiary value of the Certificate issued by the Director, Central Food Laboratory and thus, the conviction based upon it could not be sustained: (1992-1) 12 Guj.L.H. 253: (1992-1) 33 Guj.L.R. 434.

Report of Public Analyst in Form III—Non-mention of comparison of seals—Effect—Presumption of regularity of Official Acts: 1968 Cr.L.J. 729: A.I.R. 1968 Bom. 247.

Where Analyst's report stated as to his having received sample, and specimen of seal separately, *held*, it was to be presumed that he received them in the manner stated; R. 18 of the Prevention of Food Adulteration Rules, 1955 could be said to have been complied with: 1985 Cr.L.J. 1061: (1985) 87 Punj.L.R. 341: I.L.R. (1985) 2 P.&H. 204 (F.B.).

Where there is evidence to show that Local Health Authority forwarded a copy of the report of Public Analyst with necessary intimation or information to the accused, *held*, by virtue of S. 114, *Illus*. (*e*), the Court may presume that it was forwarded regularly, *i.e.*, as required in S. 13(2) of the Prevention of Food Adulteration Act, 1954 and R. 9-A of the Prevention of Food Adulteration Rules, 1955. [1985 F.A.J. 91 (Ker.) and (1981) 1 F.A.C. 287 (Ker.), Foll.; (1985) 1 Gau.L.R. 521; (1989) 1 Gau.L.R. 251; (1992) 1 Gau.L.R. 62, Overruled]: 1993 Cr.L.J. 2747 (Gau.) (F.B.); 1982 Cr.L.J. 1014: 1982 All.Cr.R. 140.

Where there is evidence to the effect that the sample was sent by the Inspector under the Prevention of Food Adulteration Act, to the Public Analyst, it is permissible to raise a presumption that the act of despatch was done regularly and properly: 1957 All.L.J. 89: 1957 All.W.R. (H.C.) 385; 1971 Jab.L.J. 474.

Official act—Act of sampling, scaling and forwarding of article by Food Inspector and ascertaining seal to be intact by Public Analyst proved—That acts themselves were performed in accordance with prescribed form and procedure may be presumed: I.L.R.

(1965) 2 Ker. 301: 1966 Cr. L.J. 416: A.I.R. 1966 Ker. 70.

Analysis of sample—Delay in compiling report—Presumption that analysis was also delayed, if can be drawn—Examination of Analyst—Necessity of: 1967 Cr.L.J. 603: A.I.R. 1967 Andh. Pra. 131.

"Proved"—Company charged for sale of adulterated buffalo-milk—Defence, that it was not buffalo-milk sold but toned milk—Company's entire business being at stake in all probability company would have taken steps to challenge Public Analyst's finding that sample sold was buffalo's milk by resorting to provisions of S. 13, Prevention of Food Adulteration Act, 1954—Steps not taken—*Held*, it must be presumed that milk sold was buffalo-milk and not toned milk: 1965 All.L.J. 182: (1965) 2 Cr.L.J. 581: A.I.R. 1965 All. 525.

Mere storing of soya bean oil, an article of food, does not by itself lead to presumption that it was adulterated: 1981 All.W.C. 732: 1981 All.Cr.C. 337.

33. Police record.—Presumption that a person acts honestly applies as much in favour of a Police Officer and it is not judicial approach to suspect him without good grounds therefor: 1966 M.L.J. (Cr.) 726: (1966) 2 An. W.R. 338.

Police Officers are citizens and the public servants; a presumption under S. 114 can be drawn that they perform their duties in the ordinary course of business faithfully and sincerely. Their evidence cannot be discarded only on the ground that they are Police Officers. However, a note of caution will always have to be kept in mind looking to the law of the land; particularly S. 25 of the Evidence Act and S. 161, Cr.P.Code: (1988) 2 Crimes 737 (Raj.); (1982) 53 Cut.L.T. 187: 1982 Cr.L.J. 506; 1993 Cr.L.J. 1622 (Del.).

Packing and forwarding of material objects by an Investigating Officer, for which no particular mode is statutorily prescribed, are official acts and are to be presumed to have been regularly performed by him. Merely because he is interested in the prosecution, it cannot be presumed that he might have tampered with or concocted the materials during the period they remained in his custody; it would not be a proper judicial attitude or a healthy approach to start with distrust or suspicion the investigative exercises of public officers; that would run down the gut and gumption of Police administration and erode the morale of its investigating agencies. Thus, a mere failure to affix the seal on the packet sent to the Analyst would not necessarily lead to the inference that the Analyst's report was thereby vitiated: (1993) 1 Ker.L.J. 542: (1993) 1 An.L.T. (Cr.) 552 (D.B.). *See* also (1989) 1 Bom.C.R. 388 (D.B.).

Entries are made in the general diary about all the events that take place in the Police Station in chronological order, and it is ordinarily difficult to fabricate false entries in the general diary. Thus, there is a presumption as to correctness of the entries in the general diary: A.I.R. 1978 S.C. 1506.

Where the prosecution has shown that regular entries were made in the public document, namely, general diary, regarding registration of the case and forwarding of the special report to the higher authorities and return of the person who has taken the special report to the Police Station, the legal presumption would be that official acts must have been duly performed: A.I.R. 1978 S.C. 1142: 1978 U.J. (S.C.) 439: (1978) 4 S.C.C. 302.

Where there is no evidence that the investigating Police Officer had any motive of setting up a case against the accused, it can be presumed under S. 114, *Illus.* (*e*), Evidence Act, that he has properly performed his official duty of recording the substance of evidence in his case diary under S. 161, Cr. P. Code and that he had not omitted inconvenient portions from his rough notes while entering them in the diary. Further, the Court may, if it thinks fit, presume that where the records have been destroyed this has been done for a reason, for example, because the Police wanted to improve on the evidence. Such presumption is a discretionary one and is an application of *Illus.* (*g*) to S. 114, Evidence Act. But no such presumption could be raised where there was no denial of right under S. 162, Cr. P. Code, as the case diary statements were available for the purpose: 1956 An.W.R. 406.

Where though the occurrence took place at 4.30 P.M., the *fard beyan*, recorded at 8.30 P.M. reached the Police Station next day at noon and the F.I.R. was sent to the Court two days thereafter but no explanation was sought for the delay while cross-examining the Investigating Officer and there was no ostensible gain by the delay to

the prosecution, *held*, no adverse inference need be drawn against the prosecution; an adverse inference cannot be drawn in every case. [A.I.R. 1972 S.C. 2679; A.I.R. 1976 S.C. 2304, Foll.]: (1989-2) 37 B.L.J.R. 458 (D.B.).

Lodging of F.I.R.—Inference that it was anti-timed—When can be drawn. *See* 1985 Cr.L.J. 966: 1985 All.Cr.R. 178.

Where though the first information report sent to the Court did not contain the Magistrate's endorsement regarding the time of its receipt, but the head constable deposed that the report was despatched to the Magistrate the moment it was received and the general diary contained an entry to that effect, *held*, an inference of ante-dating of the first information report could not be drawn: A.I.R. 1987 S.C. 1222: 1987 Cr.L.J. 991: (1987) 3 S.C.C. 331.

Where the first *parcha* of the case diary purportedly sent from the Police Station on 16-3-1977 was signed by the Circle Officer on 22-3-1977 presumably because Parliamentary elections were held on 18-3-1977 and 20-3-1977 and the Police was very busy in marking arrangements therefor, *held*, even though the Circle Officer was not examined to establish the cause for his not seeing the *parcha* earlier, no presumption can be raised that it was not sent by the Police Station on the purported date: 1990 Cr.L.J. 868: 1989 All.L.J. 492 (D.B.).

Official acts have to be presumed to have been regularly performed. It would require much stronger evidence to warrant the inference that the time mentioned in the first information report had been deliberately put back: 1958 Cr.L.J. 1170: A.I.R. 1958 Cal. 482.

Where prosecution witnesses testified to the presence of other prosecution witnesses said to have sustained injuries during the occurrence and the F.I.R., lodged within 5 hours, contained a mention of their having been so injured, *held*, a mere delay by the Police in recording the statement of the injured witnesses is no ground to discard their testimony: 1978 Raj.L.W. 340 (D.B.).

Merely because statement of an eye-witness was recorded by the Investigating Officer two days after the incident, which delay had been satisfactorily explained, *held*, no adverse inference could be drawn against the prosecution: 1990 Cr.L.J. 2720 (Raj.) (D.B.).

Where in a divorce proceeding, a certified copy of the first information report was placed on record, *held*, it could be presumed that the Police official who recorded the F.I.R. did so in a regular manner in due performance of his duty: A.I.R. 1981 P.&H. 119: 1981 Hindu L.R. 16.

Time of first information report—Presumption from entry in Police register: A.I.R. 1957 All. 809: 1957 Cr.L.J. 1378.

Where the F.I.R. gone through minutely contains no averment that the lathi blow given by the accused hit the deceased on his back, the eye-witnesses, about 200 paces behind the accused and the deceased, could not have seen whether the lathi blows in fact hit the body of the deceased, and the *post mortem* report did not point out any such blow on the deceased's back, *held*, there being no contradiction between the three, no adverse inference could be drawn against the prosecution: 1991 Cr.L.J. 3227 (All.) (D.B.).

The presumption in favour of official acts being properly done is destroyed when it is established that the Investigating Officers have not acted in a straight-forward manner and have clearly made false statements in Court: (1936) 38 Punj.L.R. 1128: A.I.R. 1936 Lah. 409.

Police Officer asked to remember certain date refusing to refresh memory—Adverse inference may be drawn: 164 I.C. 373: A.I.R. 1936 Lah. 707.

There can be no presumption that proceedings under Rr. 16-24 (*ix*) of the Punjab Police Rules were taken but, once it is admitted or proved that such proceedings were, in fact, taken, then it must be presumed, unless otherwise alleged and proved, that they were taken in accordance with law: A.I.R. 1956 Punj. 106: (1956) 58 Punj.L.R. 104. *See* also A.I.R. 1933 Cal. 347 (Presumption cannot supply deficiency in the proof).

34. Identification proceedings.—(*See* also S. 9). In a case where there is an unusually long lapse of time between the commission of the offence and the identification proceedings, and there is no proof of any coercive proceedings being adopted by the State during the period when the accused is at large, the Court of law is entitled to presume, under S. 114, the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural

events and human conduct in relation to the fact of a particular case. If no attempts are made by the Police to apprehend the accused person who runs away from justice, the Court may presume that if such attempts had really been made the accused would have been apprehended and identification proceedings arranged within a reasonable time so as to lend creditability to the performance of the prosecution witness in the parade. The prosecution cannot take advantage of its own laches in this regard and shift the burden of proof on to the accused by taking shelter under the plea that no such suggestion was made on behalf of the defence to the Investigating Officer: 1972 All.W.R. 822 (D.B.).

Where at least one of the eye-witnesses identifying the accused could reasonably be expected to have known some of the accused as residents of close by villages and his co-student, *held*, his feigned ignorance of prior familiarity with their identity becomes irreconcilable with the incidents of ordinary human intercourse; the omission to disclose their identity in the F.I.R. raises a reasonable doubt about the accused's complicity: A.I.R. 1988 S.C. 345: 1988 Cr.L.J. 422: (1988) 1 S.C.C. 14: 1988 All.W.C. 374.

Identification parade—Refusal to participate—Adverse inference, if can be drawn and when: 1983 Cr.L.J. (N.O.C.) 3: (1983) 23 Del.L.T. 42: I.L.R. (1983) 1 Del. 223.

In a criminal trial, the prosecution must adduce sufficient evidence to infer that the accused must be presumed to have committed the crime; any infirmity in the identification made for the first time before the Court cannot be set right by such presumption alone. It is high time for the Police and other investigating agencies to realise the necessity of holding pre-trial identification parades; merely because the accused usually complain in the Court of having already been seen by the witnesses should not stand in the prosecution's way in arranging such parades: (1972) 2 Sim.L.J. 349. *See* also (1984) 2 Crimes 927 (Del.).

It is to be presumed under S. 114 that every official act is properly performed, but this presumption is hardly sufficient to satisfy a Court that such precautions have been taken as to render an identification truly valuable, *e.g.*, mixing the accused in a large number of men dressed all like: 67 I.C. 721: A.I.R. 1922 Lah. 31.

Victims of different dacoities making rival claims to particular article—Their identification of articles not reliable—Presumption under S. 114, Evidence Act cannot be raised: I.L.R. (1962) Andh. Pra. 96: (1963) 2 Cr.L.J. 121: A.I.R. 1963 Andh. Pra. 314. *See* also 1988 Cr.L.J. 319 (Del.).

35. Warrant.—Offence under Mysore Police Act (IV of 1964), S. 80—Search under warrant—Court not putting to accused salient particulars of offence—Presumption under S. 80 Mysore Police Act cannot fill in *lacuna* in procedure: 1969 Cr.L.J. 1144: A.I.R. 1969 Mys. 277.

Where a warrant of arrest is on the face of it not defective the Court would be entitled to draw a presumption in accordance with the provisions of S. 114, *Illus.* (*e*). When the lower Courts have drawn such a presumption the High Court in revision would not be justified in disturbing the same especially when the accused were not being prosecuted for contravention of the warrants of arrest but for assaulting a public servant in the discharge of his duty: A.I.R. 1956 Ori. 97: I.L.R. (1955) Cut. 50.

Where a delivery warrant is issued for division of properties by metes and bounds after a preliminary decree was passed in a suit for partition and possession, endorsement on a delivery warrant made by the revenue authorities cannot be conclusive evidence of the fact that division was effected and possession was given. No doubt, such an endorsement on a warrant may rise to a presumption that what is stated therein is true, but it is only a rebuttable presumption: A.I.R. 1957 Mys. 71: I.L.R. (1957) Mys. 14.

36. Record-of-rights.—(*See* also Notes under S. 35). A record-of-right is not a document of title and the same is at best an evidence of possession: A.I.R. 1987 Cal. 248: (1986) 2 Cal.L.J. 1 (D.B.).

Entries in record-of-rights—Presumption: 1970 Cur. L.J. 166 (Punj.).

An entry in the record-of-rights is presumed to be correct until the contrary is shown. When presumption is in favour of a party, it is not necessary for him to establish the correctness of the entry by evidence nor is he under any obligation to establish the foundation for it. Generally speaking, there

can be no presumption backwards from the record-of-rights, which refers to the time of preparation of the records. But, having regard to the facts of a particular case and the surrounding circumstances, the Court is entitled to presume both a forward and backward continuity of the said entries: (1989) 2 Cal.H.N. 5: (1989) 1 Cal.L.T. (S.C.) 447.

Official acts—Entries in record-of-rights —Presumption of due enquiry before making of entries. *See* I.L.R. (1937) Nag. 395: A.I.R. 1938 Nag. 73. *See* also A.I.R. 1954 Pat. 173.

Presumption of correctness of entries in record-of-rights: A.I.R. 1967 Cal. 10.

Though entries in record-of-rights are presumed to be correct but if the civil Court on evidence finds them not to be founded on facts, the entries lose all their weight: A.I.R. 1984 N.O.C. 246: (1984) 1 Cal.L.J. 408: (1983-84) 88 Cal.W.N. 864.

Record-of-rights — Entries in neither create nor take away a right—Presumption as to their correctness also is rebuttable: (1970) 36 Cut.L.T. 636.

A mere entry in the record-of-rights does not create or extinguish title. Thus, while considering the question as to whether a person by excavating a tank acquires right of occupancy in the tank under any provision of the Sonepur land laws, popularly known as the Bhumi Bidhi, *held*, it must be borne in mind that a *raiyati* status cannot be conferred merely on the basis of an entry in a record-of-rights and the source of acquisition must be referable to the revenue laws of the Sonepur State: A.I.R. 1985 Ori. 33: (1984) 57 Cut.L.T. 524 (D.B.).

The presumption that in a conflict between the old record-of-rights and the recent record-of-rights, the recent record is correct unless it is proved by evidence to be incorrect, as well as the presumption under S. 103-B of the Bengal Tenancy Act relating to the correctness of the entries in the record-of-rights is a rebuttable one and to say that a comparatively recent record of rights would under all circumstances prevail over the old record would be begging the whole question: (1958) 1 Cal.L.J. 199: A.I.R. 1959 Cal. 78.

When there is a conflict between an old record-of-rights and a recent record-of-rights, the recent record is presumed to be correct unless it is proved by evidence to be incorrect: A.I.R. 1957 Him. Pra. 16. The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person. The Collector's book was kept for purposes of revenue and not for purposes of titles. It was not the function of the officer who compiles revenue papers to decide questions of title: (1965) 1 An. W.R. 246.

Record-of-rights—Presumption of correctness of entry—Party relying on presumption of correctness need not prove foundation or basis of correctness: (1964-65) 69 Cal.W.N. 210: A.I.R. 1965 Cal. 328.

Entries in record-of-rights—Presumption that they are correct is rebuttable. [A.I.R. 1925 Cal. 404; A.I.R. 1925 Cal. 799: A.I.R. 1927 Cal. 210; A.I.R. 1929 Cal. 255, Rel. on]: A.I.R. 1970 Tripura 43.

An entry in the record-of-rights or other revenue records is not conclusive and raises a rebuttable presumption which cannot form the sole basis to decide one way or the other against one or the other party: A.I.R. 1981 Karn. 78: (1981) 1 Karn.L.J. 217; A.I.R. 1984 N.O.C. 246 (Cal.); A.I.R. 1973 Cal. 264.

The mere signing of an entry does not raise an irrebuttable presumption of law against which no evidence can be let in: A.I.R. 1928 Lah. 820.

The entries in the record-of-rights made for the purpose of Land Revenue Act are not conclusive and are subject to the decision in a suit or other appropriate proceedings, presumption arising out of such entries is a rebuttable one: A.I.R. 1977 Karn. 4: (1976) 2 Karn.L.J. 117: I.L.R. (1976) Karn. 1430.

Though an entry in record-of-rights describing a property as an absolute debottar may raise the presumption but such presumption would be rebuttable; *held*, on facts, presumption stood rebutted: A.I.R. 1976 Ori. 126: 1976 Hindu L.R. 655.

Record-of-rights—Presumption regarding truth of entries in—Presumption arises only when entries are made lawfully—Revision of the record without prior Notification—Presumption of truth, *held*, did not arise—Presumption not drawn as of course —Conditions precedent to official act not shown as satisfied—Presumption held should not be drawn: (1968) 2 Mys.L.J. 227: 15 Law Rep. 97.

Entry in record-of-rights with respect to an unregistered *rehan* deed—Sufficient to prove debt: 1963 B.L.J.R. 472: A.I.R. 1964 Pat. 241. Election dispute: A.I.R. 1964 Punj. 231.

Record-of-rights—Entries in—Presumption as to correctness under S. 135-J, Bombay Land Revenue Code—Incorrect alteration of entry relating to plaintiff's property—There is impact on civil right, though he continues in possession: (1969) 2 Mys.L.J. 202.

While every entry in a record-of-rights finally published is to be presumed to be true, unless proved otherwise under S. 103-B(5) of the Bengal Tenancy Act, 1885 which applies to agricultural lands, such entries relating to non-agricultural lands also attract the presumption of truth under S. 44(4) of the W.B. Estates Acquisition Act, 1953; it cannot, therefore, be said that entries of C.S. settlement record relating to non-agricultural lands cannot attract the presumption of correctness and mere assessment of such lands to rent under the Bengal Non-Agricultural Lands Assessment Act, 1936 does not attract the presumption of truth: A.I.R. 1973 Cal. 264.

When persons are jointly recorded in the record-of-rights in respect of a property and on evidence are found separately possessing portions of such property, in the absence of evidence to the contrary, the only presumption available is of joint acquisition: 32 Cut.L.T. 944: I.L.R. (1966) Cut. 588.

The record-of-rights and the mutation proceeds which are meant to keep uptodate the record-of-rights have the presumption of correctness attached to them; however, that presumption is rebuttable: A.I.R. 1982 Him. Pra. 38; A.I.R. 1978 Raj. 45: 1978 Raj.L.W. 30.

Where an entry in the record-of-rights is shown or admitted as showing the land to be self-cultivated by the landholder, it gives rise to the statutory presumption under S. 133 of the Land Revenue Act, 1964 that it is not a tenanted and does not vest in the State under S. 44 of the Land Reforms Act, 1962; the presumption is, however, rebuttable unless the contrary is proved or the entry is lawfully changed. The burden of proving the contrary lies on the party which avers contrary to the entry: A.I.R. 1977 N.O.C. 289: (1977) 2 Karn.L.J. 126.

The crop-statements raise presumption only about crops raised and person raising them; there is presumption of title or of extent of possession; proper document for presumption of title is record-of-rights: 1976 Mah.L.J. (Note) 45. The entries in the crop-statements made by a Patwari in the course of his business under the Bombay Land Revenue Code are not conclusive; but under the provisions of the Evidence Act, the Court may draw a presumption under S. 114, *Illus.* (*c*) that the public officer has done his duty in the regular course of his business. This presumption, however, is rebuttable and not absolute: 1976 Cr.L.J. 751: 1976 Mah.L.J. 31.

Land—Land recorded at "Gair Mumkin land" is not "land"—Burden to displace presumption of entry: A.I.R. 1966 Punj. 185 (F.B.).

Where the record-of-rights contained no entry that the defendant was in possession of land nor was there any receipt in token of having paid rent therefor and the evidence adduced by him was not sufficient to rebut the plaintiff's possession as shown in the record-of-rights, *held*, the finding of fact by the Courts below that the defendant was tenant in possession could not be sustained in second appeal: 1981 Sim.L.C. 426: A.I.R. 1982 N.O.C. 74.

The legal presumption as to truth of entries in record-of-rights and the Pahanis under S. 133 of the Karnataka Land Revenue Act, 1964 would be available until contrary is proved, mere observation that the entries were wrongly made, would not dislodge the presumption: (1978) 1 Karn.L.J. 208: A.I.R. 1978 N.O.C. 215.

Khasra entries—Entries are presumed to be correct, though party aggrieved may rebut such presumption—Proper forum for such rebuttal—Forum of ceiling authorities is not the proper forum for rebutting presumption: 1981 All.W.C. 600: 1981 All.L.J. 1021.

If *khasras* of certain years, the name of a certain person was recorded as the person in possession, but in the *khasras* of later years, that entry disappeared, *held*, the omission by itself is not enough to destroy the presumption of continuity of possession; the presumption can be drawn both forward and backwards. [A.I.R. 1963 Bom. 100, Rel. on]: 1982 M.P.L.J. 499.

Where the Commissioner *suo motu* called for and on examining the *khasra girdawri*

entertained serious doubts about its authenticity, *held*, neither the statutory presumption of correctness under S. 44 of the Punjab Land Revenue Act, 1887 nor the optional presumption under S. 114(*c*) could be invoked in favour of the *khasra girdawri*: A.I.R. 1974 S.C. 223: (1974) 1 S.C.C. 138.

The *khasra girdawri* embodies the record of a public servant's acts performed in the discharge of his official duties and is, thus, admissible under S. 35; true, it carries no presumption of correctness but its evidentiary value is certainly not nil; the Court should not start with the presumption that it is not correct; it can be rejected only if it is found on evidence to be false or its genuineness becomes suspicious: A.I.R. 1972 P.&H. 393: 1972 Punj.L.J. 118.

Though to a *jamabandi* is attached a statutory presumption of correctness but not to a *khasra girdawri*, *held*, yet entries in the latter may be relied upon, in the absence of evidence to the contrary, as proof of a person's tenancy: A.I.R. 1983 N.O.C. 148: 1983 Punj.L.J. 339: 1983 Rev.L.R. 398.

There is statutory presumption of correctness of the entries made in the khatian: A.I.R. 1971 Pat. 249 (D.B.).

Where in a suit for pre-emption, the plot sold was described in the R.S. Khatian as a tank appurtenant to a dwelling house and the vendor was described as a *raiyati sthitiban*, *held*, only a rebuttable presumption arose therefrom; it could not straight-way mean that the tank was agricultural: A.I.R. 1983 N.O.C. 46 (Cal.).

Where R.S. Khatian, a record-of-rights, prepared in 1964 showed title of one person and the one prepared in 1966 in the name of a different person without any proceedings for correction having been taken, *held*, the second entry being unauthorised had no value in the eyes of law; the normal rule that the later entry should be preferred over the earlier was not attracted: A.I.R. 1982 Cal. 294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.).

Entries in *khasra girdawri* do not carry any presumption of truth but only constitute piece of evidence: A.I.R. 1966 Him. Pra. 48.

Where the plaintiff in a suit sought to prove their parentage from the entries in *khasra* and *khatauni* accounts of the village and the ration cards and muster rolls at the place where they were employed and the Court stated on no evidence that they were made on inquiry, *held*, that it might be presumed that the entries were made in a regular manner under S. 114 of the Evidence Act; but it is inconceivable that inquiries for such entries were made regarding the fact of *S*, being the father of plaintiffs. The Court is not bound to make any such presumption and the entries will be deemed to be made under exceptional circumstances: 1952 All.L.J. (Rev.) 203. A presumption of correctness attaches to the *riwaj-i-am* unless it is proved to be not a trustworthy document: (1959) 61 Punj.L.R. 106: I.L.R. (1958) Punj. 156.

As laid down in S. 42(1) of the Punjab Land Revenue Act, 1887, where it is not expressly provided in any, record-of-rights completed before 18-11-1871 that any forest, quarry, unclaimed unoccupied, deserted or wasteland spontaneously produced belonged to the land-owners, it shall be presumed to belong to the Government; such presumption, as per S. 42(3) of that Act is rebuttable. S. 42(2) of that Act, being in converse form, lays down that where the record-of-rights completed after 18-11-1871 does not expressly vest any forest etc. in the Government, it shall be presumed to belong to the landowners; such presumption is, however, not rebuttable. [1987 Punj.L.J. 393, Reversed]: A.I.R. 1991 P.&H. 134 (D.B.).

Where the plaintiffs seeking to injunct the defendant from interfering in their possession of the land on the ground that they were shown as in forcible possession in the remarks column of the *panchsala khasras* from 1963-64 to 1981-82 and they should be deemed to have continued in possession, *held*, since the M.P. Land Revenue Code, 1959 did not require the Patwari to make any such entry in the remarks column, he cannot be deemed to have performed an official act; no presumption of due performance and consequent continued possession of the plaintiff is permissible; injunction declined: 1991 M.P.L.J. 311 (D.B.).

Where apart from a judgment to which the defendants were not parties and which did not bind them and the plaintiff adduced no other evidence to establish the *hiba-bil-evaz* to be null and void, *held*, the Court always presumes the apparent to be the real unless the contrary is proved and, hence, the burden was on the plaintiff to prove his case

which he failed to discharge; the *hiba-bil-evaz* is valid: A.I.R. 1976 Gau. 92 (D.B.).

An entry in *khana shumari* register not having been shown to carry a presumption of correctness, *held*, is not admissible under S. 32: A.I.R. 1974 P.&H. 343: (1974) 76 Punj.L.R. 444 (D.B.).

Fard Abpashi does not create right of irrigation, it only records such rights. The records are prepared for future use by parties whose rights have been recorded therein and if a person challenges the same as having been prepared incorrectly, the burden lies on him to prove it: A.I.R. 1980 Pat. 89: 1979 B.B.C.J. (H.C.) 584: 1979 B.L.J. 619.

Entries in *wajib-ul-arz*—The *wajib-ul-arz* or village administration paper is a record of existing customs regarding rights and liabilities in the estate. It is not to be used for the creation of new rights and liabilities: A.I.R. 1957 S.C. 286.

Wajib-ul-arz is village administration paper prepared with due care and after due enquiry by a public servant in the discharge of his official duties; being a part of the settlement record, statutory presumption of correctness attaches to it: A.I.R. 1979 S.C. 861.

The entries in the settlement record-of-rights have only a presumptive value; the entries could be proved to be wrong by adducing rebutting evidence. Mere long possession of the land, however, will not show that the entries are incorrect: I.L.R. (1962) Cut. 437.

Presumption of correctness of entries in settlement papers: 28 I.C. 239: 2 O.L.J. 127.

As to presumption of regularity of official acts in settlement proceedings, *see* A.I.R. 1939 Pat. 364. *See* also 1941 R.D. 198.

Settlement entry—Presumption of correctness—Presumption of correctness attaching to the settlement entry will prevail unless the contrary is proved by the plaintiffs as required by sub-S. (3) of S. 167: I.L.R. (1963) Cut. 175: A.I.R. 1963 Ori. 121.

The presumption under S. 114, *Illus.* (*e*) is a rebuttable one and once it is rebutted by the party challenging the settlement, the onus would certainly be on the successful party to support the settlement. [With a bare denial from the adversary, the entire burden does not come on the successful party before the Collector to uphold the settlement]. [A.I.R. 1974 Ori. 194; (1976) 42 Cut.L.T. 143, Overruled; A.I.R. 1934 P.C. 217; A.I.R. 1931 Cal. 763; A.I.R. 1955 Punj. 65, Foll.]: A.I.R. 1980 Ori. 199: (1980) 50 Cut.L.T. 393 (F.B.).

In the absence of other cogent and unimpeachable evidence to the contrary, the person in whose name the properties stood in survey and settlement registers should be taken to be the real owner thereof. The mere fact that tax was paid on one occasion by one individual in respect of lands standing in the name of somebody else does not denote that he is either the pattadar or is in enjoyment of the land. It might be that he paid it on behalf of the person in possession thereof: A.I.R. 1960 Andh. Pra. 222: (1960) 1 An.W.R. 340.

Where in a suit for possession, the claimants relied on the revisional settlement record-of-rights in which suit lands were recorded in the names of their three predecessors but the three persons died long before the settlement operation, *held*, the entries had completely lost their presumptive force: A.I.R. 1988 Cal. 79.

Where the whole land in a *patti* which was once owned by a common ancestor was at the time of the regular settlement in possession of his descendants according to ancestral shares and none of the descendants had acquired any land in the *patti* by purchase or introduced strangers in it by selling any portion of his ancestral holding, *held*, that an inference could be drawn from the circumstances of equality of holdings and reference to these in terms of ancestral shares in the settlement that the land had devolved by descent on the descendants: I.L.R. (1955) Patiala 36: A.I.R. 1956 S.C. 1.

Settlement pedigree tables—Presumption of truth of relationship: (1961) 63 Punj.L.R. 177: A.I.R. 1961 Punj. 251.

Settlement records—Person recorded as *raiyat* of tank—Presumption is that he is *raiyat*—Presumption is, however, rebuttable: I.L.R. (1969) 1 Cal. 508.

Entries in settlement jamabandis are presumed to be correct unless proved otherwise: 1959 M.P.L.J. (Notes) 92.

Entries in *jamabandi* are presumed to be correct and raise presumption in favour of person whose name is recorded in *jamabandi* as tenant—Rejection of mutation relating to tenancy is no ground for not relying upon the entries as mutation order, which is not even presumptive place of evidence does not

create or extinguish any right or title: A.I.R. 1966 Him. Pra. 61.

Entries in *jamabandi* presumed to be correct—However, old entries merely copied in new *jamabandi* not necessarily correct: A.I.R. 1969 Punj. 344.

As to presumption regarding entries in *jamabandi*, *see* I.L.R. 13 Lah. 432: A.I.R. 1932 Lah. 586; 29 Nag.L.R. 273: A.I.R.1933 Nag. 130.

Entries in the *jamabandi* are not proof of title. They are only statements for revenue purpose. It is for the parties to establish the relationship or title to the property unless there is unequivocal admission: A.I.R. 1994 S.C. 227.

Where in *jamabandis* the husband was recorded as a tenant and after his death, his wife continued to be so recorded for some years whereafter she was recorded as mortgagee in possession, *held*, on redemption of the mortgage, her tenancy in the land would revert back to her; the change in the record-of-rights, could not result in cessation of the tenancy: A.I.R. 1993 Him. Pra. 137.

Under S. 114 of the Evidence Act, there is a presumption that all the formalities in respect of a mutation had been duly complied with. Neither the Patwari who entered the mutation nor the Revenue Officer who attested the mutation need be examined to prove this: (1951) 53 Punj.L.R. 291: A.I.R. 1951 Punj. 126.

There is a presumption under S. 114 that official acts have been done in a regular manner and, therefore, it must be presumed that the mutation proceedings were preceded by a regular enquiry by the revenue authorities: (1972)2 Sim.L.J. 366.

Suit for redemption and recovery of possession of mortgaged property—Copy of mutation showing mortgagee having reported to Patwari acknowledging disputed mortgage—Report said to be destroyed—*Held*, presumption under S. 114 could not be raised and mortgagee could not be deemed to have signed or thumb-marked the report: (1966) 68 Punj.L.R. 408.

Where in a suit brought in 1961, for redemption of mortgage of 1895, by the purchaser of the rights of mortgagor, the plaintiff relied on certified copy of a statement made in mutation proceedings for the purpose of acknowledgment under S. 18 of the Limitation Act, but did not produce its original nor he examined any witness to prove the fact that the persons shown to have signed the original had in fact signed the same or those persons were the mortgagors/their representatives, *held*, in such circumstances, certified copy was no proof of the original nor the presumption under S. 90 or S. 114, *Illus.* (*e*) could be raised: A.I.R. 1971 S.C. 2342: 1970 Punj.L.J. 770: (1971) 2 S.C.R. 104.

Where the order sheet in mutation proceedings showed that the proclamation was issued but no objections were preferred, *held*, it was sufficient for the Court to raise presumption under S. 114, *Illus.* (*e*) that the official act of issuing the proclamation was regularly done: A.I.R. 1972 Ori. 148: (1971) 2 Cut.W.R. 814 (D.B.).

A mutation in the name of a co-owner only raises a presumption of his being in possession; it does not amount to his being in exclusive possession or ouster of other co-owners; to pin point commencement of his adverse possession against a co-owner, the party must bring on record the proof of the co-owner's ouster: A.I.R. 1985 N.O.C. 206 (Gau.).

The presumption of correctness cannot apply to papers of a survey until final publication, but the presumption arising from the circumstances that official duties are taken to have been regularly performed applies: A.I.R. 1933 Pat. 468.

37. Revenue records.—(*See* also Notes under S. 35). Entries in the revenue records have a presumptive value as to possession. They may even be taken presumptive proof of title as held in I.L.R. (1937) Nag. 395. Because of the presumption, the burden is on person contending to the contrary to show the entries to be wrong. In the absence of anything more the presumption would be good proof of title: 1958 M.P.L.J. (Notes) 164.

The entries in the revenue records are good *prima facie* evidence to prove purpose or intended user of the disputed land but they raise only a rebuttable presumption. [A.I.R. 1969 Andh. Pra. 345 (F.B.), Reversed; A.I.R. 1944 Mad. 401, Overruled]: A.I.R. 1977 S.C. 113: (1977) 1 S.C.R. 146.

It is settled law as laid down by the Privy Council in 53 Ind. App. 220: A.I.R. 1926 P.C. 100; 47 Ind. App. 57: A.I.R. 1920 P.C. 46; A.I.R. 1948 P.C. 210, and by the Supreme

Court in (1978) 1 S.C.R. 177: A.I.R. 1977 S.C. 2012; (1991) 2 S.C.R. 531: A.I.R. 1991 S.C. 1301 that mutation of names in revenue record is no evidence of title, though it may be relevant for other purposes; it is an equally settled law that in case of open land, title follows possession: A.I.R. 1994 S.C. 1496.

Though revenue record entries should generally be accepted at their face value but the presumption of truth attaches to genuine and not forged or fraudulent entries; the distinction, fine but real, is that though one cannot challenge the entry as incorrect but one can always impugn it as having been made fraudulently or surreptitiously; fraud and forgery would rob the entry of all its legal effect: A.I.R. 1976 S.C. 1485: (1976) 3 S.C.C. 642: 1976 (U.J.) S.C. 573.

The revenue records including maps proved in a case are prepared after following certain prescribed procedure. They are presumed to be correct. The presumption, however, is rebuttable: A.I.R. 1977 Gau. 41 (D.B.).

The report of a Revenue Officer conducting a sale is admissible in evidence, and there is a presumption attaching to such report, it being for the objector to show that anything was done irregularly: (1937) 39 Punj.L.R. 187. *See* also I.L.R. (1945) Bom. 681.

Orders of Revenue Courts, of limited jurisdiction as they are, are conclusive only for the purposes of the proceedings before them; enquiries before them are of fiscal nature in the State's interest for ascertaining which of the claimant be put in occupation so as to facilitate revenue recovery; even certified copies of revenue records are not conclusive but are only *prima facie* evidence of possession or the right to hold the land; they confer no title which falls within the exclusive jurisdiction of the civil Courts which alone can fasten finality on such rights. [A.I.R. 1973 S.C. 408, Rel. on]: A.I.R. 1985 N.O.C. 6 (Andh. Pra.).

Revenue record showing party as tenant for *kharif* harvest of 1961—His possession of land in June, 1961, can be presumed: 1965 Cur.L.J. 669: (1965) 67 Punj.L.R. 1053: A.I.R. 1965 Punj. 494.

Revenue records—Puduval Registry in name of certain person—Presumption of ownership: A.I.R. 1958 Ker. 335.

Where in a suit by a temple for a declaration that suit properties belonged to it and for possession of the same after ejecting the Archakas, it was found that barring some stray entries in favour of the plaintiff almost the entire revenue record was in favour of the defendants, *held*, no useful purpose would be served by discussing the oral evidence led by the parties as it was of uncertain character and was inadequate to displace the presumption arising out of the several entries spread over a large number of years showing possession of the defendants in their own right: A.I.R. 1973 S.C. 1299: (1973) 2 S.C.C. 261.

Where a father-in-law intended to transfer a chawl in favour of his daughter-in-law as he thought that his son, being a speculator, was not dependable and the daughter-in-law and her children were to be provided for and only entries in the revenue records were made wherein the daughter-in-law was mentioned as "*kabjedar*", that is occupant, of the chawl, *held*, the only presumption that could be raised would be in regard to her possession, and possession alone, and not ownership which could only be conveyed by a registered deed: A.I.R. 1989 S.C. 1269: (1989) 2 S.C.C. 630.

No evidence that last male-holder possessed of certain items of property before he died—Revenue registers containing name of his widow as owner of these items—Fact that the widow was in possession of those items would not give rise to presumption that those items were the property of the male-holder and the widow get those items of property as heir of her deceased husband: (1968) 1 An.L.T. 377: A.I.R. 1968 Andh. Pra. 276.

38. Election matters.—(*See* also Note 87, *infra*). The entry in the electoral rolls as to age is neither conclusive nor presumptive evidence. Under sub-S. (7) of S. 36 of the Representation of the People Act, 1951, a certified copy, of an entry in the electoral roll shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency but recourse cannot be had to this sub-section for arguing that the age as mentioned in that entry also has any evidentiary value. The presumption under *Illus.* (*e*) of S. 114, Evidence Act, to the effect that the Court may presume that official acts have been regularly performed, is hardly applicable to an entry about the age in the electoral roll which is made on hearsay and is

not verified or attested: A.I.R. 1958 Punj. 433: I.L.R. (1958) Punj. 2246.

Elections—Counting of ballot papers—Single mistake deleted—Presumption of correctness attached in counting of votes is not destroyed: A.I.R. 1966 All. 20.

Where the nomination of a candidate for election to the Managing Committee of a Co-operative Society was challenged on the ground that being a defaulter he was not qualified to contest but he denied having received any notice of demand which alone could render him a defaulter and his opponents produced the original register and record which included a certificate of posting in respect of the notice of demand, *held*, though there appeared to be no doubt about the notice of demand having in fact been posted but it cannot lead to an irrebuttable presumption that the demand notice was indeed delivered; nothing on record of the Returning Officer afforded any basis, in view of the candidate's denial, that the demand notice was actually served: A.I.R. 1995 Bom. 91.

Constitution of Election Tribunal—Validity—Presumption: 1964 Kash.L.J. 335: A.I.R. 1965 J.&K. 88.

Where on the date of the scrutiny of his nomination papers for election to a Panchayat, a dismissed teacher of a recognised school governed by the Orissa Education Code had been reinstated in appeal but was not allowed to rejoin duty, *held*, he is presumed under S. 114, *Illus.* (*e*) to be in service and disqualified for contesting the election: A.I.R. 1976 Ori. 68: (1975) 41 Cut.L.T. 942 (D.B.).

Where a candidate admittedly hold the post of an Extra Departmental Branch Post Master, an office of profit, justified his candidature as a Sarpanch on the plea of having submitted his resignation which was verbally accepted, *held*, it is a fantastic theory; resignations are never accepted verbally in official dealings; he was disqualified from contesting the election: A.I.R. 1976 Ori. 68: (1975) 41 Cut.L.T. 942 (D.B.).

Presumption that the Presiding Officer under Punjab Gram Panchayat Election Rules has discharged his duties properly and in accordance with law—Rebuttal—Person seeking to rebut the presumption must lead evidence for doing so: 1966 Cur.L.J. 223 I.L.R. (1966) 2 Punj. 527.

39. Birth and death registers.—(*See* also S. 35). Birth registers are maintained by public servants in the discharge of their official duties, a duty specifically enjoined on them by law and in the generality of cases the entries therein furnish the best evidence of the date of birth unless they were shown to be wrong. It is not necessary to prove who made the entries and what was the source of his information. The identity of the person with the entry made in the register has to be established independently: (1969) 35 Cut. L.T. 60: I.L.R. (1968) Cut. 859.

Though entries in a birth register, being a public document, are admissible *per se* but mere production of their copy does not, as a matter of law, connect them with the person concerned. Where plaintiffs challenged, a sale deed on the ground that they were minors at the time of its execution and they produced their birth entries as proof of their age, *held*, in the absence of any material on record that the said birth entries related to the plaintiffs, and the fact that they failed to come in the witness box, an adverse inference could be drawn that they were not minors at the time of the sale: A.I.R. 1983 P.&H. 366.

In so far as age factor is concerned, the medical certificates are only approximate and not accurate. They cannot fix up the exact date of birth. The features of body of human individuals vary depending upon several factors like social conditions, genetic factors, nourishment, etc. As such two medical opinions are bound to differ. May be in cases where there is no other cogent and clinching evidence one has to fall back upon the medical certificates regarding the age. But where there is clinching document, *i.e.*, the certificate of birth issued by the Registrar of Births, a statutory authority who maintains the Birth Register as also the Death Register in accordance with the provisions of the Act and Rules made thereunder, *held*, such an official act carries a statutory presumption under S. 114, and the entry in the School Register mentioning the age cannot come in aid to rebut the statutory presumption attached to the certificate issued by the Registrar of Births basing on the duly maintained register in that regard. Whenever a conflict arises as regards the age of a particular person the certificate issued by the Registrar of Births is

taken as more authentic and conclusive rather than a mere self serving statement of date of birth while admitting the students in the School: (1993) 2 An.L.T. 150.

Birth and Death Register—Presumption as to correctness attaches to entries in it: A.I.R. 1968 Pat. 481.

Where an extract of death entry register was produced to establish the death of a person, *held*, in the absence of other evidence, it could not be presumed that the entry related to or proved the death of the person concerned. [A.I.R. 1963 Bom. 25; A.I.R. 1949 Ori. 22, Rel. on]: A.I.R. 1982 Karn. 248.

40. Municipal record.—Grant of exemption for a premises on the ground of its being a temple by a Municipality, *held*, is an official act; it can be taken as regularly performed while determining whether it is a temple or not: (1981) 94 Mad.L.W. 555.

Where a person was recorded lessee in Municipal records, *held*, the inference is that he is in possession: (1980) 1 M.P.W.N. 87.

Exercise of discretion—Presumption as to, Municipalities: 1959 M.P.C. 119.

Bye-laws made under S. 185(*b*) challenged—Plea that there was no beating of drum, proclaiming that original copy of draft bye-laws was open for inspection in municipal office and that there was no publication of draft bye-laws in a particular ward—There is presumption that an act done by Municipality has been done according to prescribed procedure—*Held*, draft bye-laws were published and proclaimed as provided under S. 356 read with S. 26 of Bihar and Orissa General Clauses Act, I of 1917: 1966 B.L.J.R. 717.

Allegation in petition that Vikas Adhikari was not nominated by Collector for purpose of co-option proceedings as envisaged under Rajasthan Municipalities (Appointment of Members Councillors by Co-options) Order, 1959—Allegation not supported by affidavit—Rule of presumption that official acts are regularly performed applied: 1964 Raj.L.W. 599: I.L.R. (1965) 15 Raj. 140: A.I.R. 1965 Raj. 86.

41. Land acquisition proceedings.—Consent of Government under S. 40, Land Acquisition Act—Presumption as to grant of: A.I.R. 1958 All. 126.

Payment of compensation to widows in land acquisition proceedings—Payment of compensation would not necessarily mean that widow's title to land is established: (1967) 1 S.C.R. 153: A.I.R. 1967 S.C. 1134.

Grant—Land Acquisition Officer having access to all relevant documentary evidence, not for a moment doubting that there was grant of minerals—Question of such grant not traversed before District Judge—It must be assumed that Land Acquisition Officer was fully aware that question of grant of minerals was not controverted—Land Acquisition Act, 1894, S. 54: (1967) 1 Mys.L.J. 159.

Judicial and official acts—Presumption—Land acquisition proceedings—Hearing of objections—Proceedings of Dy. Commissioner stating that intimation of adjourned date had been issued—Service of intimation must be presumed—Land Acquisition Act, 1894, S. 5-A(2): A.I.R. 1964 Mys. 55.

Acquisition of land for company by Government under Land Acquisition Act—Presumption is that land was acquired for purpose of business of company: A.I.R. 1966 Pat. 338.

Land acquisition—Sale of adjoining properties—Sale deed registered—No presumption that price shown was actually paid: A.I.R. 1969 Ker. 265.

Where in the proceedings for determination of compensation payable for the land acquired, when the sale deeds of certain adjacent lands were sought to be relied upon for determining the market value of the property acquired, the claimants contended that the Court should proceed on the basis that generally less price is shown in the sale deeds, *held*, in absence of any evidence to the contrary, the Court cannot presume that the price shown in the sale deed was less than the actual price: A.I.R. 1994 All. 66.

Notification under S. 4, Land Acquisition Act—Giving of substance is an official act—Unless contrary is proved, it must be presumed to have been properly done: I.L.R. (1969) 1 Cal. 529.

"Public purpose"—Meaning—Decision of State Government as to public purpose—Presumption as to correctness is rebuttable—Court can examine the purpose: A.I.R. 1962 Punj. 177.

Reservation of an area for particular purpose—Does not amount to restriction—

Presumption as to diminishing of value cannot arise: A.I.R. 1968 Guj. 5.

Where respondent's land was acquired and compensation was awarded by concerned officer but subsequently she filed a claim for enhancement of compensation and pleaded that bar under S. 27 of the Kerala Land Acquisition Act, 1962 regarding enhancement of compensation did not apply as notice under S. 9 of the said Act was invalid inasmuch as it did not give prescribed 15 days time to the claimant to make a claim regarding compensation before the concerned officer, *held*, a presumption arose that the claimant had been prejudiced and, thus, bar under S. 27 of the said Act was inapplicable: A.I.R. 1981 N.O.C. 162 (Ker.) (D.B.).

In a reference under S. 18 of the Land Acquisition Act, 1894, the presumption under S. 114 (*e*) of the Evidence Act is that the Collector was *prima facie* satisfied about the claimant's right to the reference; such a presumption is rebuttable as the acquisition authority (the Improvement Trust) was not heard when the reference order was made, the onus to dislodge the presumption lies on that authority; if that authority did not produce the documents in its possession showing the quantum of the lands and the compensation therefor paid to the landowners, the Court may draw an adverse presumption against it under S. 114 (*e*) of the Evidence Act: (1985-2) 88 Punj.L.R. 663.

Application for reference made beyond six weeks from date of award—Plea that applicant was not present when award was made—Plea not raised before Land Acquisition Officer or before District Judge—*Held*, circumstances indicated that applicant was present and affidavit filed by him that he was not present was not of much value: 1965 Raj.L.W. 495: A.I.R. 1966 Raj. 118.

Acquisition of land for company—Suit for declaring acquisition null and void—Plaintiff claiming *locus standi* on the basis of interest acquired under an alleged settlement of the land to him by the company making no attempt to prove his case—Court cannot find title in his favour by drawing adverse inference against the company for non-production of documents of title of plaintiff particularly where it had denied the existence of those documents: I.L.R. (1969) 1 Cal. 529.

42. Assessment record.—The Court is entitled to presume that all official acts are regularly performed and that every public servant discharges his duties in accordance with the provisions of law. It must be assumed, therefore, that before according his approval under S. 22 (4), Income-tax Act, the Commissioner had satisfied himself in regard to the necessity of calling for the world income of the assessee: A.I.R. 1957 Punj. 26: I.L.R. (1957)Punj. 567: (1956) 30 I.T.R. 496.

Proceedings taken by Income-tax Officer—Presumption in favour of regularity: (1959) 36 I.T.R. 397: A.I.R. 1959 All. 775.

Authentication of Government order—Presumption: 1959 M.P.L.J. 407. Member of Commission under Taxation on Income (Investigation Commission) Act—Discharging functions—Authorization—Presumption. *See* I.L.R. (1954) Bom. 567: A.I.R. 1954 Bom. 184.

Where under an Export Promotion Scheme, weavers residing in Maharashtra and Gujarat were issued cards entitling them to buy specified quantity of art silk yarn from specified manufacturers in terms whereof the manufacturer had to offer within a week of the allocation the yarn for sale and to complete a firm contract of sale within three weeks of the allocation but the manufacturer in Tamil Nadu delivered the supply to the weavers through its agent in Bombay, *held*, the assessing authority had correctly taken it to be an inter-State sale liable to be taxed as such; in case there were any intervening facts which could have rendered it a local, not inter-State, sale it was for the assessee to place them before the assessing authority; if he did not do so, the presumption is that they would have gone against the assessee: A.I.R. 1981 S.C. 1604: (1981) 3 S.C.C. 457.

43. Arbitration.—There is no presumption that the arbitrator must have given notice of the date of the hearing before him to one of the parties to the arbitration proceeding, it being not a matter of presumption but a matter of evidence: A.I.R. 1953 Ajmer 58: 1953 A.M.L.J. 111.

Rules of natural justice—Observance of, by arbitrator—Presumption as to—Violation of principles of natural justice, when justifies interference—Both parties heard—Minor grievance—No ground for misconduct: 1963 M.P.L.J. 284: A.I.R. 1964 Madh. Pra. 15.

Steps in aid of proceedings as contemplated by S. 34 of the Arbitration Act—Presumption—Rebuttable: A.I.R. 1968 Raj. 187.

Government contract—Head of Department appointed arbitrator—Bias—Presumption as to. *See* A.I.R 1958 Punj. 19.

Statement of arbitrator as to amount of fees he received—Statement presumed to be correct. [A.I.R. 1924 Mad. 274, Rel. on]: A.I.R. 1970 All. 525: 1970 All.L.J. 297 (F.B.).

44. ***Illustration*** **(*e*)—Others.**—No evidence of any dedication of the properties to the purposes set out in S. 3(1) of the Wakf Act—*Held*, no presumption that they constituted wakf properties. *See* (1987) 100 Mad.L.W. 949.

Discretion vested in President under Cl. (1) of R. 11 of Central Civil Services (Provision) Rules, 1972, is neither arbitrary nor is likely to be abused; there is presumption in favour of legality of all official acts: 1984 Lab.I.C. 498 (Andh. Pra.).

Where the Registrar granted a licence under R. 9 of Bombay Money Lenders Rules, 1959, *held*, a presumption will arise that the licence was granted only after satisfaction about compliance of the conditions precedent: (1982) 2 Bom.C.R. 195.

Where the examination of two students in a combined competitive examination in general knowledge was cancelled merely by rejecting their reply to the show cause notice on its "careful consideration" as "not satisfactory" without a speaking order or assigning any reasons therefor, *held*, this being a *quasi* judicial decision having civil consequences, the authorities not having their objective mind and kept the writ Court in the dark, failed to observe the principles of natural justice: (1989-1) 37 B.L.J.R. 140.

Where the petitioner who was declared to have failed in some of the subjects applied for revaluation but no reply was received to his various letters calling upon the Registrar for revaluation and thereafter he prayed for a direction to Registrar to revalue certain papers but the University stated that the answer scripts of the petitioners were not available and later on it was found that same had been disposed of to a paper mill for purpose of pulps in violation of the University Rule which provided that the University should keep the answer scripts for at least six weeks from the date on which the results were announced, *held*, an adverse inference could be drawn against the University that had the answer scripts been produced, the Court would have found facts adverse to the University's stand and, therefore, they had withheld the production of answer scripts arbitrarily and deliberately: A.I.R. 1989 Kam. 174.

It cannot be said that in the case of allegations of fabrication of a document, the contents of which are culled out from a record, maintained in a public office, there is an irrebuttable presumption that the parent record does not suffer from any infirmity. Each case will depend upon its facts. Where tabulation marks register declared respondent as unsuccessful but the certificate issued by the competent authority showed him as successful and his name was also gazetted in the list of successful candidates and it was not claimed that the said certificate suffered the vice of corrections or alterations or erasures and it was not signed and issued by the competent authority, *held*, in the absence of proper and clinching evidence, pointing out that the certificate issued by the competent authority and possessed by the respondent, must stand eschewed as a fabricated one, it was not possible to go by any universal presumption that the Tabulation marks register alone was reflecting the correct position and that presumption was irrebuttable: (1989-2) 104 Mad.L.W. 118 (D.B.).

Under Regn. 34(2) of the Gujarat Higher Secondary Certificate Examination Regulations, 1977, a candidate declared to have been failed can be declared successful only if on verification it is discovered that an answer was not evaluated or marked or there was a mistake in totalling. Thus, where the marksheet and the moderator's sheet supported by affidavit showed the failed candidate to have secured 18 per cent marks in Gujarati, *held*, his failure was *prima facie* proved and the presumption under S. 114 (*e*) could be drawn; merely because the Board had destroyed his answer book in haste and before the prescribed period is no ground to declare the candidate having passed: A.I.R. 1988 Guj. 6: (1987-2) 28 Guj.L.R. 839: (1987-2) 7 Guj.L.H. 219 (D.B.).

The fact of sickness or physical inability on the day of examination must be accepted on the basis of medical certificate in absence

of any proof to the contrary. The fact that a person was in a position to travel on the next day cannot lead to an irresistible conclusion that he was not sick on the previous day: (1986-1) 27 Guj.L.R. 121.

Where proceedings under the Bihar Public Land Encroachment Act, 1956 were conducted in violation of the provisions of law, *held*, there could be no presumption that the judicial and official acts were regularly performed: (1990-2) 38 B.L.J.R. 1092.

Though under S. 72-K(2) of the Kerala Land Reforms Act, 1964, a purchase certificate issued under that Act is conclusive proof of the assignment of the right, title and interest of the owner and the intermediaries of the holding and under S. 114(*e*) of the Evidence Act, 1872, there is a presumption of its having been granted regularly, *held*, it does not oust the civil Court's jurisdiction to try and determine whether it was obtained by fraud: A.I.R. 1991 Ker. 316: (1990) 2 Ker.L.J. 702.

U.P. Imposition of Ceiling on Land Holdings Act, 1960, S. 5—Determination of ceiling area—Family arrangement recognised by Consolidation Authorities—Such transaction cannot be characterised as fictitious merely because it tends to reduce holding of tenure holder—Nothing to show that this arrangement was arrived at with a view to defeat ceiling law—No such presumption can be drawn merely because it results in reducing the area held by tenure holder: 1977 All.W.C. 330: 1977 All.L.R. 534.

Where the award was unanimously given by the *panchas* appointed in terms of R. 20 of the Wilkinson's Rules enforceable under S. 1 of the Chotanagpur Tenancy Act, 1908 for partitioning property under the customary law governing the community, *held*, it could be presumed under S. 114(*e*) that the *panchas* were most conversant with the customary law and their judicial and official acts were regularly performed: A.I.R. 1988 Pat. 287: 1987 B.B.C.J. (H.C.) 551: 1988 Pat.L.J.R. (H.C.) 39: 1988 B.L.J. 451.

Lands situate in inam village—Private or *ryoti* lands—Presumption and onus of proof—Test to determine whether particular land is private land of landholder: A.I.R. 1968 S.C. 1005.

Courts are bound to take judicial notice of prorogation and presume the regularity of these actions which must be interpreted as far as possible so that the thing done may be valid rather than invalid: A.I.R. 1969 S.C. 903.

Ancient marriage register produced from proper custody evidenced payment of *streedhanam* to sisters of deceased—No motive for making, decades before the dispute arose, a false or imaginary entry regarding payment alleged or proved—Entries must be presumed to be genuine: A.I.R. 1979 Ker. 34 (F.B.).

Where after the *malguzari* villages vested in the State and the Forest Department auctioned the right to propagate and collect *lac* from *malguzari* forests and the auction-purchaser had also worked the contract, *held*, a presumption could be raised under S. 114 (*e*) of the Deputy Commissioner having transferred the possession of the forests on behalf of the State to the Forest Department in the normal course of official business. [A.I.R. 1966 S.C. 1931, Rel. on]: A.I.R. 1973 Madh. Pra. 274: 1973 M.P.L.J. 286 (D.B.).

Where a writ petition challenged a notification appointing a Commission of Inquiry to enquire into the allegations made against a Chief Minister and his Government, *held*, it is permissible to raise the presumption of the official acts having been regularly performed; however, it has been the practice of the High Court to ask the Government to State the facts and refer to the relevant documents to enable the Court to know, even before admitting the petition, whether the allegations made therein are true or not; though the Court does not follow the procedure of caveat, hearing the other side before admission is not unusual: (1977) 90 Mad.L.W. 223: A.I.R. 1977 Mad. 192 (D.B.).

Where on integration of services consequent upon the reorganisation of the States of Punjab and Himachal Pradesh, the composite Punjab State Electricity Board was dissolved and some of its employees were allocated to Himachal Pradesh and the joint integrated seniority list prepared was impugned by them on the contention that their representation against it was rejected by the Advisory Committee and the Central Government though statutorily required did not apply its independent mind to their representation, *held*, from the signature of the Minister appended on the record it could be presumed that the Central Government had considered all relevant facts and documents: 1981 Lab.I.C. 758 (Him. Pra.) (D.B.).

Effect of receipt under S. 39(3)—Presumption under a bill of lading—Word "tally"—Meaning—Tally of cargo—Duty of Port Trust—Port Trust giving receipt in general way without specifying brands which were also part of marking of consignment does so at its own risk—Issue of 'A' certificate by Port Trust precludes it from saying that steamer agents had not landed consignments with particular brand (*Obiter*): I.L.R. (1966) 1 Mad. 164: A.I.R. 1968 Mad. 42.

Pledge of Savings Bank Pass Book to third person—Redelivery of Pass Book was not by pledger—Presumption: A.I.R. 1959 J.&K. 67.

Entries in Ledger account of High Commissioner for India in London—Presumption that official acts have been regularly performed and common course of business has been regularly followed: A.I.R. 1960 J.&K. 136.

Applicability—Regularity of official acts—Presumption—Affidavit sworn before Oaths Commissioner in Pakistan—Presumption does not apply: A.I.R. 1970 J.&K. 159.

Foreign *ex parte* decree against defendant a domicile and resident of India—Observation in the decree that summons was duly served on defendant—From this observation it cannot be presumed that defendant was resident, was physically present in that country on the date of suit when the summons was served since a defendant may be served even outside that country: A.I.R. 1967 Del. 22.

Where a Will executed in 1941 in Burma was also registered on the same day and a certified copy thereof with a certificate from the Registrar was produced in India, *held*, in the absence of other evidence, the factum of *prima facie* execution of the Will in the normal course of official business could be presumed under S. 114(*e*): A.I.R. 1973 Mad. 421: (1972) 2 M.L.J. 508: (1973) 86 Mad.L.W. 122 (D.B.).

School leaving certificate issued by foreign State—Presumption of correctness: I.L.R. 50 Bom. 716: A.I.R. 1927 Bom. 11.

Where a firm in contravention of contractual obligation tried to pass on different goods as those which were agreed upon and relying upon the inspection report the firm was black-listed, *held*, it could not be contended that action of black-listing the firm was not based on sufficient material; and, moreover, there is a presumption that official records maintained in the normal course of business are correct: A.I.R. 1992 Del. 295 (D.B.).

Where a Raja gifted certain valuable land called "Barang" to his younger brother at a nominal rent, *held*, a presumption arose that "Barang" was estate and donee was intermediary under S. 2(*g*) and (*h*) of the Orissa Estates Abolition Act, 1951. More so when after abolition of the estate, the State was directly receiving land revenue from the erstwhile tenants to the deceased petitioner treating them as *raiyats*. [A.I.R. 1974 Ori. 141 (F.B.), Rel. on]: A.I.R. 1988 N.O.C. 61 (Ori.) (D.B.).

Where in a prosecution of an owner of a mine for failure to file the annual return under S. 66 of the Mines Act, 1952, there was on record a reminder issued by Chief Inspector of Mines, and a clerk was examined to show that no return was received in the office; *held*, that when the letter was issued by the Chief Inspector of Mines, the presumption was that the official business was conducted in common course of natural events. Accordingly, the Courts should presume that the letter was issued only after being satisfied that no return was received in the office. The onus was on the accused to prove that the return was filed: I.L.R. (1960) Cut. 162: 1960 Cr.L.J. 1355: A.I.R. 1960 Ori. 180.

Official acts—Non-mention of section in Preamble to Rent Control Order—Effect—Presumption. *See* A.I.R. 1957 Ker. 109.

Deputy Secretary making order in his own right and not authenticating order issued in the name of President—Validity—Presumption of official act: 1967 Cr.L.J. 581: A.I.R. 1967 Punj. 174.

Registration of society under Societies Registration Act—Presumption: A.I.R. 1969 All. 248.

Retirement certificate of service, after scrutiny by Accountant-General—Presumption: 1968 Lab.I.C. 116: A.I.R. 1968 Andh. Pra. 50.

Rule requiring quorum of Central Transport Board to be of two members—Proviso that if within 15 minutes other member does not appear Chairman alone to hear appeal—Appeal heard by Chairman alone—Presumption that Chairman acted in accordance with the proviso: 1958 An.L.T. 1074.

Appending signature to official receipt for payment of money for Government work—Presumption: (1963) 2 Cr.L.J. 36: A.I.R. 1963 Pat. 262.

Act V of 1859 is special statute dealing with Ghatwali lands while Act IV of 1870 is general statute dealing with management of estates that come under superintendence of Court of Wards—General later law does not abrogate earlier special one by mere implication—Special provisions under Act V of 1859 in regard to conditions imposed for validity of lease of Ghatwali land prevail over those imposed under Act IV of 1870—Ghatwali estate under superintendence of Court of Wards leased in perpetuity for purpose of effecting dwelling houses—Lease granted by Deputy Commissioner and not by Commissioner, on behalf of Court of Wards—Validity of lease not questioned for about 80 years and lessee in possession of land all those years—Presumption under *Illus.* (*e*), S. 114, Evidence Act, 1872, *viz.*, official act if proved to have been done, is presumed to have been regularly done, arises—Lease held valid: A.I.R. 1966 S.C. 1931.

Discretionary power vesting in the executive—Exercise of power depends on the subjective satisfaction of authority on existence of objective fact—Satisfaction of Government challenged—Burden of proof: I.L.R. (1967) Guj. 620.

Official Acts—Approval of transport scheme under Motor Vehicles Act, S. 68-D—Presumption: A.I.R. 1969 Mys. 215.

One cannot presume against the interest of an accused person that the ordinary official procedure was not carried out: (1937) 39 Punj.L.R. 629.

Satisfaction of detaining authority under Preventive Detention Act—Presumption: (1965) 2 Cr.L.J. 119: A.I.R. 1965 Punj. 270.

When the language of S. 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 obliges the officer concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or a Magistrate, *held*, there is no room for drawing a presumption under S. 114(*e*) of the Evidence Act that he had so informed in absence of any evidence to that effect. If no evidence to this effect is given, the Court must presume that the person to be searched was not informed of the protection the law gave him: 1995 Cr.L.J. 2662 (S.C.).

As S. 3(2) of the J.&K. Preventive Detention Act, 1964 requires the detaining authority, other than the Government, to report to the Government about the detention and the place of detention of a person under the Act, *held*, being an official act, it must be presumed that, in the absence of an averment to the contrary, the report was sent, the Government was made aware of the place of detention and had approved of them: A.I.R. 1971 J.&K. 1: 1970 Kash.L.J. 338: 1971 Cr.L.J. 48 (F.B.).

An order of detention passed under the J.&K. Public Safety Act, 1978 signed by the Addl. Secretary to Govt., Home Department and issued by orders of the Governor, *held*, is presumed to be valid; such presumption is, however, rebuttable but in that event the onus lies upon such person who asserts the same to be contrary to the provisions of the Constitution: 1993 Cr.L.J. 727 (J.&K.).

Where the detenu under the National Security Act, 1980, was a practising advocate and the Advisory Board consisted of High Court Judges and the detenu had given very lengthy arguments before the Board citing a number of authorities in support of his submission and the board after due consideration concluded that his detention was proper and gave its reasons also for such conclusion, *held*, there was a presumption that the Advisory Board had considered all the documentary evidence produced by the detenu: A.I.R. 1985 S.C. 1082: 1985 Cr.L.J. 1348.

Where a detenu under Conversation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), contended that the confirming authority had not considered at all the deposition of the defence witness but it appeared that the Advisory Committee had in its report referred to the evidence of the defence witness, and the confirming authority had considered the report of the Advisory Committee, *held*, it will not be unreasonable to presume that all the records including the deposition of the defence witness were before the confirming authority and that it had applied its mind to the deposition of defence witness also: A.I.R. 1987 S.C. 48: 1987 Cr.L.J. 318: (1986) 4 S.C.C. 240.

45. *Illustrations* (*e*) and (*f*)—Postal business—General.—A correctly addressed postal cover sent by registered post is presumed, under S. 114, to have been duly served upon the addressee; evidence of actual tender and refusal is wholly redundant and not necessary for raising the presumption; for if evidence was required to be produced, there would have been no need to provide for the presumption: A.I.R. 1976 Del. 111: (1976) 12 Del.L.T. 127.

A letter correctly addressed and posted, if not received back through the dead letter office must be presumed to have reached the addressee. A postal receipt does not normally bear the whole address of the addressee except the name of the addressee and that of the Post Office where the letter is addressed and, thus, it cannot be argued that the letter was not sent in the proper address. Therefore, where a letter containing a notice to quit was not received back, *held*, it had to be presumed, in the circumstances, that it duly reached the addressee and was received by him: A.I.R. 1971 Ker. 231: 1971 Ker.L.T. 273: 1971 Ker.L.J. 485; (1994-1) 113 Mad.L.W. (S.N.) 114.

If it is proved that a letter addressed to the addressee had been handed over to the postal department, the presumption is that it has been delivered to the addressee. It is not necessary that there should be a despatch by registered post or under a certificate of posting: (1969) 19 Law Rep. 415 (Mys.).

If a notice was sent by registered post, the presumption is that the notice was served at the time when it would be delivered in the ordinary course of post. The presumption is, however, rebuttable: A.I.R. 1950 Cal. 256.

If a letter properly directed, containing a notice is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office and was received by the person to whom it was addressed and that presumption would apply even in the case of a letter sent by ordinary post: A.I.R. 1969 Bom. 410: 1968 Mah.L.J. 797: (1969) 71 Bom.L.R. 214; A.I.R. 1968 Ori. 234: I.L.R. (1968) Cut. 424: 34 Cut.L.T. 823.

Notice—Service of by post—Presumption: A.I.R. 1967 J.&K. 141.

Notice by registered post—Posting proved—Presumption as to receipt: A.I.R. 1966 Assam 84.

As to presumption regarding notice and other processes of Court, *see* A.I.R. 1957 Pat. 487.

There is a presumption that there was proper service of summons: I.L.R. (1956) Trav.-Co. 1130.

Postal business—Presumption—When letter is posted, presumption is that it has reached destination and has been delivered to addressee—Letter sent by registered post—Presumption is still stronger—Acknowledgment signed by someone at other end—Presumption would be that it was received on behalf of addressee—Presumption is, however, rebuttable: 1966 B.L.J.R. 808: A.I.R. 1966 Pat. 434.

A "properly addressed" cover for the purpose of presuming due service under S. 114, *Illus.* (*e*) need not be the "permanent" address; it would suffice if it is the party's correct address for the time being. [A.I.R. 1970 All. 446 (F.B.), Rel. on]: A.I.R. 1972 All. 539.

A person may have more than one address and a notice sent to that person at any of the addresses under registered post may be presumed to have been validly served on him. But in such a case, there must be evidence that that person has more than one address: A.I.R. 1984 Pat. 245.

With respect to letters which are not properly addressed, presumption cannot be raised that they must have reached the place of destination: A.I.R. 1975 Raj. 121: 1975 Raj.L.W. 107.

Notice posted by giving proper address—Presumption—Rebuttal: A.I.R. 1966 Assam 104.

A notice sent by registered cover properly addressed and pre-paid carries a presumption of due service, but when the addressee denies on oath about the tender of any such notice, the presumption stands rebutted: (1981-82) 86 Cal.W.N. 438; 1978 All.L.J. 44: (1978) 4 All.L.R. 90; A.I.R. 1978 N.O.C. 206: (1978) 1 Cal.L.J. 451: (1977-78) 82 Cal.W.N. 731.

Though there is a presumption that letters shown to have been sent by registered post had reached their destination, yet the presumption stands rebutted if the addressee denies having received them; it is then only on the evidence of tender by the postal peon to the addressee that the letters can be taken to have been duly delivered: A.I.R. 1972 Pat. 142: 1972 B.L.J.R. 97: 1971 Pat.L.J.R. 587 (D.B.).

The presumption of service of a letter sent by registered post can be rebutted by the addressee by appearing as witness and stating that he never received such letter. If the acknowledgment due receipt contains the signatures of the addressee himself and the addressee as a witness states that he never received such letter and the acknowledgment due does not bear his signature and such statement of the addressee is believed then it would be a sufficient rebuttal of the

presumption drawn against him. The burden would then shift on the plaintiff who wants to rely on such presumption to satisfy the Court by leading oral or documentary evidence to prove the service of such letter on the addressee. This rebuttal by the defendant of the presumption drawn against him would of course depend on the veracity of his statement. The Court in the facts and circumstances of a case may not consider such denial by the defendant as truthful and in that case such denial alone would not be sufficient. But if there is nothing to disbelieve the statement of the defendant then it would be sufficient rebuttal of the presumption of service of such letter or notice sent to him by registered post: A.I.R. 1990 S.C. 2156: (1990-2) 10 Guj.L.H. 430.

A letter sent by registered post to the correct address of a named person is presumed and deemed to have been received by him and the mere statement on oath by the addressee that it had not been received by him will not rebut the presumption contained in S. 114 of the Evidence Act and the deeming provision in S. 27 of the General Clauses Act: (1970) 2 M.L.J. 535.

Existence of acknowledgments in respect of registered articles in Post Office—Existence would no more than raise a presumption that those articles were delivered to the addressee—Presumption may be rebutted by evidence of addressees that articles were in fact not received by them: (1963) 2 Lab.L.J. 667: (1963) 1 S.C.R. (Supp.) 408: A.I.R. 1963 S.C. 822.

Where notice by land acquisition authorities was sent by registered post acknowledgment due to trustees of a charitable trust at residential address and acknowledgment duly signed was received by the postal authorities, *held*, a presumption of service of notice arose. Mere fact that the postman who tendered the registered packet was not examined would not rebut said presumption. [A.I.R. 1981 S.C. 1284, Disting.]: A.I.R. 1995 Bom. 172 (D.B.).

Where there was no pleading by the plaintiff that the notice was not served upon him nor did he lead any evidence in that regard, *held*, presumption of service of notice could be raised: 1973 B.B.C.J. 120.

There is no warrant for holding that if a registered letter is not received back by the sender it must be presumed that it was received by the addressee: (1983) 85 Punj. L.R. 520: 1983 Cr. L.T. 344.

There is always a presumption under law that, in case any letter or a publication like the newspaper is forwarded under postal certificate on a correct address, publication or letter has reached the addressee unless it is received back with a report that the addressee does not reside at the given address. Thus, where the newspaper containing notice of the date of hearing of the suit sent at the party's address was not received back by the Court, *held*, presumption arose that it was correctly delivered at that address: A.I.R. 1991 Del. 50: (1990) 42 Del.L.T. 401: 1990 Rajdhani L.R. 425: (1991-1) 99 Punj.L.R. (Del.) 70.

The post marks of the places of posting and destination, on the invitation cards, *held*, are sufficient to infer that they were posted and received by the addressees in the normal course; they are, thus, admissible in evidence: A.I.R. 1994 Andh. Pra. 102 (D.B.).

Presumption of due service of letter—Report and intimation sent by registered post at correct address of accused with correct name supplied by him at time of taking sample—Presumption under S. 114, *Illus.* (*f*): 1982 All. L.J. 1338.

Where a notice is required or authorised to be served by post under any Central or State enactment and a notice is accordingly despatched by registered post, an obligatory presumption of due service would arise under the relevant provisions of the Central or the State General Clauses Act. Where any such notice is not required or authorised to be served by post, but a notice is nevertheless served by post, registered or ordinary, a Court may, not that it must, in a given case raise a presumption of due service under the provisions of S. 114. But in either case, the Court may, in view of the sworn assertion of the addressee to the contrary, or some other reliable evidence on record, hold any such presumption, whether obligatory or optional, to have been rebutted. Thus, S. 13(6) of the W.B. Premises Tenancy Act, 1956, not having required or authorised service of notice by post, the presumption of due service which would operate is not the obligatory one under S. 28 of the Bengal General Clauses Act, but the optional one under S. 114 of the Evidence Act: A.I.R. 1989 Cal. 14: (1988) 1 Cal.L.J. 250: (1988) 1 Cal.H.N. 219:(1987-88) 92 Cal.W.N. 929 (D.B.).

(*a*). Section 27 of the General Clauses Act *vis-a-vis* section 114 of Evidence Act.—Presumption of law under S. 27 of the

General Clauses Act and that under S. 114 of the Evidence Act—Distinction explained: 1970 All.L.J. 336: A.I.R. 1970 All. 446 (F.B.).

Presumptions under S. 27, General Clauses Act and S. 114, Evidence Act—Distinction—Former is one of law and obligatory while latter is discretionary: 1969 All.L.J. 849: 1969 Ren.C.R. 849: 1969 All.W.R. (H.C.) 477.

A presumption arises under S. 114 of the Evidence Act read with S. 27 of the General Clauses Act (1897) with regard to a notice sent to the tenants. The posting of the notice by mail and the endorsement of refusal recorded thereon are official acts and it will be presumed to have been done in the ordinary course: A.I.R. 1977 N.O.C. 335: 1977 Kash.L.J. 57: 1977 Ren.C.J. 636.

Although presumption under S. 27, General Clauses Act can only arise when the notice is sent by registered post, there may arise a presumption under S. 114, Evidence Act when notice is sent by post as contemplated by S. 106, T.P. Act irrespective of whether it is sent by ordinary post or under certificate of posting.

Both the presumptions are, however, rebuttable. When the cover containing the notice has been returned to the sender by the postal authorities, then that fact is direct proof of the fact that the notice sent by post was not delivered to the party to whom it was addressed. Whether it was tendered and, if so, to whom tendered, remain a matter to be ascertained on evidence. If acceptable evidence is available, that it was tendered to the party personally, then such facts may bring the service of notice within the second mode mentioned in S. 106. If, however, tender or delivery is not to the party personally but to a member of his family or a servant, then it may be effective tender or delivery only when, the notice was addressed to the residence of the party. Such personal tender or vicarious tender may be effective even if it was through the agency of post office, and proof of that tender come from testimony of any person present at the event, and not only by examining the postman. If the letter containing notice sent by post has not been returned to the sender, then it is a case where presumption operates. Whether such presumption has been rebutted depends on the acceptability of evidence denying tender or delivery offered by the defendant. Mere denial will not lead invariably to rebuttal of presumption properly raised: A.I.R. 1968 Cal. 49.

The first presumption as to delivery of letter to addressee arises by posting of the letter in the ordinary course without registration under S. 114, *Illus.* (*f*) of the Evidence Act. The raising of this presumption is not in any way prevented by S. 27 of the General Clauses Act. The latter provision does not mean that no presumption of the delivery of letter can arise unless it is registered. The second presumption under S. 27 of the General Clauses Act arises only when the letter is sent by registered post. But the provisions of S. 114, *Illus.* (*f*) of the Evidence Act and S. 27 of the General Clauses Act are independent of each other and can stand together. They are not mutually repugnant. Thus, where a notice of demand was served by landlord under a certificate of posting as well as through registered post but the registered envelope was returned with remarks that nobody from inside gave a reply, *held*, the presumption of the delivery of notice arose only under S. 114, *Illus.* (*f*) and not under S. 27 of the General Clauses Act: A.I.R. 1973 Del. 39: I.L.R. (1972) 2 Del. 943: 1972 Ren.C.R. 960. *See* also (1979) 16 Del.L.T. 32.

Service by post—Presumption under S. 27, Mysore General Clauses Act (III of 1899)—Presumption is rebuttable—Contrary that has to be proved for rebuttal has no reference to actual service: A.I.R. 1970 Mys. 77.

Where in ejectment proceedings, the landlady claimed to have sent the notice through registered post but defendants denied to have signed the acknowledgment, *held*, presumption under S. 114, Evidence Act and S. 27, General Clauses Act could be raised only if it was shown that the notice gave correct particulars of the addressee on the notices and on the forms of acknowledgment and such a presumption was indeed rebuttable. [A.I.R. 1971 J.&K. 20, Dissent. from]: A.I.R. 1978 J.&K. 31.

The presumption of service of a notice sent under registered post is available under Ss. 16 and 114, *Illus.* (*e*) of the Evidence Act as well as S. 27 of the General Clauses Act only when the plaintiff proves that the letter was properly addressed and put into the Post

Office; but the full address given in the body of the notice raises no presumption that the envelope was also correctly addressed; at any rate, such presumption is rebuttable; thus, when the addressee appears before the Court and denies on oath the service of notice, the presumption stands rebutted; and here the evidence of the Postman becomes necessary: A.I.R. 1978 N.O.C. 112 (Gau.).

S. 106 of the Transfer of Property Act uses the words "sent by post" regarding service of the notice to quit; S. 27 of the General Clauses Act, 1897 also does not lay down that the notice to quit, when sent by post, must be by registered post; S. 27 of that Act does not extend to a letter sent under a certificate of posting, but S. 114 is certainly attracted; it raises a rebuttable presumption of the letter having been sent: A.I.R. 1976 Cal. 478.

When the notice comes back unserved for refusal by the addressee to accept it, *held*, the notice must be presumed to have been served as contemplated by S. 27 of the General Clauses Act, 1897: A.I.R. 1992 S.C. 1604: (1992) 1 S.C.C. 647; A.I.R. 1981 S.C. 1284; A.I.R. 1976 All. 515.

(*b*). Endorsement of refusal.—An endorsement made by a postman on the cover of a registered letter containing a notice, that the letter was refused, entitles the Court to hold under the presumption in *Illus.* (*e*) of S. 114 that the endorsement was made by the postman and it was correctly made. If, however, there is some evidence to rebut this presumption a different finding will follow. [A.I.R. 1915 Cal. 313, Dissent. from]: (1972) 74 Bom.L.R. 723: 1973 Mah.L.J. 51; 1971 Mah.L.J. (Notes) 17.

The question whether, where a registered letter is returned by Post Office as refused, a presumption can be drawn as to due delivery or service of the letter by post must depend on particular circumstances of each case. Though it is open to the Court under S. 114, *Illus.* (*f*) to presume that the common course of business has been followed, it cannot hold that the posting of the letter proves delivery, as it is a matter of common knowledge that postal servants are not always diligent: A.I.R. 1933 Rang. 76: 146 I.C. 422; A.I.R. 1937 Pat. 14.

Where a notice sent by post in a registered cover is returned by the postman with a notice that the addressee refused to receive it and the posting of the notice has been proved there is a presumption under S. 114 that the addressee did refuse to receive it: 121 I.C. 382: A.I.R. 1930 Lah. 439.

If a notice sent by registered post is returned with the endorsement "refused" the Court is entitled to presume that it was tendered. But the presumption is rebuttable: A.I.R. 1948 Cal. 63: 82 Cal.L.J. 9; (1901) 3 Bom.L.R. 420.

The fact that the letter came back does not in itself rebut the presumption that it was tendered. The writing of endorsement "refused" falls within the ambit of "common course of business" of the postman, and, therefore, even without any formal proof, involves the presumption that it was written on a refusal by the addressee: A.I.R. 1957 Punj. 284. But see *infra*. Where a post card registered and sent by post but returned as refused is relied on as evidence of a notice having been given to the addressee, there must be evidence of the fact that it was so refused. In the absence of the evidence of the postal peon in question the registered post card cannot be accepted as evidence to show that it was actually refused: I.L.R. 26 Pat. 582: A.I.R. 1948 Pat. 337; A.I.R. 1957 Madh. Bh. 151.

The endorsement by the post-peon would be *prima facie* evidence of tender and refusal of the notice and it will be open to the other side to rebut the presumption which arises by reason of the endorsement: 1955 An.W.R. 609.

When a notice bearing the endorsement of refusal is produced, the Court has to deem that its service was properly effected at the time when the letter would have been delivered in the ordinary course of post; it is then for the addressee to prove to the contrary: A.I.R. 1981 Madh. Pra. 76: 1980 Jab.L.J. 285.

From the manner in which the post office deals with registered letters, the Court can presume under S. 114 that the endorsement of refusal was made by the postman in discharge of his official duties, that the delivery of the registered letter was offered to the addressee who refused to accept it under his signed receipt even in the absence of any substantiating evidence by the authority which had endorsed refusal on the letter. [A.I.R. 1970 Mys. 77; A.I.R. 1935 Bom. 247; A.I.R. 1956 Nag. 266 and A.I.R. 1964 Andh.

Pra. 314, Dissent. from]: A.I.R. 1975 Guj. 54: (1974) 15 Guj.L.R. 655 (F.B.).

Where a notice was despatched to the addressee by registered post at his correct address and the postal endorsement of "refusal" thereon was proved by the postman, *held*, considering the manner in which post offices deal with registered letters, there is a presumption under S. 114, *Illus.* (*e*) and (*f*) of the attempt to deliver and the addressee's refusal to receive the notice; he is also deemed to have constructive notice of the contents of the letter as well; such presumption, though rebuttable, is not rebutted by mere denial of the addressee; it requires reliable evidence: A.I.R. 1974 Raj. 112: 1973 Raj.L.W. 611.

Letter sent by registered post returned as refused—Presumption: A.I.R. 1961 Cal. 439.

Refusal endorsed on back of registered letter—Presumption is that letter was delivered to addressee and was refused by him: 1967 All.L.J. 371.

Presumption about official acts and common course of business—Notice under S. 106 of the Transfer of Property Act duly despatched through post office by registered post to correct address of tenant—Presumption about due service of that notice can be made under *Illus.* (*e*) and (*f*) of S. 114 of the Evidence Act—Endorsement on notice "refused" strengthens the presumption: 1970 All.L.J. 336: 1970 Ren.C.J. 485: A.I.R. 1970 All. 446 (F.B.).

Letters received back with endorsement "refused"—Postman not examined—Presumption still arises that the letter was tendered to the addressee—Tendering of letters not clearly denied—Possibility of Munim returning letters admitted by shop-keeper—Presumption held not rebutted that the notices reached the defendant who refused to accept them: 1961 Raj.L.W. 456.

A presumption of correctness of the postal endorsement of "refusal" can be drawn with the aid of Ss. 16 and 114 but it is an optional presumption. If the presumption of correctness of the postal endorsement of "refusal" remains unrebutted, *held*, failure to examine the postman as a witness was of no effect: A.I.R. 1981 Madh. Pra. 76: 1980 Jab.L.J. 285.

The word "refused" in the endorsement raises a presumption that the postman concerned took the envelope and tendered it to the addressee who refused it, which obviates the necessity of producing the postman in evidence. But where the sender produces the postman himself in evidence and his testimony is disbelieved, the party producing him cannot fall back upon any presumption of law. The purpose of the presumption is to fill a gap in the evidence but not to make false testimony truthful. The presumption applies only where the postman concerned is not produced, but if he gives evidence the Court must ignore the presumption and assess his veracity and decide whether he should be believed. If he is not, no presumption can convert a lying witness into a truthful one: 1964 All.W.R. (H.C.) 333.

There is presumption of service of a letter sent under registered cover returned undelivered with a postal endorsement that the addressee had refused to accept it; the presumption is no doubt rebuttable and it is open to the addressee to show that the address on the letter was incorrect or the letter was never tendered to him or there was no occasion for him to refuse the letter, the burden whereof would lie on him; but if he places no such evidence on record to show that the postal endorsement was wrong, the letter would be taken to have been served: A.I.R. 1989 S.C. 1433: (1989) 2 S.C.C. 602.

Notice to quit sent in close envelope—Refusal to accept delivery—Knowledge of contents can be imputed to addressee—Notice addressed to joint lessees tendered to and refused by one of them—Constructive knowledge to other lessee may be presumed: A.I.R. 1964 All. 52.

Where summons were issued to the appellant through registered post but the endorsement on the envelope was that the appellant refused to accept it, *held*, said endorsement carried with it a presumption of its correctness, unless the contrary was proved: 1985 M.P.L.J. 408.

Where the summons was not accompanied by a copy of plaint, *held*, the refusal of the defendant to receive summons would not, by itself, give rise to a presumption that the defendant had acquired knowledge of date of hearing of the suit: A.I.R. 1985 Raj. 53: 1984 Raj.L.W. 62: 1984 Raj.L.R. 102.

It is true that the presumption that is attached to letter sent by registered acknowledgment due at correct address is rebuttable, but such a presumption is required to be

rebutted only if the statement of the addressee is believed. If the statement of the tenant that he did not receive the notice or that he did not refuse to accept the same is believed then, of course, it was incumbent upon the landlord to produce the postman to substantiate his plea with regard to refusal of the notice by the tenant: (1992-1) 101 Punj.L.R. 90.

The presumption under S. 114 relates to an official act being done in a particular manner; if the Court is unable to raise such presumption, it should exhibit only the unopened registered cover addressed to the addressee, and not the endorsement of refusal made by the postal peon; the burden to rebut the presumption would lie on the addressee who challenges the endorsement of refusal: A.I.R. 1975 Guj. 54: (1975) 15 Guj.L.R. 655 (F.B.).

The presumption raised under S. 114 is one of fact; the Court, however, is not bound to raise the presumption; the Court may refuse to draw the presumption if the evidence on record or the circumstances of the case raise any doubt. But if the sender leads evidence that the unopened registered letter addressed to its recipient had no postal endorsement of refusal when sent but had it when it was returned to the sender, it would greatly assist the Court in raising the presumption that the addressee had refused to accept its delivery. No general rule of presumption could possibly be laid down about raising or refusing it; each case has to be decided on its own facts: A.I.R. 1975 Guj. 54: (1975) 15 Guj.L.R. 655 (F.B.).

Where the presumption arising from the endorsement of the postman on the back of the registered notice stands rebutted by the statement on oath of the tenant and that statement has not been controverted by the production of the postman, *held*, that the notice has not been proved to have been served: (1972) 74 Punj.L.R. 930.

Service of notice by post—Presumption—Postal peon's endorsement of refusal on registered letter—Effect: A.I.R. 1957 Punj. 284.

Where the tender of notice through the registered letters was sufficiently proved, *held*, the refusal as endorsed by the serving postal peon on those letters must be treated as valid service: A.I.R. 1974 Cal. 261 (D.B.).

Where a notice is sent by registered post and it is alleged that it has been returned with the postal endorsement has to be proved by calling in evidence the postman who tendered the registered letter to the addressee. Unless it is so proved the endorsement is not admissible in evidence in proof of the allegation: A.I.R. 1957 Madh. Bh. 151.

Mere denial of receipt of notice served by post will not be sufficient to rebut the presumption arising under S. 114, *Illus.* (*e*) of the Evidence Act when there is an endorsement of refusal by the postal authorities: 1966 All.W.R. (H.C.) 135: 1966 All.L.J. 421: A.I.R. 1966 All. 519.

The legal position as to when the presumption of "due service" under *Illus.* (*e*) of S. 114, can be raised, or is available, is well settled. It is a rebuttable presumption. If the evidence relating to refusal of notice—sent by registered post—by the addressee is acceptable, the presumption of "due service" under *Illus.* (*e*) of S. 114 is available and in such cases it can be raised. On the contrary, if the evidence on the point is not acceptable, the question of raising the presumption does not arise, as in such a case, there will not be a proof of an attempt made by the postman to serve the registered notice on the addressee and refusal of the same by the addressee. It is not always necessary to examine the postman who tried to effect service. The denial by the addressee that he has refused to receive the notice sent by registered post, may even be found to be unacceptable on the other evidence on record. Some times, it may even be possible to reject the evidence of the addressee that he had not refused to receive the notice from his admissions or conduct or other evidence on record. Hence, as a rule, it cannot be laid down that the presumption available under *Illus.* (*e*) of S. 114 is rebutted on the addressee entering the witness-box and stating on oath that he had never refused to receive the notice. It depends upon the total effect of the evidence on record: (1985) 1 Karn.L.J. 174: I.L.R. (1985) Karn. 901.

Refusal to take notice sent by registered post—Presumption of delivery of notice is not conclusive but can be rebutted even by denial on oath if it is believed by Court—*Held*, on facts, that the denial of service by addressee was incorrect and, hence, the presumption had not been dislodged: 1979 Rajdhani L.R. 493 (Del.).

Refusal to accept the notice will not in any way be in the interest of the defendant-tenant. No sane person will act against his own interest. Therefore, the simple denial by the tenant to the effect that he has never refused to accept the service of notice should be held sufficient to rebut the presumption arising on account of the endorsement of "refusal" on the registered article: (1984-1) 25 Guj.L.R. 631: (1984) 4 Guj.L.H. 110.

There may be a presumption of service of notice by denial on endorsement by the postman to that effect even without producing the postman. However, such presumption is not conclusive but rebuttable. It is also settled law that if such a presumption has been rebutted, the burden again shifts upon the plaintiffs to prove by his further evidence the service of the notice upon the tenant and in such situation production of the postman as a witness would become material. [A.I.R. 1976 S.C. 869; 1979 (U.P.) R.C.C. 5; A.I.R. 1979 All. 366; 1970 All.L.J. 455, Rel. on]: A.I.R. 1985 All. 17: (1984) 10 All.L.R. 672.

If a notice sent by registered post is returned to the sender with an endorsement of refusal made by the postman, mere proof of posting and production of the registered letter itself bearing the endorsement of refusal without examination of the postman is *prima facie* good and sufficient evidence of service. When the posting of a registered letter is proved, the statutory presumption under the General Clauses Act, carries the proof up to due service. Although there may be no evidence of tender and refusal, that gap may be filled, when the endorsement is there, by invoking *Illus.* (*f*) to S. 114, that is to say, by presuming that the common course of business was followed and the postman did tender the letter to the addressee and did write the endorsement on refusal by the addressee to accept delivery. If the refusal does not come within the ambit of "common course of business", surely the tender does and that itself is sufficient to constitute service, or it may even be said that the writing of the endorsement comes within "the common course of business" of the postman and, therefore, involves the presumption that it was properly written after a refusal by the addressee. The fact that the letter came back does not in itself rebut the presumption that it was tendered and, therefore, served: (1947-48) 52 Cal.W.N. 659.

Sending of letter by registered post raises presumption of delivery of letter—Presumption is rebuttable—Statement on oath by addressee that such letter was not tendered to him—Presumption stands rebutted: (1968) 70 Bom.L.R. 253: 1968 Mah.L.J. 490: A.I.R. 1968 Bom. 387.

The presumption of delivery in case of the endorsement of "refused" on the registered letter is rebuttable; thus, both A.I.R. 1968 Bom. 387 and (1947-48) 52 Cal.W.N. 659, though apparently contradictory, lay down the correct law; in the Bombay case, the presumption stood rebutted by the addressee's denial on oath but in Calcutta case, no such rebuttal was brought on record: A.I.R. 1976 S.C. 869: (1976) 2 S.C.C. 409: (1976) 3 S.C.R. 551.

Where a notice of demand contained in a registered cover addressed and posted to the tenant came back with the postal endorsement of "refused", *held*, the presumption of "refusal" by the tenant may properly be drawn even if the postman is not examined to prove tender of the registered cover to, and its refusal, by the tenant; the presumption indeed is of fact and rebuttable; however, a mere denial on oath by the tenant is not sufficient to rebut it unless the Court believes the tenant. [A.I.R. 1963 S.C. 822; A.I.R. 1976 S.C. 869, Foll.]: A.I.R. 1979 Ori. 11.

Where defendant tenant denied any service of notice on him and his testimony was not challenged by the plaintiff in the cross-examination and the plaintiff did not produce the postman or any other evidence to show that the defendant was not deposing the truth and that notice had, in fact, been served on him, *held*, presumption of service of notice stood rebutted. [A.I.R. 1976 S.C. 869; A.I.R. 1970 All. 446 (F.B.), Foll.]: A.I.R. 1981 All. 208.

Ordinarily, a statement of the addressee on oath that the postal cover, said to have been refused by him, was never tendered to him would be sufficient to dislodge the presumption and shift the onus on the other side to establish by evidence that the service had been duly effected. It is, therefore, not possible to accept the contention that the bare statement on oath of the addressee in such a case would not, as a matter of law, be sufficient to dislodge the presumption that may be raised either under S. 114 of the Evidence Act or under S. 27 of the General Clauses Act. A statement on oath of a party to the proceedings is a piece of oral evidence like

statement of any other witness and there is no rule of law that such a statement should not be accepted merely because it is made by a person who is interested in the proceedings nor is there any requirement of law that the statement on oath of a party to the proceedings must always be corroborated by any independent evidence before it could be accepted by a Court of Law. It is not possible to lay down any hard and fast rule of law with regard to sufficiency of evidence. If a statement of a party on oath inspires confidence, the Court is entitled to accept it and base its conclusion on it: A.I.R. 1976 Del. 111: (1976) 12 Del.L.T. 127.

Where in an eviction proceeding a notice to the tenant was served and the same was received back with an endorsement of refusal and the defendant tenant clearly gave out that the postman never came to him to offer the notice nor he refused to take it, *held*, the presumption of service in the circumstances of the case was amply rebutted by solitary statement of the tenant and the suit was bad for want of a notice. [A.I.R. 1976 S.C. 869; A.I.R. 1976 Del. 111; A.I.R. 1968 Bom. 387, Rel. on]: A.I.R. 1980 All. 280: (1980) 6 All.L.R. 457.

In A.I.R. 1980 All. 280 and A.I.R. 1976 Del. 111—the question considered was to the statement on oath by the tenant denying the tender and refusal to accept delivery. It was held that the bare statement of the tenant was sufficient to rebut the presumption of service. But there could be no hard and fast rule on that aspect. Unchallenged testimony of a tenant in certain cases may be sufficient to rebut the presumption but if the testimony of the tenant itself is inherently unreliable, the position may be different. It is always a question of fact in each case whether there was sufficient evidence from the tenant to discharge the initial burden: A.I.R. 1990 S.C. 1215: (1990-2) 11 Guj.L.H. 77.

Where the notice informing date of hearing sent by the registered cover was received back with the endorsement "refused" but the party concerned filed an affidavit that such endorsement of "refusal" was false and fraudulent, *held*, in such a case, it was the duty of the Court to go more deeply into the facts of the case and not to accept implicitly the report of the postman as gospel truth without even calling upon the adversely affected party to examine such postman: A.I.R. 1979 All. 366.

Where the quit notice, sent by registered post, was returned back with the endorsement "refused" and the sender examined the postman in Court who testified that the addressee refused to accept the registered packet, *held*, a mere denial by the addressee, would not rebut the presumption arising under S. 114: A.I.R. 1989 Bom. 410: (1989) 3 Bom.C.R. 467: 1990 Mah.L.J. 79; (1990) 1 An.W.R. 342: (1992) 1 An.L.T. 555.

Where there was positive evidence to the effect that the registered envelope carrying the notice was actually tendered by the postman to the appellant but the latter refused to accept, *held*, there was due service effected upon the appellant by refusal and he must be imputed with the knowledge of the contents of said document which he refused to accept. [A.I.R. 1935 Bom. 247, Overruled; A.I.R. 1964 All. 52; 1972 All.L.J. 499; A.I.R. 1970 All. 446 (F.B.), Approved]: A.I.R. 1981 S.C. 1284: 1981 All.L.J. 504: (1981) 2 S.C.C. 535.

Registered letter containing notice sent to tenant in arrears—Letter refused—Presumption of receipt of notice by tenant will be raised: 1963 All.L.J. 25: A.I.R. 1963 All. 250.

Registered envelope returned back with endorsement of refusal—Presumption can be raised that notice was duly served—Denial of service by addressee—Lower Appellate Court on consideration of evidence concluding that presumption had not been rebutted—Finding is question of fact and cannot be interfered with in second appeal: 1979 (U.P.) R.C.C. 397 (All.).

There is a presumption in favour of the endorsement "refusal" to be correct. The burden is on the tenant who disputed the said endorsement and it is not correct to say that the landlady should have produced the postman to prove the endorsement. Thus, where the landlady produced a witness who deposed that notice was sent in an envelope which contained the endorsement of refusal, *held*, this was sufficient proof of service of notice and the burden lay on the tenant to disprove it as the presumption was rebuttable: (1974) 10 Del.L.T. 349.

Where of the two registered notices by the landlord to the tenant, detained in jail, one addressed to him in jail was returned as refused and the other addressed to the tenant's home address was redirected to the jail and acknowledged by its Superintendent, *held*,

the presumption was that initials under the refusal were those of the postman and the notice acknowledged by the Superintendent of Jail had been served on the tenant; the presumptions not having been rebutted by the tenant, the notice had been properly served on him: A.I.R. 1973 All. 24: 1972 All.W.R. (H.C.) 628.

Proceedings before Rent Controller—Service of notice—Notice sent by post refused by the tenant—Effect—Rent Controller's order vitiated for want of service of notice: 1962 An.W.R. 148.

Where the tenant deposed on oath that he had not "refused" the notice and was not in fact in town and the postman deposing "refused" also admitted that he did not know the tenant nor any attempt was made in the Court to enable the Postman to identify the tenant, *held*, the notice could not be deemed to have been served; the evidence of refusal must be very clear and convincing as the consequences of deemed service are very drastic; it is not unknown or unusual for such endorsements made without proper care or even deliberately; it is, thus, the Court's duty to insist on very clear and convincing evidence; on facts, service not proper. [(1985) 5 Guj.L.H. 361, Foll.]: A.I.R. 1988 Guj. 5: (1987-1) 7 Guj.L.H. 274: (1987-2) 28 Guj.L.R. 473.

Where the postman deposed in an eviction suit that the addressee of the registered letter (endorsed as "refused") was not met at the address and his brother refused to give the addressee's outstation address where he had said to have gone, *held*, no presumption of service could be drawn: A.I.R. 1974 All. 354: 1974 All.L.J. 597.

Where notices determining tenancy were served by the landlord to the three co-tenants and notices sent to the two co-tenants returned with an endorsement refused while the notice sent to the third co-tenant returned with an endorsement that the addressee was out of station, *held*, a presumption of service of notice could be raised under S. 114. [A.I.R. 1963 S.C. 468; A.I.R. 1970 All. 446 (F.B.), Rel. on]: A.I.R. 1977 All. 476.

A decree for eviction having been passed by the Courts below against the tenant-appellant on the grounds specified under S. 12 of the M.P. Accommodation Control Act, 1961, and his defence against eviction was struck out, the only ground of contention was that the tenancy was not properly determined by a quit notice.

First of all a notice was sent by registered post and it was returned with an endorsement that the house was locked. The respondent, then sent two notices under two registered covers, one to Korba, where the appellant was reported to have gone and another to his Bilaspur address. Both these envelopes came back with the endorsement "refused" made and signed by the postman. It was not disputed that the registered envelope which bore the appellant's address of Bilaspur was correctly addressed. *Held*, that the presumption arises that the notice was tendered to the addressee at Bilaspur and was refused by him. It was not necessary to examine the postman to prove refusal: 1969 M.P.L.J. (Notes) 65.

The landlord on 2nd January, 1965 sent a notice to the tenant determining his tenancy under S. 106, T. P. Act by registered post. It appeared that a postman from the delivery post office took it to the residence of the tenant for delivery to him on 4th January, 1965. Admittedly, the notice was not delivered. It bore an endorsement "Inkari Wapas Hai". The tenant's son deposed that no notice was offered to his father and that it was wrong to say that he refused any notice. From his own evidence it was also clear that he was not in a position to depose about the same. *Held*, that under these circumstances, it could properly be presumed under S. 114, *Illus.* (*e*) and (*f*) and S. 16, *Illus.* (*a*) and (*b*) of the Evidence Act, that the notice was tendered to the tenant and that he refused to receive it. The notice was, therefore, held as having been served on the tenant. *Held* further, there was no rebuttal of evidence worth the name.

Rr. 35 and 36 of the Post Office Guide, Part I, were also considered in this connection. Under these rules, no registered article can be delivered to any one except the addressee or his authorised agent. If the addressee refuses to receive it, the postman will have no option than to bring back the registered article and lodge it in the post office. The endorsement, *held*, confirmed the view that the addressee refused it: 1968 All.L.J. 707: 1968 All.W.R. (H.C.) 507.

Where in an eviction petition the landlord produced as evidence a postcard addressed to the tenant's brother together with a

postal acknowledgment bearing some postal stamps and endorsement of "refused" but neither the concerned postman nor the postcard's writer were examined as witnesses when the tenant had categorically denied the acknowledgment, *held*, no presumption could be raised of due service on the tenant of the notice to quit under S. 106 of the Transfer of Property Act, 1882: A.I.R. 1971 J.&K. 20.

Notice of ejectment—Notice served on tenant by registered post returned with postal peon's endorsement "refused by tenant"—Due service of notice can be presumed to have been served on tenant under S. 27, General Clauses Act, 1897: (1966-67) 71 Cal.W.N. 282.

Where a notice to quit, after being properly addressed prepaid and posted by registered post, is returned with an endorsement "refused", two different presumptions are of assistance to the plaintiff. One is the presumption as mentioned in *Illus.* (*f*) of S. 114 of the Evidence Act, namely, that "the Court may presume that the common course of business has been followed, in particular case." As soon as the Court presumes that the common course of business has been followed, it is entitled to hold that the postal peon did go to the address and the return of the cover was due to one of two reasons, either that the man was not found or that though found, he has refused. These circumstances entitle the Court to hold, unless the contrary is proved, that the endorsement "refused" was made by the peon himself and that it was correctly made.

Apart from this, the presumption mentioned in *Illus.* (*e*) of S. 114 of the Evidence Act is also of great assistance to the plaintiff. All that happens in the post office from the moment of posting of a letter to the point of delivery to the addressee or its return to the sender are official acts. As the law entitles the Court to presume that official acts have been regularly performed, the Court is entitled to hold that the endorsement was made by the peon and it was correctly made.

Even if, there is no other evidence on record to support the decision that the endorsement was actually made by the proper person and not by somebody else, the presumption that the Court may make under *Illus.* (*e*) and (*f*) of S. 114 entitles the Court to hold, in the first place, that the endorsement has been made actually by that person and that the endorsement "refused" that has been made is a correct statement of fact. If the Court chooses to make a presumption under S. 114, it is entitled to hold that it is correct statement provided that if there is evidence to the contrary and that evidence is believed by the Court, the presumption must be held to be rebutted: (1957-58) 62 Cal.W.N. 193: A.I.R. 1958 Cal. 251.

Where a notice to quit was sent by a registered post and the tenant in his written statement did not dispute the service of notice on him; but stated that the notice sent by landlord was fictitious and did not satisfy the requirements of S. 106 of Transfer of Property Act, *held*, such a bald denial was insufficient to rebut the presumption of service of notice: A.I.R. 1985 All. 178: (1985) 1[illegible] All.L.R. 213.

Where in an eviction proceeding, the notice dated 4-10-1969 was sent by post but was returned unserved with the remark that the addressee was out of station and similarly the second notice also received back with the endorsement "refused 18-11-1969", *held*, the fact of presentation to the proper addressee and the making of a true endorsement could be presumed under *Illus.* (*e*) and (*f*) of S. 114. [A.I.R. 1958 Cal. 251; A.I.R. 1970 All. 446 (F.B.); (1934-35) 39 Cal.W.N. 934; (1871) 16 Suth W.R. 223; A.I.R. 1961 Cal. 439; A.I.R. 1957 Punj. 284, Rel. on]: A.I.R. 1977 Pat. 155: 1977 Pat.L.J.R. 295: 1977 B.B.C.J. (H.C.) 685: 1976 B.L.J.R. 657.

Notice demanding rent from tenant sent by landlord by registered post—Court finding that notice was refused by tenant not on the basis of presumption drawn from endorsement on acknowledgment receipt only —Conclusion drawn by the Court on the strength of the evidence of the landlord which was believed by it stating that he accompanied the postman and that the notice was refused by the tenant in his presence—*Held*, the finding was binding in second appeal: A.I.R. 1964 All. 416.

Where in a proceeding for approval of the dismissal of a workman under S. 33(2) (*b*) of the Industrial Disputes Act, 1947, the Labour Court found the dismissal order sent by the employer to the workman under registered post and returned with the postal endorsement of "refused" as not having been served, *held*, the finding could not be sustained; a presumption of due service ought to have

been drawn on the facts and circumstances of the case: (1992-1) 40 B.L.J.R. 528.

The presumption that arises is a statutory rebuttable presumption of fact. In view of the provisions of S. 27 of the General Clauses Act, the presumption with regard to the delivery of the registered article arises and when there is an endorsement of "refusal" on the registered article, a further presumption under S. 114 of the Evidence Act as to the knowledge of the contents of the notice also arises. But these presumptions are rebuttable presumptions: (1984-1) 25 Guj.L.R. 631: (1984) 4 Guj.L.H. 110.

Where the envelope containing the summons despatched to the addressee on his address given in the suit as well as the application for setting aside the *ex parte* decree was returned with the postal endorsement of "refused", *held*, there was a presumption of service of the summons under S. 114. [A.I.R. 1975 Guj. 54, Rel. on]: A.I.R. 1982 Guj. 235: (1981) 22 Guj.L.R. 1229: (1981) 1 Guj.L.H. 228.

Where a notice calling upon the debtor to pay a certain sum served upon the debtor both by registered post with acknowledgment due and also under certificate of posting but the registered cover came back with the endorsement "refused", *held*, it could be presumed that there was valid service of notice. [A.I.R. 1958 Cal. 251; A.I.R. 1957 Punj. 284; A.I.R. 1930 Mad. 544, Rel. on]: A.I.R. 1986 Cal. 29.

Notice of demand—Word "refused" endorsed in notice—Defendant not proving any exceptional circumstance to conclude that regular course of practice was not followed in the case—His bare denial could not be believed so as to rebut the presumption: 1965 All.L.J. 839.

The admissibility of the "refusal" endorsed by the postman on the registered cover containing notice of demand on the money due on the pronote is admissible in evidence even if the postman has not been examined; the endorsement is made by the postman in the discharge of his official duties and has to be presumed to be a valid act; the burden lies on the party challenging the endorsement to show that it was not correct. [A.I.R. 1953 Mad. 884, Rel. on]: A.I.R. 1972 Andh. Pra. 72.

Where notice sent by the defendant was received back with the endorsement "refused" and it could not be suggested that the defendant got the endorsement manipulated with the connivance of the postal authorities, *held*, it was proper to presume that the endorsement of refusal was true and that the plaintiff out of ulterior motives refused to receive the notice: A.I.R. 1976 Andh. Pra. 243: (1976) 1 A.P.L.J. (H.C.) 97 (D.B.).

Where the detenu refused to receive the order of detention, grounds of detention and the copies of the documents in spite of best efforts made by the officials, *held*, the order of detention must be deemed to have been served on the date of refusal: 1991 Cr.L.J. 315 (Karn.).

(*c*). Notice to quit.—Where the service of notice to quit is effected by registered post and the acknowledgment came back with a signature, purporting to be that of the defendant, the plaintiff is entitled to the presumption, arising from the fact of service (despatch) of the notice by registered post and the notice must be held to have been duly served upon the defendant: (1956-57) 61 Cal.W.N. 841: A.I.R. 1957 Cal. 479.

Though for drawing the presumption of due service of the notice to quit sent by registered post, the postal peon need not be examined but where the Court's below found that the defendant's signature on the postal acknowledgment was a forgery, no presumption of due service could be drawn; the presumption stood rebutted: 1979 All.W.C. 85.

The presumption of service of notice does not necessarily imply that the tenant himself received the notice and he was actually residing there. The presumption of service has a limited role. In the first place, the presumption is raised in favour of the sender of the notice. It cannot be raised for the benefit of the tenant. He has to prove the positive fact that he was residing in the premises during the crucial period. Secondly, the presumption is a rebuttable presumption. It is not a conclusive presumption. Nor is it a rule of law: A.I.R. 1980 Del. 110: 1980 Rajdhani L.R. 423: (1980) 17 Del.L.T. 395.

Where the notice to quit under S. 13(6) of the W.B. Premises Tenancy Act, 1956 sent under registered post with acknowledgment due was correctly addressed and the acknowledgment receipt contained the signature not of the tenant himself but of some one else who signed on his behalf, *held*, merely because the landlord did not prove that the

said person had authority to receive notice on behalf of the tenant, it could not displace the presumption of due service. [A.I.R. 1918 P.C. 102, Rel. on]: A.I.R. 1985 Cal. 162 (D.B.).

Where a notice to quit was sent by registered post and which was duly received by treasurer and secretary of tenant company but the tenant company denied having received any notice, *held*, though the onus of proof of producing its register of letters received and issued did not lie on the tenant company, an adverse inference could be drawn against the tenant company for not producing the same.[A.I.R. 1917 P.C. 6; A.I.R. 1968 S.C. 1413, Rel. on]: A.I.R. 1982 Cal. 127: (1981-82) 86 Cal. W.N. 456.

Notice to quit—Service by registered post—Notice received by addressee's husband—Presumption of due delivery to addressee: (1960-61) 65 Cal.W.N. 690.

Notice to quit—Service by post—Presumption of service. *See* A.I.R. 1958 All. 369. *See* also 1979 Jab.L.J. (Note) 50; 1974 Mah.L.J. 239: (1974) 76 Bom.L.R. 35.

Notice of termination of tenancy—Notice sent under certificate of posting—Presumption arises that the notice has been duly delivered to addressee. [A.I.R. 1968 Cal. 49, Rel. on]: (1969) 2 Mys.L.J. 179: 19 Law Rep. 435: A.I.R. 1970 Mys. 77.

Where a notice to quit under S. 106 of the Transfer of Property Act, 1882 is sent to correct address, presumption of due service is not rebutted by the tenant's mere denial of its tender; he has to further deny his non-presence at the place on the purported date of refusal by him in his evidence: A.I.R. 1972 All. 539. *See* also 1965 All.L.J. 839; 1966 All.L.J. 421; A.I.R. 1989 Bom. 410.

It is true that when a notice is sent by post a presumption arises in law that the notice has reached the addressee. But when the postal cover itself comes back such presumption goes. Similarly, when the addressee refutes that he received any notice sent in a postal cover, then also there cannot be any such presumption, and it is for the sender to prove service of notice. Where landlord sent a notice in a postal cover but it was returned by the postman after six days with an endorsement "not found" made on each of the six days, *held*, a presumption as to valid service of notice of termination on the tenant could not arise: (1990-1) 105 Mad.L.W. 529.

Service of notice of ejectment—Service by registered post—Returned with remark "left"—Service held bad—Personal service was also bad—Presumption available for service under certificate of posting should not be given effect to, in the context: A.I.R. 1969 Cal. 109.

Where a notice sent to a tenant at the tenancy premises came back with the postal endorsement of "left" when the tenant had left India without leaving behind her foreign address or empowering any one to receive communications on her behalf and a copy of the notice sought to be personally served on her was also affixed on the door of the premises in the presence of the witnesses, *held*, the notice may be taken as having been duly served; even without the presumption under the General Clauses Act, the presumption under S. 114, Evidence Act is available. [Case law discussed]: A.I.R. 1991 Cal. 152 (D.B.).

Where the service of notice to quit is a precondition for seeking eviction of a tenant under any of the grounds mentioned in S. 11 of the J.&K. Houses and Shops Rent Control Act, 1966, and on the notice sent under registered cover on being refused by the tenant, it is affixed on the door of the demised premises, *held*, it is sufficient compliance of the requirements of S. 106 of the Transfer of Property Act, 1882; the presumption under S. 114(*e*), Evidence Act is also attracted: A.I.R. 1977 N.O.C. 335: 1977 Kash.L.J. 57.

Where the notice to quit served to the tenants by registered post with acknowledgment due come back undelivered and endorsements on the envelope read as "not claimed" and "mis-sent" as post peon visited the suit premises twice, *held*, considering the first endorsement being "not claimed", a presumption of due service of the notice arose. [(1960-61) 65 Cal.W.N. 1239, Rel. on]: A.I.R. 1978 Cal. 202: (1976-77) 81 Cal.W.N. 739 (D.B.).

Where the notice to quit sent to a tenant by registered post at the demised premises came back undelivered with the postal endorsement, "premises found locked", *held*, the endorsement by itself was sufficient to rebut the presumption; it could not be taken to be a due service: (1979) 92 Mad.L.W. 5: (1979) 1 M.L.J. 346.

Where the registered notice of eviction sent by the lessor returned unserved with the

endorsement that on some dates the addressee was absent and that on the last date he refused to receive the same and while the lessee enters the witness-box and states that he never refused any notice and the postman who tendered the notice was not examined, the presumption available to the lessor under S. 114, Evidence Act stood rebutted. It was only on the date when the lessee refused that he could be imputed with notice: 1970 Ren.C.R. 107: (1969) 2 Mys.L.J. 481.

Where a notice to quit was sent through registered post which was refused by the tenant, and the postman could not identify the tenant who was produced before him in the Court, due to lapse of time, *held*, an adverse inference could not be drawn to nullify the effect of endorsement made on the letter as the postman never stated that he had not gone to the place of addressee or that letter had not been refused by the addressee. [1969 All.L.J. 849, Foll.]: A.I.R. 1981 All. 5.

Where in a suit for eviction, notice was sent to tenant through registered post as well as through a certificate of posting and the tenant admitted that the address on the envelope containing the notice was correct, *held*, there was clear presumption that notice was duly served. [A.I.R. 1973 Del. 39; 1974 Ren.C.R. 578 (Del.), Foll.]: A.I.R. 1981 Del. 169: (1981) 19 Del.L.T. 170: 1981 Rajdhani L.R. 191.

Notice under S. 111 (*g*), Transfer of Property Act—Joint tenants—Notice served on one joint tenant—Correctly addressed notices posted to others—*Prima facie* evidence of service on others: A.I.R. 1966 Cal. 63.

(*d*). Certificate of posting.—Letter sent under certificate of posting—Presumption is that it must have been received by addressee unless addressee by positive evidence shows that he did not receive it: (1963) 65 Bom.L.R. 434: 1963 Mah.L.J. 670: I.L.R. (1963) Bom. 583; (1971) 2 Mys.L.J. 113; (1980) 1 M.P.W.N. 144; (1985-86) 90 Cal.W.N. 413.

In law, a certificate of posting raises only a presumption to the effect that a parcel containing some communication was received by the postal authorities for dispatch under that certificate on the date on which it purports to have been received by them. It may also be presumed that in the due course of business, the postal authorities had or might have had dispatched the same for delivery to the addressee on the address noted on the postal article. It may be further presumed that in the course of business, the postal authorities had or might have had caused the postal article to be delivered to the addressee. But, the law does not raise an unrebuttable presumption that such a postal article was, in due course, received by the petitioner. In the circumstances of a particular case, it may be possible even to presume that such a postal article must have been received by the addressee, if subsequent conduct of the parties could enable the Court to presume so: A.I.R. 1995 Bom. 91.

Presumptions arising from postal seals on letters and certificate of posting are rebuttable: (1971) 2 Mys.L.J. 407.

Where the evidence about certificate of posting was unsatisfactory and there was also absence of any evidence about enclosing of the notice in the letter and posting the selfsame letter in the Post Office, *held*, in the absence of evidence no presumption could be made about service by certificate of posting. [A.I.R. 1918 P.C. 102; (1870) 1 W.N. 119; (1962-63) 67 Cal.W.N. 819; A.I.R. 1970 Cal. 328, Rel. on]: A.I.R. 1978 Cal. 123: (1976-77) 81 Cal.W.N. 629 (D.B.).

Where the addressee of a letter sent under a certificate of posting had denied its receipt and the other party relied on the certificate as proof of despatch, *held*, it is extremely difficult to hold merely on such a certificate that the original of the letter was actually sent to the addressee on the purported date; the certificate does not disclose whether the article posted was an envelope, an inland letter or a postcard; in the absence of positive evidence as against the halting and vacillating statement the witness purportedly proving the posting, that the original of the letter was actually enclosed in an envelope which was actually posted in the concerned Post Office, not even a rebuttable presumption can be drawn. [A.I.R. 1978 Cal. 123; A.I.R. 1971 Ker. 231, Rel. on]: A.I.R. 1979 Ori. 126.

Cheque sent by post under certificate of posting—Presumption, in the absence of anything to the contrary, that it was duly delivered to addressee, would be fair: A.I.R. 1963 Ker. 306.

Certificates of posting of letters obtained—Certificates given by postal authorities in ordinary course of business—Presumption about their genuineness and truth about their contents—Further, presumption under the section—That letters were posted and were received by the addressee—Mere denial of receipt of letters does not rebut presumption. [(1962-63) 67 Cal.W.N. 819, Rel. on]: A.I.R. 1970 Cal. 328.

Notice sent by post and correctly addressed as evidenced by certificate of posting—Presumption arises that there was proper service of notice: A.I.R. 1966 Cal. 615.

Where a certificate of posting is put in evidence the presumption is that letter was posted and that it reached its destination unless something is shown to the contrary. It is entirely wrong for the Court to work on the presumption that the certificate of posting is a forgery: 190 I.C. 533: A.I.R. 1940 Cal. 227. Letter sent under certificate of posting—Presumption—Entries in Minutes of meetings and in Register of letters sent by Corporation. *See* I.L.R. (1952) 2 Cal. 321: A.I.R. 1952 Cal. 467.

A certificate of posting is easy to procure and does not inspire confidence: A.I.R. 1994 S.C. 678.

There is a presumption that a letter sent by post under certificate of posting was delivered to the addressee unless there are circumstances in a particular case to show that the common course of business was not followed and that something extraordinary happened which prevented the common course of business being followed. Where the addressee has not placed any material to show that anything happened which prevented the letter written by the sender under certificate of posting, it could be presumed that the addressee has received the letter: (1988) 1 Raj.L.R. 873 (Raj.).

Where a quit notice was sent under certificate of posting and the certificate of posting was produced on record, *held*, a presumption could be raised that the notice must have reached the addressee in due course and this presumption could be rebutted only by adducing positive evidence; a mere denial was not potent enough to rebut this presumption: A.I.R. 1989 Bom. 410: (1989) 3 Bom.C.R. 467.

Where in an eviction proceedings, the landlord sent a notice to quit under certificate of posting and the evidence of actual posting of letter was also produced, *held*, a presumption arose under S. 114 that the notice was duly served. [A.I.R. 1918 P.C. 102; I.L.R. (1972) 2 Cal. 480, Rel. on]: A.I.R. 1978 Pat. 256: 1978 B.L.J.R. 666: 1978 Pat.L.J.R. 634 (D.B.).

Where the respondents in their return to the writ petition denied the receipt of the petitioner's letter revoking his resignation said to have been sent under a certificate of posting, and the denial was supported by an affidavit sworn by the Divisional Superintendent of Education and there was no reason to disbelieve him, *held*, no presumption of the delivery of the letter in the circumstances could be raised: A.I.R. 1975 Madh. Pra. 21: 1974 M.P.L.J. 512 (D.B.).

Where a detenu impugned his detention under S. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 on the ground that he had retracted his statement on which his detention was based by letter sent under certificate of posting even before the passing of the detention order, and he had also made a representation to that effect accompanied by a photostat copy of the certificate of posting but not of the retraction letter which was not found, despite thorough search, by the detaining authority, *held*, no presumption of the delivery of the letter could be raised: A.I.R. 1981 S.C. 1191: 1981 Cr.L.J. 889: (1981) 3 S.C.C. 317.

(*e*). **Money order**.—Normally the presumption is that where money is remitted by money order, the postal authorities acted in the normal course of their duties; the postman tendered the money to the payee assuming, of course, that his correct address was shown on the money order form. At one point of the time the lower two-third portion of the money order form was returned to the remitter when the money order was returned as unclaimed but since 1969, under R. 285(3) of the P.&T. Manual, only the coupon portion of the money order form is given to the remitter and the acknowledgment portion is retained by the paying office and, after detachment it is filed with the office copy of the money order paid list. Thus, in the absence of an endorsement on the money order coupon received by the remitter as "not claimed", it cannot mean that the money order was not refused. The burden to show that the money order was sent on the correct address is on the person so contending but that burden can be discharged by putting on record the circumstances which would lead to that conclusion, in the absence of direct evidence to show the address on which the money order was sent: 1981 Mah.L.J. 646: 59 F.J.R. 130.

Where the tenant appears in the witness-box and states that on the date mentioned, the amount demanded by the landlord was sent by money order and in support of it he produces the receipt, it cannot be said that the sending of money order or its tendering is not established. It is true that the receipt by itself does not prove that the amount sent was the arrears of rent but the receipt alongwith statement do not leave any room for doubt that the amount sent was towards arrears of rent: A.I.R. 1982 All. 44: 1981 All.W.C. 612: 1981 All.C.J. 518: 1981 All. Ren. Cas. 680: (1982) 8 All.L.R. 70.

In the case of remittance by money order, where the remitter and the addressee reside in the same place, a small town, the

presumption is that it will ordinarily not take more than a few days (in the instant case four days) of remitting it. This presumption is rebuttable. When the money order is returned with the endorsement "refused", if the sender proves that he remitted the amount by money order and that it was returned to him by the Post Office with the endorsement "refused", a presumption arises that the postal authorities followed the ordinary course and tendered the amount to the addressee who refused it. This presumption also is rebuttable but the onus is on the addressee to prove by reliable evidence that he did not receive the amount. A bare denial by him will not necessarily rebut the presumption: 1966 All.L.J. 424: 1966 All.W.R. (H.C.) 420.

Where a money order is remitted for delivery to an addressee residing in the same town, the Court should presume, in the absence of any evidence to the contrary, that it was tendered in the ordinary course—at any rate, not later than 10 days: 1965 All.W.R. (H.C.) 504: A.I.R. 1966 All. 214.

The object of S. 4 of the M.P. Accommodation Control Act, 1955, a pivotal provision, is that the tenants must be protected from eviction as well as they must be compelled to continue to pay rent. Thus, where a tenant shows tender of rent, he is not in default and he cannot be evicted. Therefore, unless the landlord intimates in his demand notice his address for remittance of the arrears, a money order sent to him at his residential or business address is good and sufficient tender; that is the surest and safest mode of tender and payment. His handing over of the arrears to the Post Office for transmission to the landlord is the strongest evidence of his *bona fides*; the money goes out of his hands and he cannot take it back. The endorsement of "refused" by the postman is presumptive proof of tender of rent unless the contrary is established by reliable evidence adduced by the landlord: A.I.R. 1973 Madh. Pra. 268: 1973 M.P.L.J. 510.

Where in an ejectment proceedings on the grounds of arrears of rent, the tenant asserted that the rent was remitted through money order and the remittance was proved although the acknowledgment receipt was not delivered to the tenant, *held*, a presumption under S. 114, *Illus.* (*f*) could be raised that the amount must have been tendered to the addressee and received by him. However, such presumption was rebuttable. [A.I.R. 1918 P.C. 102; A.I.R. 1968 Ori. 234; A.I.R. 1970 Cal. 328, Rel. on]: A.I.R. 1977 All. 534: (1977) 2 Ren.C.J. 459.

In a suit for eviction on non-payment of the arrears of rent the tenant admitted the receipt of the notice of demand and showed that he had remitted the arrears by money order about one week before the expiry of the last date for payment to the landlady, both parties residing in the same building, *held*, presumption may be raised that the normal course of postal business was followed and the amount had been tendered to the landlady or her agent within the permitted time. [1966 All.L.J. 424 and 1964 All.L.J. 148, Foll.]: A.I.R. 1971 All. 22: 1970 All.W.R. (H.C.) 586.

Where the money order, remitted to the addressee residing in the same town at his correct address, was received back with the endorsement "refused", *held*, it could be presumed, in the absence of any evidence to the contrary, that the money order was tendered in the ordinary course to the addressee and he did not accept the same: A.I.R. 1975 Raj. 196: 1974 Raj.L.W. 251. *See* also 1980 Jab.L.J. 423.

Remittance of rent by money order—Money order returned with endorsement "refused"—Presumption is that addressee landlord was found but refused the money order—A slight inaccuracy in the name will not affect raising of such presumption—Tenant cannot be said to be in "arrears of rent": 1966 All.W.R. (H.C.) 185.

Money order acknowledgment form with endorsement "refused"—Presumption as to delivery is not displaced on addressee's statement on oath denying its receipt: 1963 All.W.R. (H.C.) 472.

Where the landlord in an eviction case denied on oath that he had not refused to accept the money order, *held*, the postal endorsement of "refusal" could not by itself and without the Postman's evidence lead to a presumption that the money was tendered to the landlord and he refused to accept it: A.I.R. 1984 Sikkim 1.

The rent and taxes deposited by the tenant in the Court of the Registrar Presidency Small Cause Court, acting as the thika controller to the credit of the landlord, were alleged to be duly forwarded to the landlord by postal money orders under S. 20(1) of the Calcutta Thika Tenancy Act, 1949 by the thika controller. But the landlord denied receipt of some of such money orders and filed an application for withdrawal of said amounts. There was no evidence to show

that the amounts which were sent to the plaintiffs by postal money orders reached the plaintiff and the acknowledgment receipts had not been produced by the defendant. The defendant had not also examined any witness nor produced any record to show that the amounts sent by money orders were not sent back by the postal authorities. *Held*, in the circumstances, it might be presumed that in the normal course of business the postal authorities returned the amounts to the sender, namely, the thika controller and as the defendant failed to rebut that presumption, the plaintiffs were entitled to withdraw the said amount from the thika controller, or in other words the defendant was liable to pay the amount to the plaintiffs: A.I.R. 1973 Cal. 262.

(*f*). **Illustrative cases**.—Where Court notice of the award having been filed, sent by registered post at the firm's correct address, was received by some person on behalf of the firm and the only partner who appeared in the Court did not disclose the names of the firm's employee, *held*, a presumption could properly be drawn against the partners from their conduct that the notice was duly served on the firm: A.I.R. 1984 N.O.C. 89 (Him. Pra.).

Where a notice issued under O. 37, C.P.Code, was received by someone on the defendant's behalf and the acknowledgment due was received by the Registry of the Court, *held*, there was presumption that the notice was delivered to the defendant on the date shown on the acknowledgment due: A.I.R. 1989 J.&K. 25: 1988 Kash.L.J. 493.

When there is nothing to indicate that the Court had not satisfied itself of the service of notice, it must be presumed that the Court was so satisfied: A.I.R. 1927 Lah. 506; A.I.R. 1923 Pat. 406.

S. 13 of the Prevention of Food Adulteration Act, 1954 read with R. 9-A of the Rules framed under that Act provided that the report of public analyst should be sent by registered post to person concerned and, thus, when the report was sent by registered post with acknowledgment due but no such acknowledgment was brought on record and it was contended that provisions of Act had not been complied with, *held*, as the requirement of law was to send the letter only by registered post and not that it should be sent with acknowledgment due, if any excess had been done beyond the requirement of law that will not affect the legal position as stood under the law. Accordingly, as the provisions of law had been sufficiently complied with, a presumption as to service of report could be raised: 1995 Cr.L.J. 1512 (Madh. Pra.).

Where summons were directed to be served on the defendant by ordinary process as well as by registered post and the postal acknowledgment is received, *held*, it tantamounts to complete service; the Court need not await the report by ordinary service: A.I.R. 1994 N.O.C. 335 (Del.).

Where summons were served by registered post and the postal acknowledgment was received which was signed by somebody but the addressee made a bald statement that no one on his behalf had singed the postal acknowledgment, *held*, presumption as to service of summons arose. [A.I.R. 1916 Cal. 181; A.I.R. 1975 Raj. 121, Disting.; A.I.R. 1922 Bom. 159; A.I.R. 1976 S.C. 869, Approved]: A.I.R. 1982 N.O.C. 96: 1980 Raj.L.W. 407.

Where an *ex parte* decree was set aside on the mere averment of non-service of summons because the postal peon had not been examined to prove service, *held*, the Court had not acted properly; case remitted for proper disposal in accordance with law: A.I.R. 1985 N.O.C. 9 (Cal.).

Where of the two notices from the Court, sent by registered post on the same day, one requiring the defendant to show cause why the *ad interim* injunction should not be made absolute was admittedly received by him but he denied receipt of the other notice whereby the *ad interim* injunction was served on him and the defendant, after obtaining some time from the Court to show cause, executed the sale deed a day before the hearing, *held*, it could be presumed in the contempt proceedings for breach of the *ad interim* injunction that he had received both the notices in the normal course of business: A.I.R. 1976 Pat. 240: 1976 B.B.C.J. 305 (D.B.).

Where stay order was passed and sent on the same day, *held*, the presumption is that it must have been received within a couple of days: (1979) 1 M.P.W.N. 274.

Where a pre-paid correctly addressed letter posted under a certificate of posting was shown to have contained documents, *held*, a presumption could be raised under S.114(*f*) that the letter was received by the addressee at proper time as per the regular course of Post Office business; the presumption, though rebuttable, is not rebutted by the testimony of an official of the addressee who did not invariably receive or saw the post received and no record of the post received was maintained in any register. [A.I.R. 1975

Madh. Pra. 21 no longer good law in view of A.I.R. 1981 S.C. 1284]: A.I.R. 1982 Madh. Pra. 75: 1982 Jab.L.J. 82.

The mere fact that a cover insured for a certain amount is sent, raises a presumption in law that that cover contains the necessary amount of Government currency notes: 21 All.L.J. 865: A.I.R. 1924 All. 205.

Postal letters—Letters in the handwriting of *B* received by *A*—There is a presumption under S. 114 that the letters were sent by *B* to *A*: I.L.R. (1955) Nag. 882: A.I.R. 1955 Nag. 204.

Common course of business—Postal business—Insurance policy sent to appellant by post at his proper address—Law presumes that it must have reached him: (1967) 69 Punj.L.R. 578.

Delivery of postal articles—Presumption that registered letter would be deemed to have been delivered to addressee in due course can be rebutted—Acknowledgment due of registered letter not bearing signature of addressee—*Held*, presumption stood clearly rebutted: 1968 All.L.J. 289: 1968 All.W.R. (H.C.) 357.

Postal business—Presumption—Sales tax —U.P. Sales Tax Rules, 1948, Rr. 45, 77—Copies of assessment orders sent by registered post—Copies received by person other than addressee—Presumption: (1968) 21 S.T.C. 445 (All.).

Posting of valid income-tax return within time allowed, under certificate of posting, in the absence of proof to the contrary is sufficient evidence of return having been filed within time: 1983 Tax. L.R. 1134: (1984) 146 I.T.R. 577.

Before presumption could be drawn there must be proof that the letter had been actually posted—Certificate of posting and conduct of receipt thereafter would be relevant factors—On receiving notice of award under S. 12(2) of Land Acquisition Act on 24th February, 1964 party applying for reference under S. 18 by posting application addressed to Land Acquisition Officer under certificate of posting on 12th March, 1964 and also sending registered communication referring to application made on 2nd March, 1964 on 1st January, 1965—Department not specifically denying receipt of letter but stating that application was belated—Department on receipt of registered letter ascertaining from postmaster whether letters were posted under certificate of posting on 12th March, 1964—Postmaster confirming that letters were posted—*Held*, in view of these facts and in the context of land acquisition proceedings that preceded immediately before, presumption that party made applications duly and in time could be drawn: (1968) 2 M.L.J. 302.

Official acts—Disqualification pleaded under S. 50(1) (*hh*) of Madras Act (V of 1920) must be established—Presumption under the provision cannot be invoked to make good the want of evidence of proper service of notice: (1968) 1 M.L.J. 403.

Order of Government communicated by telegram—Neither expressed in the name of the Governor nor authenticated by proper authority—Averment as to existence of such order however very clear—Order must be presumed to have been validly passed: A.I.R. 1967 Assam 22.

Where the question was on what date a telegram sent by the plaintiff was received by the defendant, the defendant alleging that it was received on a particular date after the business hours, the receipt of the telegram having been admitted, the defendant is the best person to produce the telegram and show that it was received on the day and at the time alleged by him. If he fails to produce it, the Court can draw an inference against him: 1960 Raj.L.W. 29: I.L.R. (1959) 9 Raj. 938.

Where a notice was served to the respondents through telegram but the appellants failed to summon the postal and telegraph department to produce the records for the purpose of ascertaining the date and time of the service of the telegram, *held*, in view of default of the appellant to produce the necessary document, presumption regarding due service of the telegram could not be drawn: (1987) 100 Mad.L.W. 750.

S. 140 of the Railways Act, 1890 prescribes the mode of service of notices and other documents on the Railway administrations; Cl. (*c*) of that section which relates to the service of notice through the agency of postal department has two ingredients. Firstly, the notice should be enclosed in a prepaid envelop and secondly, it should be registered. S. 142 of that Act deals with the presumption in case the notice is sent by post and provides that a notice would be deemed to be served if it was sent by post under registered cover and addressed properly. Ss. 140 and 142 of said Act apply in case of preference of a claim under S. 78-B of that Act as well. Thus, where a notice for claim under S. 78-B was forwarded by post but not under registered cover and it even did not bear the correct address of the addressee, *held*, no presumption of its due service could be raised: A.I.R. 1984 P.&H. 41; A.I.R. 1974 Punj. 190: (1974) 76 Punj.L.R. 10 (D.B.).

Where a bank draft was purchased by a party in one town for payment of money to another party in another town 38 miles apart, *held*, the normal presumption is that the draft was to be sent by post; posting of the draft to the payee or his agent would, thus, be taken to be the point of delivery; the Post Office thereafter acts as the payee's agent: A.I.R. 1976 Bom. 185: 1976 Mah.L.J. 66 (D.B.).

Where a tenant owed certain sum on two promissory notes and his wife wrote several letter under certificate of posting to the landlord for adjustment of said amount against the rent due and the landlord did not question the correctness of the address given in all such letters and further the respondent failed to place any material to show that anything happened which prevented said letters reaching him, *held*, it could be presumed that the respondent landlord received all the letters written by the wife of the petitioner-tenant: A.I.R. 1981 Mad. 277: (1981) 94 Mad.L.W. 404: (1981) 2 M.L.J. 288.

Where the dispute was regarding the date as to when the copy of arbitration award of the arbitrator was received by a party, and stenographer of the arbitrator deposed to the effect that he had received the acknowledgment receipt of the registered letter from that party within ten days from the date of despatch and he had handed over the same to the arbitrator, *held*, a presumption arises that the registered cover must have been received within a reasonable time: A.I.R. 1993 S.C. 1245: (1993) 1 S.C.C. 572.

Where arbitration notices were sent to appellant-partner of a firm and her father, guarantor, through registered A.D. and a letter under certificate of posting at the same address and the A.D. receipt showed that the letter was received but even then only the father appeared before arbitrator, *held*, there was an unrebuttable presumption that she was served by the arbitrator: A.I.R. 1981 Del. 106: (1981) 19 Del.L.T. 41 (S.N.) (D.B.).

Allegation of petitioner of having sent medical certificate under certificate of posting—Presumption is only with regard to posting the cover—Contents of cover are to be proved by sender: (1983) 2 Serv.L.J. 648.

Where notice of dissolution of the firm was issued by publication in a newspaper and a letter was sent under the certificate of posting but the addressee denied having seen them as he was then abroad, *held*, no presumption of its service could be raised against the addressee: A.I.R. 1976 J.&K. 37: 1975 Kash.L.J. 397.

Where notice issued in respect of the proceedings under S. 125 of the Code of Criminal Procedure was not served as provided for in the Cr.P.Code, but it was sent by registered post to the petitioner-husband and it was not returned, *held*, the issue of notice by registered post was wholly unwarranted and, thus, the question as to whether the notice actually reached the husband-addressee or whether any presumption could be drawn with reference to S. 114, Evidence Act that the notice had reached him, would not arise for consideration at all: 1993 Cr.L.J. 418 (Karn.). *See* also (1981) 1 Karn.L.J. 353; (1992) 2 Karn.L.J. 254.

Where respondent-Municipal Committee sent notices to appellant-assessee as provided in S. 215(1) and (2) of the Punjab Municipal Act, 1911 but the notices were returned unserved and the assessee also failed to prove non-compliance of S. 215 of the said Act by the respondent-Municipal Committee, *held*, a presumption as to valid service of notice arose: A.I.R. 1982 N.O.C. 46: (1981) 20 Del.L.T. 141.

Contract for sale of plots—Auction—Failure by bidder to perform his part—Rescission of contract by Government—Communication by letter—Legal presumption arises in favour of official act done—Burden is on plaintiff to prove that it was not received: 1979 Kash.L.J. 334 (D.B.).

Where it is shown that the Railway Administration had sent intimation of the arrival of the goods to the booking station, it is presumed that the booking station received the intimation: (1958) 71 Mad.L.W. 70: (1958) 1 M.L.J. 175.

Call towards unsubscribed share capital—Resolution discriminating as regards call amount between ordinary shareholders and Directors; no time fixed for payment nor notice of demand provided for—No provision in the articles of the company for making difference in call amount between share holders—Resolution held bad in law—Notice of demand not served—No assumption of service of notice without proof—Call made pursuant to resolution is invalid—However, Directors who were party to resolution are estopped from raising objections

as to validity of resolution: (1961) 31 Comp. Cas. 573 (Punj.).

Illustration (f)

46. General.—Under S. 114 there is a presumption not only that official acts are regularly performed but also that ordinarily business acts are normally carried out. Therefore, in the absence of any evidence to the contrary the Court can presume that a power-of-attorney which was stamped was in fact stamped by the proper officer in the Financial Commissioner's office: (1941) 43 Punj.L.R. 499: A.I.R. 1941 Lah. 345.

Illus. (*f*) applies to the course of business followed in public offices as well as in private offices. The effect of sending a letter to the Post Office will, in general, be regarded as presumptively proved if the letter is shown to have been left with the person whose duty it was in the ordinary course of business to carry it to the Post Office: A.I.R. 1958 Punj. 440.

47. Presumption regarding post.—The presumption of due delivery under *Illus.* (*f*) to S. 114 hardly arises if there is no evidence of posting the letter: A.I.R. 1958 Cal. 644.

Where the question was whether certain letter meant to be despatched by post to the plaintiff by the office of an insurance company was in fact posted, in the absence of any evidence to establish that the letter in question was in fact delivered to the Post Office or other evidence to connect that letter with the Post Office, no presumption can be drawn to the effect that it was in fact posted as provided in S. 114 and that the letter had reached the plaintiff: 1959 B.L.J.R. 425: A.I.R. 1959 Pat. 540.

When a notice issued by an officer of a company purports to have been issued by order of the Board of Directors, there is a presumption that it was issued pursuant to such an order, and unless the presumption is displaced, the Court must act on that presumption: (1956) 58 Bom.L.R. 660: I.L.R. (1956) Bom. 619: A.I.R. 1956 Bom. 537.

The entry of the despatch number in a despatch register should ordinarily be presumed to be correct in the absence of any evidence to the contrary: I.L.R. (1964) 14 Raj. 107: A.I.R. 1964 Raj. 184.

Entry in a despatch register maintained in the office of a disciplinary authority does not support the allegation of actual posting of the letter containing the final order: (1973) 2 Cut.W.R. 1218 (D.B.).

Entry in peon book of firm showing date of despatch of letter—Date of its receipt—Presumption. *See* A.I.R. 1952 Cal. 455.

Partnership Act, 1932, S. 68—Notice of change in constitution of firm—Entry made in Register of Firm—Evidentiary value. *See* A.I.R. 1964 Cal. 209.

Despatch register of Transport authority and affidavit of Regional Transport Officer produced in support of assertion that order of the Regional Transport Authority was despatched on a particular date—Presumption can be drawn in such circumstances of the letter having been duly posted and, therefore, to have reached the addressee: (1973) 2 Cut.W.R. 1586 (D.B.).

When a member of the Bar writes a letter purporting to be instructed by a client, there is a presumption, until the contrary is proved, that the letter is written under instructions: 144 I.C. 996: A.I.R. 1933 Rang. 147.

S. 114 relates to presumptions of facts and such presumptions may be drawn, in the language of the section "in their relation to the facts of the particular case". Only upon proof that a letter had been actually posted, can a presumption arise of the letter having reached its destination in due course. Where two names including the name of the addressee on the letter in question were noted on a certificate of posting, not by the postal authorities but by some one on behalf of the party and the postal stamp was below those entries, *held*, in the circumstances of the case, that the certificate had no evidentiary value and the Court was justified in brushing it aside: A.I.R. 1960 Andh. Pra. 331.

Compromise decree for restitution of conjugal rights—As per terms of compromise husband sending letter to wife to remain ready to accompany him to return home—Wife refusing to accept the letter—Adverse inference that wife was in no mood to return should be drawn: (1965) 67 Punj.L.R. 56: 1965 Cur. L.J. 72.

48. *Illustration* (*f*)—Others.—Statutory presumption — Resolution of company signed by its Chairman—Resolution must be presumed to be correct: A.I.R. 1968 Del. 68.

When a notice issued by an officer of a company purports to have been issued by

order of the board of directors, there is a presumption that it was issued pursuant to such an order, and unless the presumption is displaced, the Court must act on that presumption: (1956) 58 Bom.L.R. 660: I.L.R. (1956) Bom. 619: A.I.R. 1956 Bom. 537.

Statutory presumption of correctness attaches to the entries in books regularly maintained by limited company. It is for the person alleging the contrary to prove it: A.I.R. 1956 Pepsu 89.

Where an immovable property of the Electricity Board was purchased by a Company and the consideration therefor in the form of a cheque was accepted by the Board's Superintending Engineer who later on communicated to the Company that it worked out to be full price and the possession was delivered by the Board's Assistant Engineer, *held*, since sale of its immovable property was not a normal business of the Board and neither of the Board's two officers who completed the transaction had any ostensible or real authority to do so, the purchaser should have enquired whether any resolution of the Board had empowered them to enter into the transaction; since S. 13 of the Electricity (Supply) Act, 1948 provides that all orders and decisions of the Board should be authenticated by the Chairman or any other Member of the Board and other instruments by authorised members and officers under their respective signatures, it could not be presumed that the sale was effected in the normal course of the Board's business and was valid: A.I.R. 1973 Madh. Pra. 281: 1973 M.P.L.J. 846 (D.B.).

Income-tax Act, 1922, S. 23(3)—(Income-tax Act, 1961, S. 143(3)—High denomination notes encashed under High Denomination Bank Notes (Demonetization) Ordinance, 1946—Burden to prove source of notes is first on assessee—Assessee, a businessman, alleging receipt of notes from banks three years before—Time-lag between receipt of notes and encashment—Lack of evidence to show that money was lying idle—Numbers of encashed notes not tallying with numbers given by banks—Material held relevant in rejecting assessee's explanation—Presumption that businessman would not keep money idle, *held*, was permissible: (1966) 2 I.T.J. 860 (All.).

Acknowledgment of liability by pleader on behalf of client—Presumption of authority: 1963 Ker.L.T. 926: A.I.R. 1964 Ker. 175.

Where the Counsel of the accused puts defamatory questions imputing unchastity to the complainant who is a young woman, the Court has to start with the presumption that the questions were put on instructions and it is only when the contrary is proved that the Court can come to a finding that the questions were put without instructions: 1954 Cr.L.J. 1239: A.I.R. 1954 Mad. 741.

It frequently happens that when two persons go together to any shop where refreshments are provided, any one of the two persons gives the order and it is not possible to conclude that the person who gave the order must be presumed to be the person who handed over the money: 1957 Cr.L.J. 117 (All.).

Advance payment through post voluntarily made by buyers in British India to assessee trading in Native State—Request for payment on part of assessee cannot be inferred on mere fact of receipt of sale-proceeds in advance: I.L.R. (1965) Guj. 215.

Prize competitions—Printing of competitions and results—Presumption as to conduct and promotion of such competitions—From the printing of competitions and the results thereof Court can presume that they were so printed for the conduct and promotion of a prize competition and that prizes were to be offered as printed therein: 1964 All.L.J. 581: (1964) 2 Cr.L.J. 632: A.I.R. 1964 All. 572.

Muslim residents of village burying dead bodies in plot—Right recognised by defendants even after passing of Act—Presumption is that plot was dedicated for use as graveyard: 1965 All.W.R. (H.C.) 371.

Existence of graveyard established—No presumption that it is public wakf: 1965 All.W.R. (H.C.) 296.

Where an Assistant Manager of a branch of the Insurance Company, deposed that he was familiar with procedure followed by the Company for export cargo insurance and that the company used to prepare several carbon copies of the policy together with annexures attached thereto and one complete carbon copy thereof was kept as office record and he produced a copy of the policy together with a carbon copy of marine debit note, issued before he had joined the Branch, *held*, the copy of the marine debit note so produced attracted the presumption available

under S. 114(*f*); it may be presumed that the copy was prepared and attached when the policy was initially issued: A.I.R. 1971 S.C. 44: (1970) 1 S.C.R. 821: 1971 Cr.L.J. 5: (1983) 13 E.L.T. 1413.

On the imposition of gallonage fee under the Hyderabad Denatured Spirit Rules and the A.P. Denatured Spirit Rules having been struck in a writ petition, *held*, refund of the gallonage fee could not be allowed; that would tantamount to unjust enrichment; it can be reasonably presumed that the dealers must have included the gallonage component in the price at which he was selling the denatured spirit; the burden to plead and prove the loss and absence of unjust enrichment would lie on the party claiming refund: A.I.R. 1986 Andh. Pra. 361: (1986) 2 An.L.T. 206 (D.B.).

Where the assessee's claim of not having worked his brick kiln after 3-7-1967 was negatived by the Sales Tax Authorities on the ground that he had purchased coal on 12-10-1967 and on 16-2-1968 and the kilns normally commence their operations after Dashahra, *held*, the adverse inferences drawn by the Sales Tax Authorities against him were not unwarranted; it is not necessary that there should be direct evidence of every fact; it can be established by circumstantial evidence and probabilities: 1979 U.P.T.C. 840.

Where the power-of-attorney executed by a Yugoslav in Yugoslavia was authenticated by a Judge there and transmitted through the Yugoslav Foreign Office to the Indian Embassy where the signatures thereon were attested by an Embassy official and the power-of-attorney was sent to the plaintiff in India who filed it in the Court, *held*, the power-of-attorney would be presumed to be authentic as the common course of business had been followed: A.I.R. 1984 Del. 20.

True, there is no presumption in law that a father or a son can never sub-let, assign or part with possession of tenanted premises in favour of the other within the meaning of S. 14(1)(*b*) of the Delhi Rent Control Act, 1958, yet it will be disastrous to hold that because the tenant's parent or progeny lives or carries on business in the tenanted premises, it must be presumed that there is some kind of parting with possession; such an approach is not permissible in law, unless facts proved on record unequivocally compel to do so; the accepted way of life is that a father and son are normally expected to live together, earn together and spend their separate earnings for each other and the family; cogent and strong facts are required to displace this life style; on facts, *held*, sub-letting not proved. [A.I.R. 1974 S.C. 280, Rel. on]: A.I.R. 1984 Del. 14: (1983) 24 Del.L.T. 316: (1984) 86 Punj.L.R. (Del.) 39: (1984) 1 Ren.L.R. 107.

Illustration (*g*)

49. Scope of *Illustration* (*g*).—As to scope of illustration, *see* I.L.R. 61 Cal. 711: A.I.R. 1935 Cal. 39; I.L.R. 21 Pat. 735: A.I.R. 1943 Pat. 69.

The adverse inference contemplated under S. 114(*g*) is not a rule, much less a routine exercise of the Court's power; it has no independent existence of its own; while drawing such a presumption, the Court is required to have regard to the common course of natural events, human conduct and public and private business in relation to facts of the particular case. The use of the words "may presume" emphasises the Court's "total discretion"; the settled law is that presumptions are necessarily be made against parties who having knowledge of fails in dispute will not subject themselves to examination when a *prima facie* case is made against them but by their own evidence, they might have answered it; no adverse inference may be drawn if the evidence of the witness held back would not have improved the party's case: (1994) 3 An.L.T. 491.

The language of section as well as that of *Illus.* (*g*) is not imperative, *i.e.*, the Court is not bound to raise adverse presumption even if the requirements of the section are fulfilled: (1986) 6 Guj.L.H. 861: (1986-2) 27 Guj.L.R. 1303. *See* also (1978) 2 M.P.W.N. 334.

The object of raising a presumption under *Illus.* (*g*) is to fill the gaps left in the evidence; a presumption is, however, no substitute for evidence; thus, there must be some evidence on record on the basis whereof the Court could raise the requisite presumption: A.I.R. 1984 N.O.C. 304 (Cal.).

There is no element of compulsion under S. 73 on a party or any witness; the only consequence of non-compliance of a direction under S. 73 is that it is open to the Court to draw a presumption under S. 114 about the disputed writings which may go against the person or party. [A.I.R. 1975 Andh. Pra. 88;

(1968) 34 Cut.L.T. (Note) 319, Rel. on]: A.I.R. 1986 Ori. 218: (1985) 60 Cut.L.T. 591.

Illus. (*g*) to S. 114 refers to "evidence which could be and is not produced" and it is the non-production of this evidence which could be and is not produced that would give rise to the presumption under the section that if produced it would be unfavourable to the person who "withholds" it. The illustration, therefore, postulates two things: first, that the evidence could be produced and secondly, that that evidence is withheld. Obviously, the illustration refers to evidence which is under the control of the party concerned and if the evidence be not under his control there is no question of raising any presumption under S. 114. *Held*, that there was no satisfactory evidence that any general diary entry relating to the incident was at all made and even if an entry was made the prosecution having been started on a petition of complaint, it could not be said that the complainant was in possession of that police document and could, if he would, have produced it. So far as the petition of complaint that was earlier filed was concerned, the same was with the police record and was also not under the control of the complainant. The two documents, therefore, not being documents under the control of the complainant and not being within his power to produce, there was no question of his having withheld them. In this view, a presumption under S. 114(*g*) was not liable to be drawn against the prosecution for non-production of the documents: (1966-67) 71 Cal.W.N. 781.

Failure to obtain evidence—Adverse inference can be drawn only if there is withholding of evidence and not merely on account of failure to obtain evidence: 1967 Mah.L.J. 747: (1967) 1 S.C.R. 595: 1967 S.C.D. 1050: A.I.R. 1967 S.C. 450.

In order to entitle the Court under S. 114, *Illus.* (*g*) to draw inferences unfavourable to the person withholding evidence, the opposite party must satisfy the Court that such evidence was in existence and could be produced:(1932-33) 37 Cal.W.N. 657: A.I.R. 1933 P.C. 87: 64 M.L.J. 413 (P.C.); 61 I.A. 177: I.L.R. 57 Mad. 443: (1933-34) 38 Cal.W.N. 669: 67 M.L.J. 1 (P.C.).

A presumption of fact under S. 114(*g*) is a question of fact and not a question of law: A.I.R. 1985 Cal. 168: (1984) 2 Cal.H.N. 160 (D.B.).

The permissive presumption under S. 114(*g*) may be raised only in case of deliberate withholding of material evidence; thus, where in a suit for recovery of money on hundies, the plaintiff at the relevant times had neither a bank-account nor books of account and did not produce any document to show that she had sufficient source to lend the money, *held*, there being nothing on the record to show that she could adduce better evidence, the presumption under S. 114 could not be raised: A.I.R. 1988 Cal. 59 (D.B.).

50. Withholding of best evidence.—It is the duty of the party concerned to place before the Court all relevant material with reference to a matter which the Court is called upon to decide and the Court is justified in raising a presumption against such party for non-production of any relevant material asserted to exist. To withhold the best evidence which a party has in his possession and then to rely upon a set of facts is against sound legal principles when that evidence would throw considerable light on the matter in issue: 1961 M.P.L.J. 287.

It is against sound legal principles for those relying upon a set facts to withhold from the Court the best evidence in their possession which would throw light on the matter to be investigated by it. It is, therefore, not unreasonable for the Court to draw an adverse inference from the failure of a party to produce the best evidence in its possession to prove a fact the initial burden in regard to the proof of which has been discharged by the other party: I.L.R. (1954) 1 All. 582: A.I.R. 1954 All. 393. *See* also I.L.R. (1953) Trav.-Co. 537: A.I.R. 1953 Trav.-Co. 481; I.L.R. 36 Pat. 786: A.I.R. 1958 Pat. 329.

Non-production by party of best evidence, gives rise to presumption against the party: A.I.R. 1951 Punj. 361.

Best evidence not produced though available raises adverse presumption. Inconsistent pleas and not proving pleas raised indicate falsity of defence: (1928-29) 33 Cal.W.N. 430: A.I.R. 1929 P.C. 95: 57 M.L.J. 565 (P.C.).

Best evidence rule which governs the production of evidence in Courts, requires that the best evidence of which the case in its nature is susceptible should always be presented. When better evidence is withheld it is only fair to presume that the petitioner had some motive for not producing it and that, if

offered, his design would be frustrated: A.I.R. 1978 Del. 199.

A very strong presumption must be raised against a party who withholds a document, which was the best evidence and abstains himself from appearing in the witness-box, especially when the version given against him by the opposite party is supported and corroborated by the scribe: A.I.R. 1960 Punj. 573: (1960-61) 18 F.J.R. 428.

If a party to a case does not produce a document which is the best evidence in support of his contention, an inference can be drawn that, if proved it would be against his contention. It is only in the case of non-production of documents irrelevant to the case that such an inference cannot be drawn unless the party is asked to produce the document and he fails to do so: 21 Cut.L.T. 322: A.I.R. 1955 Ori. 60; (1956-57) 61 Cal.W.N. 78; A.I.R. 1958 Madh. Pra. 129.

If a party to an action is in possession of the best evidence, which one way or other is decisive on the fact in issue then there is a heavy duty cast upon him to assist the Court with the same and that notwithstanding what the abstract doctrine of the onus of proof may suggest about it. And in case he fails to produce it without any reasonable justification, whether called upon to do so or not then in law it is open to the Court to draw an adverse inference against him for that reason: A.I.R. 1960 Pat. 223; A.I.R. 1988 Del. 332. But see *infra*. A presumption can only arise if a relevant document in the possession of the opposite party is not produced in spite of notice to produce it. But where the opposite party gives an explanation for the non-production, which is plausible, there is no ground for raising any adverse inference: 1959 Raj.L.W. 19: A.I.R. 1959 Raj. 391. It is for the suitor to decide which would be the best evidence to prove his case, and, for failure to produce one piece of evidence, an adverse inference should not be drawn against the party who has chosen not to file it, unless the other side had called for that evidence: A.I.R. 1960 Pat. 111.

A party in possession of best evidence which would throw light on the issue in controversy withholding it—Court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him—Party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it: (1968) 3 S.C.R. 862: A.I.R. 1968 S.C. 1413.

Whether or not an adverse inference from the non-production of the best evidence by a person on whom the burden of proving a fact lies should be drawn is not, however, a matter of an inflexible rule but is dependent upon the circumstances of each individual case. Inferring the existence or non-existence of a certain fact from the omission of a party to produce a particular evidence the Court follows the same mental process which is followed and is implicit in all inferences. The question always is whether the existence of a fact or a state of thing makes the existence of another fact or state of things so likely that it may be presumed to exist; and even in deciding whether an inference adverse to a party should be drawn from the non-production of a particular evidence or type of evidence, the Court really answers the above question. Naturally the answer must vary according to the circumstances. The nature of the fact required to be proved and its importance in the controversy the usual and commonly recognised mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned have all to be taken into account. And it is only when all these matters have been duly considered that an adverse inference may be drawn. But the proposition that the Court is never justified in drawing an adverse inference from the non-production of a particular type of evidence is manifestly untenable: I.L.R. (1965) 1 All. 483: A.I.R. 1966 All. 570.

A case has to be decided on the evidence led by the parties, and not on evidence which might have been led if the parties were better advised, unless it be that a party deliberately withholds the best evidence which has shown to be in its possession, in which case an adverse inference may be drawn against that party. But for drawing that adverse inference the Court has to be satisfied that the evidence was available and has been withheld.

A municipal employee had prepared a survey map of a road with reference to a fixed point (Railway gate) which was also shown as the fixed point in the survey sheet of the year, 1901. The survey map tallied with the survey sheet of the year 1901 which was a public document. The employee

appeared as a witness on behalf of the State which was the plaintiff in the instant case. His evidence had remained unshaken in cross-examination.

Held, that the witness was a public servant and had no personal interest in the subject-matter of the litigation. His evidence could not be discarded on ground that the defendant did not admit the correctness of the survey sheet or that the Court was of the opinion that better evidence could have possibly been led. This is more so when the survey by the Commissioner appointed by the Court would not have made any difference: 1983 All.L.J. 1155.

Where the long delay of the plaintiffs in bringing the suit has prejudiced the defendants and has prevented them from bringing the best evidence that would otherwise have been available to them, the tendency of the Court must invariably be to make an inference against the plaintiff unless good cause is shown and the Court should attach great importance to such presumption in testing the credibility of the evidence actually given: 118 I.C. 154: A.I.R. 1929 All. 561.

Plaintiff not producing best evidence in support of adoption as disclosed in plaint itself—Plaintiff applying for time not being fortified with necessary evidence—Time not allowed—Plaintiff, therefore, constrained to be ready with whatever evidence was available—Details of documents upon which plaintiff wanted to rely in support of adoption given in plaint—*Held*, if those documents contained recitals against the story of adoption, it was open to defendant to file them—In the circumstances, no adverse inference could be drawn against the plaintiff: I.L.R. (1962) Cut. 422: A.I.R. 1963 Ori. 45.

Party claiming that houses were impressed with character of joint family property as their purchase alleged from sale-proceeds of land belonging to joint family—Party not producing sale-deed of land nor producing extracts from land records to show existence of land but offering oral evidence—Non-production of document suggests for adverse inference and oral evidence cannot be accepted: I.L.R. (1965) 1 All. 483: A.I.R. 1966 All. 570.

State deliberately withholding certain evidence from Court—Every possible presumption could be raised against State in that respect: A.I.R. 1968 Punj. 72; (1992) 2 Cal.L.J. 247 [Where respondent State Government withheld list of the persons for whom certain posts were created, *held*, an adverse inference could be drawn against the State that the writ petitioner was one of those persons.]

Where the Government withholds relevant documents in its possession, the Court will draw an inference adverse to it: I.L.R. 50 Cal. 276: A.I.R. 1923 Cal. 233. But *see* A.I.R. 1929 Mad 399 [Where the Government failed to produce original settlement record but no adverse inference was drawn.] Although S. 114 permits a Court to presume that evidence, which could be and is not produced, would, if produced, be unfavourable to the person who withholds it, it does not allow any such presumption to be made in the case of documents about which there is no certainty that they would even have been relevant evidence in the case: I.L.R. (1944) All. 9: A.I.R. 1944 All. 5.

Under S. 114 (*g*), the Government stands on no higher footing than a private party except in cases where the function of the Court in this behalf is taken away by specific statutory provisions, which while vesting the Government with statutory powers on the basis of certain objective facts relegates the question of existence of such objective facts not to a *quasi* judicial determination thereof but to the satisfaction of the authority concerned: I.L.R. (1952) Cut. 529: A.I.R. 1953 Ori. 121.

Where though both the plaintiff and the defendant were traders and maintaining their respective accounts books, but both failed to produce them, *held*, adverse inference could not be drawn only against the plaintiff: A.I.R. 1979 N.O.C. 196 (Andh. Pra.) (D.B.).

Neither party producing any evidence even though any of them can produce it, if available—Absence of evidence is inconclusive and does not help either party: (1967) 1 S.C.R. 153: A.I.R. 1967 S.C. 1134.

Relevant piece of documentary evidence (birth and death register) available to both parties but none of them producing it—No adverse inference can be drawn from the non-production against plaintiff—At most adverse inference held could be drawn against defendants who set up a specific case to prove which they failed to take steps to produce the document which it was possible for them to do: A.I.R. 1962 Pat. 131.

51. Non-production of witness by prosecution.—Law does not require that all the eye-witnesses to an occurrence must be produced and examined in a criminal case to prove a charge. S. 134 of the Indian Evidence Act lays down that no particular number of witnesses shall in any case be required for the proof of any fact. Evidence has to be weighed and not counted. When four of the eye-witnesses to the occurrence have been examined and their evidence may be legally relied upon, non-examination of the other eye-witnesses would not in any way affect the prosecution case: 1972 Cr.L.J. 1552 (Gau.) (D.B.).

The correct law as to the proper effect of the non-production of the witness cannot be decided in the abstract. In the final analysis, it is a question of fact to be determined on a consideration of the circumstances of the individual cases, in which *inter alia* the following factors should receive due consideration. (*i*) Whether the witness is in a position to give relevant and material evidence. (*ii*) Whether the witness is within easy reach of the prosecution or not, or, whether there are circumstances justifying the withholding of a witness, *viz.*, the witness is likely to be hostile to the prosecution. (*iii*) The nature and intensity of the controversy raised by the defence on a particular issue on which the witness is expected to give evidence. (*iv*) Presumptiveness of the evidence which is on the record: I.L.R. (1971) 21 Raj. 209.

No particular number of witnesses is required to prove a fact. Before raising an inference adverse to the prosecution under S. 114(*g*) it has to be shown that the prosecution has withheld a witness, who has to unfold the story for the prosecution. Thus, where there were already sufficient number of witnesses for the prosecution and the examination of other possible witnesses would only have added to the repetition of the same story over again by those witnesses, entailing a protracted trial, *held*, an adverse inference against the prosecution could not be drawn: 1983 M.P.L.J. 411.

The material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need be produced and not all witnesses said to have seen the occurrence and no adverse inference can be drawn against the prosecution for the non-production of a non-material witness. [(1936) 37 Cr.L.J. 963: A.I.R. 1936 P.C. 289; A.I.R. 1971 S.C. 2156, Rel. on]: 1973 Cr.L.J. 806 (Raj.).

By introducing S. 207-A in the Cr.P.Code the Legislature has considerably altered the law relating to the procedure to be adopted in commitment proceedings instituted on a police report. Cl. (4) of S. 207-A gives to the prosecution absolute discretion in the matter of production of witnesses of the actual commission of the offence. It further empowers the Magistrate to take evidence of any one or more of other witnesses for the prosecution, if he considers it necessary in the interest of justice. If, in the exercise of its discretion, the prosecution did not produce all the identification witnesses in the committal proceedings, and the Magistrate, too, did not consider it necessary to take the evidence of any of the other witnesses for the prosecution, no inference adverse to the prosecution can justifiably be drawn from such non-production of witnesses before the committing Magistrate: I.L.R. (1962) 1 All. 169: (1962) 2 Cr.L.J. 411.

It is not the number of the witnesses which is material, but it is the quality and nature of the evidence produced which is relevant. However, in specified circumstances, the Court may draw adverse inferences, where the material evidence is stated to have been withheld. Where there was non-production of witnesses, from the statements of whom the Court could ascertain the circumstances under which the prosecutrix was, allegedly, supposed to have been subjected to sexual intercourse against her consent and the prosecution failed to satisfy the Court or even give a suggestion regarding the circumstances which prevented it from producing the said witnesses in the Court, *held*, non-production of material witnesses was definitely a factor required to be taken note of alongwith other circumstances of the case: 1994 Cr.L.J. (N.O.C.) 327 (J.&K.).

Non-examination of some witnesses—Presumption—Duty of Court: *See* A.I.R. 1956 Bhopal 6.

Criminal trial—Evidence—Appreciation of—Non-examination of material witness—Effect: I.L.R. (1963) Andh. Pra. 349: (1964) 2 An.L.T. 77: (1964) 2 Cr.L.J. 78; (1994) 5 S.C.C. 188: 1994 S.C.C. (Cr.) 1391.

The prosecution is not bound to produce all witnesses if they are not considered necessary. Non-production of a witness, therefore, is not always sufficient to throw any doubt on the prosecution version: (1961) 63 Punj.L.R. 742; 1982 M.P.W.N. 486 [No adverse inference could be drawn against the prosecution for non-examination of a witness whose evidence is not material.]

Non-examination of prosecution witness —Inference. *See* A.I.R. 1954 Andhra 46: 1955 An.W.R. 183.

Duty of prosecution to call as witnesses all persons. *See* I.L.R. (1953) Mys. 625: A.I.R. 1954 Mys. 81.

Duty of prosecution to call all material witnesses—Failure to examine—Effect: 1967 Cur.L.J. 51 (Punj.).

There is always a duty cast on the prosecution to examine the material witnesses, who unravel the prosecution story. If a material witness is deliberately or unfairly withheld a serious reflection is cast on the propriety of the trial. But it is not as though the prosecution is bound to call all the witnesses, who might be aware of the occurrence, and duplicate the evidence: 1968 Cr.L.J. 1630: A.I.R. 1968 Tripura 57.

All eye-witnesses, selected fairly and honestly and not with a view to suppress inconvenient witness from witness box, are to be examined: 1981 Cr.L.J. 536 (Gau.).

A prosecution is not bound to call witnesses irrespective of considerations of number and of reliability, nor is a prosecution bound to discharge the functions both of prosecution and defence. It is only those witnesses who are essential to the unfolding of the narrative on which the prosecution is based who must be called by the prosecution, whether in the result the effect of their testimony is for or against the case of the prosecution.

It is no part of the duty of the prosecution to supply ammunition to the defence for the purpose of blowing up the prosecution's case: 1960 Cr.L.J. 1042: A.I.R. 1960 Andh. Pra. 545; 1981 Jab.L.J. 407.

The non-production of witnesses cited by prosecution when their evidence was unnecessary cannot justify adverse inference when there is nothing else on record to justify it: 120 I.C. 606: A.I.R. 1930 Lah. 163.

Where a serious offence like murder is committed and large number of accused persons are tried, attempts are made either to terrorise or win over prosecution witnesses and if prosecution honestly and *bona fide* believes that some of the witnesses have been won over, it would be unreasonable to insist that they must be tendered before the Court. But it is also settled law that material witnesses considered necessary by the prosecution for unfolding the prosecution story need be produced; such witnesses cannot deliberately be kept back: 1979 Cr.L.R. 88 (Raj.).

In a criminal trial for an incident due to village faction, *held*, no adverse presumption against prosecution may be drawn for non-examination of a particular witness, since people avoid to invite displeasure of one side or the other side when there is a village faction: 1983 All.L.J. 232 (D.B.); A.I.R. 1985 S.C. 880: 1985 Cr. L.J. 902: (1985) 2 S.C.C. 61; 1994 (Supp.) 1 S.C.C. 74: 1994 S.C.C. (Cr.) 239.

The prosecution is not bound to produce each and every eye-witness irrespective of the fact whether he would or would not support its case. If the prosecution comes to the conclusion that a particular witness is not a truthful witness, there is no obligation on it to call him: 1977 Cr.L.R. 251 (Raj.); (1986) 1 Crimes 201 (S.C.).

The prosecution cannot be compelled to examine one witness or the other and if a material witness is withheld, the utmost that would follow would be to draw an adverse inference against the prosecution. But, before such adverse inference can be drawn, it must be proved to the Court that material witnesses had actually seen the occurrence, but had been deliberately withheld from the witness box by the prosecution: A.I.R. 1989 S.C. 2004: 1989 Cr. L.J. 2167; A.I.R. 1976 S.C. 2304: (1976) 4 S.C.C. 369.

For non-examination of witnesses found to have been won over by the accused, *held*, no adverse inference could be drawn against the prosecution. [1977 Cr.L.J. 273 (S.C.), Rel. on]: 1984 Cr.L.J. 29 (D.B.).

Where the prosecution had given up two witnesses, not essential for unfolding of its case, on the ground of their having been won over by the defence, *held*, no adverse inference could be drawn for their non-examination by the prosecution; suborned witnesses as they were, the prosecution

would have discredited by cross-examining them; in the absence of any other convincing reason having been put forth by the defence, their non-production has no effect: 1977 Raj.L.W. 100 (D.B.).

Where the prosecution dropped a witness on the ground that he was won over and the defence at no point of time questioned the prosecution's stand in this regard, *held*, no adverse inference could be drawn against the prosecution for its failure to examine the said witness and his non-examination could not reflect on the credibility of other prosecution witnesses: A.I.R. 1992 S.C. 214.

In the Court of Session the Public Prosecutor gave up certain witness as having been won over by the accused. The witness was present in the Court of Session but was not examined by the accused. *Held*, that the non-production of the witness by the prosecution did not adversely affect the prosecution case: (1954) 56 Punj.L.R. 43: A.I.R. 1954 Punj. 126.

Prosecution requesting to drop witness *K* as accused has bribed him and he is not expected to state truth—Prosecution also bringing to notice of Magistrate that *K* is present within precincts of Court—*Held*, no adverse inference could be drawn against prosecution by trial Court on account of non-production of *K* as witness: 1967 Cur.L.J. 682: (1967) 69 Punj.L.R. 935.

Person mentioned in dying declaration not produced by prosecution on ground of his being won over—Effect. *See* A.I.R. 1957 S.C. 904: 1958 M.L.J. (Cr.) 38.

Where material on record indicated that some of the prosecution witnesses had succumbed to the threats and pressure of defence to stay away from the witness box and were given up by the prosecution as having been won over, *held*, that by itself would not detract from the probative value of the testimony of other prosecution witnesses examined in the Court: A.I.R. 1989 S.C. 1456: 1989 Cr.L.J. 1466: (1989) 3 S.C.C. 5.

Where three examined witnesses had testified and proved the facts and two other witnesses, who could prove some of those facts, were not examined in the case of a raid under S. 21 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, *held*, for non-examination of the two witnesses, no adverse inference could be raised against the prosecution: 1991 Cr.L.J. 134 (Del.).

Where in a criminal case, the High Court had found that the testimony of two eye-witnesses was absolutely credible and truthful, *held*, it could not have rejected the prosecution case on the ground that other eye-witnesses named in the F.I.R. had not been examined by it; the Court in such cases is concerned not with non-examination of other independent witnesses; it has to decide whether the evidence actually on record is reliable or not: A.I.R. 1979 S.C. 1116; (1981) 19 Del.L.T. 437.

Non-examination of some prosecution witnesses—A mere consideration that the witnesses might have given a further description of how things happened would not justify the conclusion that the omission to examine them was for an oblique motive and would go to benefit the accused: (1962) 32 Comp. Cas. 699: A.I.R 1962 S.C. 1821: (1963) 1 S.C.R. 253.

A number of eye-witnesses to the incident of rioting mentioned in first information report—Only three examined and two of them though produced for cross-examination not so examined by accused—*Held*, that simply because two other eye-witnesses were not produced, the evidence of those who were produced could not be disregarded: 1958 Cr.L.J. 1232: A.I.R. 1958 Raj. 226: I.L.R. (1957) 7 Raj. 997. *See* also (1981) 1 M.P.W.N. 95.

Criminal trial—Some eye-witnesses not called—No inference favourable to accused can be drawn: 10 O.L.J. 68: A.I.R. 1923 Oudh 217; A.I.R. 1955 Bhopal 17: 1955 Cr.L.J. 1559.

Where prosecution failed to examine certain post occurrence witnesses, *held*, no adverse presumption could be drawn against the prosecution under S. 114, *Illus.* (*g*) more so when the evidence led by the prosecution was trust-worthy and reliable: 1988 Cr.L.J. 1835 (Cal.) (D.B.).

The abuse and insult hurled on the daughter-in-law usually are not expected to be made public so that the neighbours may have occasions to criticise the improper conduct of the accused and hold them with disrespect and contempt. Thus, no adverse inference could be drawn from the mere fact of non-examination of the neighbours and tenant of the accused family in case of a prosecution for death of a newly wedded lady,

when there is sufficient evidence of close relatives of the deceased: A.I.R. 1994 S.C. 1418: 1994 Cr.L.J. 2104.

Where out of three injured prosecution witnesses, the prosecution produced two, *held*, no adverse inference against the prosecution for non-examination of the third witness could be drawn as the evidence of third witness would have simply multiplied the evidence and was not likely to unfold the prosecution case any further: 1989 Cr.L.J. 1555 (P.&H.) (D.B.).

Where in a murder case evidence given by witnesses including injured ones was reliable but the prosecution failed to examine some witnesses, *held*, presumption could not be drawn against prosecution: 1991 Cr.L.J. (N.O.C.) 14 (Karn.) (D.B.).

It is well settled that evidence is to be weighed not counted; where a witness was given up by the prosecution on the ground that his testimony would be no more than pure duplication of what had been deposed to by the injured witnesses, *held*, his non-production would not in the least detract from the prosecution case: 1981 Cr.L.J. 190 (P.&H.) (D.B.); 1980 Cr.L.J. 951 (P.&H.).

Broadly speaking, the principle is that the prosecution has some discretion in the examination of witnesses, but should not without giving very good reasons refuse to examine witnesses essential for the unfolding of the prosecution story. On the other hand, if the same set of incidents is deposed to by a number of witnesses, the public prosecutor need not waste public time and burden the record by getting witness after witness to repeat the same story. If the witness is unwilling and shows patent indications of unwillingness there is no point in compelling him unless he is likely to bring material that is absolutely necessary, and is such that it cannot be obtained by the examination of any other witness. Where the witness is essential for the unfolding of the prosecution story and where he is a public servant (such as a village chowkidar or a village patel) and has in fact given the first information report and is further willing and ready to give evidence having been listed and summoned, the prosecution can have no justification in giving him up. A prosecution at the instance of Government is really not a proceeding aimed at necessarily punishing the person sent up by the police, but one for a fair inquiry to find out the real course of events whether or not it is going to damn or exonerate the persons on trial.

Where after the riot took place between the two communities of a village, the village chowkidar who gave the first information report, and the village patel, had gone to the scene of attack immediately after the incident and though they were public servants and listed as P.Ws. both of them were given up because the Public Prosecutor formed his own notions of their impartiality and varacity, *held*, that there was certainly the oblique purpose of eliminating everything which did not support the preconceived theory. The proper course for the Public Prosecutor would have been to call the witnesses and put questions and after hearing the answers move the Court if there was justification for declaring them hostile and seek leave to cross-examine them: 1963 Jab.L.J. 932: (1964) 2 Cr.L.J. 185: A.I.R. 1964 Madh. Pra. 182.

Where the prosecution had actually examined some eye-witnesses to the occurrence which had taken place in a thickly populated area, the mere fact that the prosecution failed to examine more witnesses will not necessarily lead to an adverse inference against the prosecution. In order to draw an inference adverse to the prosecution it has to be established that there was competent evidence which was deliberately withheld. The mere fact that there were people close by would not be a sufficient ground for asking the Court to draw an adverse inference. The presence of a large number of people near about may be presumed; but such presumption does not assist the conclusion that they or any of them had actually seen anything or the occurrence; and unless it is established that the persons not called were competent to prove an essential part of the narrative upon which the prosecution depended and whose evidence would be normally expected it can never be said that an adverse inference arises: (1965) 2 Cr.L.J. 79: A.I.R. 1965 Cal. 348.

Though as a general rule, all prosecution witnesses should be called to testify at the hearing of a prosecution, there is no obligation compelling the prosecution to call all witnesses, who speak to the same facts. Ultimately it is a matter for the discretion of the prosecution and though a Court ought and

no doubt, will take into consideration the absence of witnesses whose testimony would be accepted, it must judge the evidence as a whole and arrive at its conclusion accordingly, taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled, in the absence of possible witnesses. The prosecution has a discretion as to what witnesses should be called and the Court will not interfere with the exercise of that discretion, unless it can be shown that the prosecution has been influenced by some oblique motive. A mere consideration that the witnesses might have given a further description of how things happened would not justify the conclusion that the omission to examine them was for oblique motive.

Thus, where offence of murder was alleged to have been committed in residential area at midnight when only near relations of the deceased and of the accused were the eye-witnesses, failure to examine independent witnesses would not be sufficient to raise adverse inference: 1969 Cr.L.J. 1002: I.L.R. (1969) 19 Raj. 273: A.I.R. 1969 Raj. 219.

Where though the prosecution produced only some of the eye-witnesses, their evidence sufficiently unfolded the prosecution's case, *held*, non-production of other eye-witnesses would not entail an adverse inference against the prosecution: 1984 Cr.L.J. 221 (Ker.) (D.B.). *See* also 1984 Cr.L.J. (N.O.C.) 161 (Gau.).

Search by Police—Witnesses taken from distant locality—Only witness from locality not examined—Presumptions arising from these circumstances: (1963) 2 Cr.L.J. 454 (Ker.); 1982 Cr.L.J. (N.O.C.) 135 (Ori.); 1979 Cr.L.J. (N.O.C) 213: 1979 Cut.L.R. (Cr.) 152: I.L.R. (1979) 1 Cut. 669.

Where the murder had taken place near the house of a prosecution's witness who was near relative of the deceased and it was not shown that any other resident of the locality was present at the time of occurrence except the said witness, *held*, no adverse inference could be drawn against the prosecution for non-examining any other resident of the locality: A.I.R. 1989 S.C. 2004: 1989 Cr.L.J. 2167.

Where in a trial for robbery the persons robbed could not be examined as there was evidence to show that they had left the country, *held*, no adverse inference could be drawn against the prosecution for non-examination of those witnesses: 1990 Cr.L.J. (N.O.C.) 80: (1989) 38 Del.L.T. 249; (1983) 23 Del.L.T. 338 (D.B.) [Where despite sincere efforts of the prosecution to serve a witness, he could not be traced, *held*, no adverse inference could be drawn against the prosecution for his non-production.]

Where the charge against the accused, a Revenue Inspector, was that though he received Rs. 946 from an excise contractor, but he deposited only Rs. 810 in the treasury and misappropriated the balance and there were receipts showing receiving of said amount, *held*, as the case depended upon the documentary evidence, even if for some reason the said excise contractor could not be examined, that fact would not introduce an infirmity in the prosecution case: A.I.R. 1973 S.C. 506: 1973 Cr.L.J. 3: (1972) 3 S.C.C. 681.

Where the prosecution gave reasonable explanation for not examining certain witnesses stated to be material witnesses and there was nothing to show that the accused filed any application before the trial Court or even before the High Court for examining these witnesses as the Court witnesses nor did they choose to examine them as the defence witnesses but there were two independent prosecution witnesses whose evidence was fully corroborated by the medical evidence and evidence of recovery of weapons at the instance of accused, *held*, no adverse inference could be drawn against the prosecution for non-examination of those witnesses. [A.I.R. 1954 S.C. 51; A.I.R. 1973 S.C. 618, Disting.; A.I.R. 1959 S.C. 484; A.I.R. 1965 S.C. 202, Rel. on]: A.I.R. 1977 S.C. 472: (1976) 4 S.C.C. 158: (1977) 1 S.C.R. 280: 1977 Cr.L.J. 273.

Non-examination of persons who were not eye-witnesses, *held*, does not affect the prosecution's case: A.I.R. 1979 S.C. 1173: 1979 Cr.L.J. 700: (1979) 4 S.C.C. 332.

Non-production of some of the witnesses: *See* A.I.R. 1955 Cal. 461: 56 Cr.L.J. 1174; A.I.R. 1954 Tripura 11; 1957 Cr.L.J. 263 (All.). Inference to be drawn from non-examination of prosecution witness—Direction to jury: *See* A.I.R. 1954 Cal. 305: (1952-53) 57 Cal.W.N. 962.

Where the prosecution does not call all available eye-witnesses, the Court may draw an inference adverse to the prosecution. *See*

I.L.R. 42 Cal. 422: 27 I.C. 554; 51 I.C. 679: 20 Cr.L.J. 519; (1979) 1 M.P.W.N. 62; (1978) 1 M.P.W.N. 58, but *see* contra 74 I.C. 434: A.I.R. 1923 Oudh 217. On this point, *see* also 34 I.C. 987: 12 P.R. 1916 (Cr.); I.L.R. 60 Cal. 1361: (1932-33) 37 Cal.W.N. 1098: A.I.R. 1933 Cal. 600.

Where the prosecution filed alongwith chalan a list of witnesses and did not examine them, *held*, that the non-production of such witnesses raised a presumption that the evidence, if given by those witnesses, would be unfavourable to the prosecution: A.I.R. 1951 Simla 14. But see *infra*. It cannot be said that because a party does not examine all the persons named as witnesses, it should be presumed under S. 114 that the party's case must be false or that the allegations of the other side must be true: 1945 A.M.L.J. 77.

It is not incumbent on the prosecution to examine each and every witness so as to multiply witnesses and burden the record, this rule, however, does not apply where the evidence of the eye-witnesses suffers from various infirmities and could be relied upon only if properly corroborated. Thus, where all the eye-witnesses examined by the prosecution had serious animous against the accused and they were interested in implicating the accused and the Police could neither recover any weapon nor explain how the accused got hold of the guns and the F.I.R. was also antetimed, *held*, in view of the special circumstances it was incumbent on the prosecution to examine the two witnesses at least to corroborate the evidence and if they were not examined an adverse inference could be drawn against the prosecution: A.I.R. 1978 S.C. 59: (1977) 4 S.C.C. 420: 1978 Cr.L.J. 177.

A party asking the Court to draw against the other party an adverse inference of the nature indicated in *Illus.* (*g*) to S. 114 of the Evidence Act by reason of the non-examination of a witness by that party must, whether the proceeding be a civil or a criminal one, lay the foundation for it by eliciting evidence which would show that the witness in question was available to the other party for the purpose of giving evidence at the time of the hearing. That evidence may be elicited either in the course of the cross-examination of the witnesses examined by the other side (*e.g.*, the investigating officer in a criminal case), or by leading evidence to that effect. Unless that foundation is laid, no question of drawing an adverse inference as indicated in *Illus* (*g*) to S. 114 arises at all.

Even if an adverse inference were to be drawn, it would be for the Court to weigh the evidence of such of the witnesses as have been examined before it as against that adverse inference and, if those witnesses are found to be reliable, the Court would be perfectly justified in convicting the accused persons: (1969) 71 Bom.L.R. 536: I.L.R. (1969) Bom. 1191: A.I.R. 1970 Bom. 166: 1969 Mah.L.J. 433: 1970 Cr.L.J. 660.

The test to determine whether a witness is material is not whether he would have given evidence in support of the defence; the test is whether he is a witness essential to the unfolding of the narrative on which the prosecution is based; whether a witness is so essential or not would depend on whether he could speak to any part of the prosecution case or whether the evidence led disclosed that he was so situated that he would have been able to give evidence of the facts on which the prosecution relied; if a material witness has been deliberately or unfairly kept back then a serious reflection is cast on the propriety of the trial itself and the validity of the conviction resulting from it may be open to challenge. Where in a prosecution of the accused for alleged refusal to give inspection and causing obstruction to search punishable under S. 25(1)(*f*) and (*h*) of the Orissa Sales Tax Act, 1947, the charge was based on the statement given by the accused to the Inspecting Officer, and attested by two witnesses and the prosecution failed to produce the attesting witnesses, *held*, that an adverse inference could be drawn from the fact of non-production of the attesting witnesses to the accused's statement since they were both material witnesses: (1961) 3 Ori.J.D. 416: (1962) 1 Cr.L.J. 835.

Per *Shiv Dayal, J.*—It is true that the prosecution has the choice to produce such witnesses as it likes, but the ultimate aim of the prosecution must be to give its best assistance to the Court in ascertaining the truth and for that purpose to place before it all materials available. Where although the prosecution, in a murder charge, had produced as many as six witnesses to prove the prosecution case but had withheld three important and seemingly impartial and independent witnesses, the prosecution exposes itself to serious comment because of

this conduct and it creates an impression that the prosecution was not keen and conscientious in rendering its best assistance to the Court in the administration of justice: (1962) 2 Cr.L.J. 672 (Madh. Pra.).

It is the bounden duty of the prosecution to examine a material witness, particularly, when no allegation has been made then, if produced, he would not speak the truth. Non-production of such a witness raises an adverse inference against the prosecution in view of S. 114 (*g*), Evidence Act and the circumstance of his being withheld from the Court also casts a serious reflection on the fairness of the trial: 1968 Cr.L.J. 925: A.I.R. 1968 Goa 63; A.I.R. 1954 S.C. 51.

Where a material witness for the prosecution has not been examined and no explanation is forthcoming for his non-examination, an adverse inference against the prosecution may be drawn: 1956 Cr.L.J. 906: I.L.R. (1956) Mys. 118: (S.) A.I.R. 1956 Mys. 51; (1978) 1 Karn.L.J. 452; (1979) 2 M.P.W.N. 259; (1978) 2 M.P.W.N. 96; 1982 M.P.W.N. 521; 1982 M.P.W.N. 452; (1979) 1 M.P.W.N. 185.

The Court will not appreciate the liability to get at a witness by the Police saying the whereabouts are not known. They should secure the important witnesses which can be done under the provisions of law available: (1957) 23 Cut.L.T. 449.

The failure to examine a material witness justifies the inference that the witness, if examined, would have deposed against the prosecution: (1927) 29 Punj.L.R. 14: A.I.R. 1928 Lah. 125. *See* also A.I.R. 1929 Pat. 615; I.L.R. 15 Lah. 407; 159 I.C. 808: A.I.R. 1934 Rang. 130; (1983) 23 Del.L.T. 410; (1980) 1 M.P.W.N. 62.

The fact that a person was relative of the complainant or that a person was informing that he would not support the prosecution case, *held*, is no good ground for not examining them: 1979 All.Cr.R. 1: 1979 Cr.L.J. (N.O.C.) 74 (D.B.).

Duty of prosecution to examine material witnesses—Non-examination of some witnesses—Adverse inference when can be drawn: 1968 Cr.L.J. 1655: A.I.R. 1968 S.C. 1402; (1979) 1 M.P.W.N. 73; (1979) 1 M.P.W.N. 235.

Where out of several persons who had witnessed the occurrence only one witness was examined by the prosecution, *held*, such testimony has little evidentiary value: A.I.R. 1954 Him. Pra. 33.

Non-examination of interested witnesses by prosecution—Adverse presumption: (1965) 2 Cr.L.J. 814: A.I.R. 1965 Tripura 45.

It is duty of prosecution to call and examine—Test to see whether it is essential to unfold prosecution narrative—Non-examination of material witness—Adverse inference against prosecution case and fairness of trial can be drawn: (1965) 1 Cr.L.J. 173: A.I.R. 1965 Ker. 44.

Where all the four partisan witnesses deposed that an independent witness was present at the occurrence but he was not examined by the prosecution, when it was duty bound to produce him, *held*, non-production of such an independent witness who could have given the true version was fatal to the prosecution, especially when no allegation was made that he would not have spoken the truth. [A.I.R. 1936 P.C. 289; A.I.R. 1915 Cal. 545, Rel. on]: A.I.R. 1971 Raj. 68: 1971 Cr.L.J. 498 (D.B.).

Where the evidence of witnesses examined in Court is in any manner discrepant or doubtful, then the circumstance that some of the eye-witnesses had not been examined would assume importance: (1970) 2 Mys.L.J. 402.

Where the murder was committed in a busy locality and none of the persons therefrom including those named to be present at the spot were examined by the prosecution without assigning any reason therefor, *held*, it casts a serious reflection on the trial's fairness; an adverse inference has to be drawn against the prosecution; conviction set aside: 1977 Raj.L.W. 107: 1977 Cr.L.R. 154 (D.B.); 1980 Cr.L.R. 546 (Raj.); 1991 Cr.L.R. 388 (Raj.).

Where the prosecutrix had alleged that at the time she was raped she and her husband were sleeping together in the same room and that she informed her husband as to what happened immediately after the occurrence, *held*, for failure of the prosecution to examine her husband, an adverse inference could be drawn: 1993 Cr.L.J. 2364 (Mad.).

Where in a case of conspiracy and consequential defraud of public money, the doctors were alleged to have issued false prescriptions and essentiality certificates as a part of the offence but were neither arraigned as culprits nor examined as prosecution witnesses, *held*, they were material witnesses; their testimony would have shown whether the prescriptions and the

arraigned as culprits nor examined as prosecution witnesses, *held*, they were material witnesses; their testimony would have shown whether the prescriptions and the certificates were genuine or not; their non-examination as witnesses was, thus, fatal to the prosecution: 1983 Raj.L.W. 226.

Where in a prosecution for false entries, the defence raises a question that the entries, were made under the direction or authority of some members of the complainant firm and the money was also said to have been advanced under his direction, it is duty of the prosecution to call that particular partner of the firm as a witness to give a positive denial of the allegation which the accused put forward. But when even after citing the proprietors of the firm as witnesses, the prosecution fails to produce them without assigning any reason, the Court is justified in drawing adverse inference against the prosecution: 1957 All.L.J. 60: A.I.R. 1957 All. 342.

Where in a murder trial, though a prosecution witness deposed that the accused had kept the ornaments of the deceased with one *T* but said *T* was not examined by the prosecution, *held*, failure of the prosecution to examine him would make the Court to draw an adverse inference against the prosecution: A.I.R. 1973 S.C. 501: 1972 Cr.L.J. 1296: (1972) 3 S.C.C. 393: (1972) 3 S.C.R. 622.

Where the alleged articles were recovered from the land of the applicant but no resident of the colony of the applicant were examined to prove the possession of the accused-applicant over the recovered articles, *held*, mere recovery of the articles did not lead to conclusive proof that the accused applicant was in possession of those articles. [A.I.R. 1933 All. 437, Appl.]: 1991 Cr.L.J. 3065 (All.).

Where in a murder trial, an important witness, who according to the prosecution case was also in the verandah at the time of the occurrence was not produced at the trial, *held*, the benefit of optional presumption under S. 114, *Illus.* (*g*) could be given to the accused and to infer that, if she had been produced, it would have damaged the prosecution case against the appellant: A.I.R. 1974 S.C. 778: 1974 Cr.L.J. 664: (1974) 4 S.C.C. 193.

Adverse inference against prosecution for non-examination of seizure witness. *See* (1979) 2 M.P.W.N. 162.

Where admittedly the Medical Officer accompanied the Food Inspector at the time he took sample of the milk, *held*, in a prosecution under the Prevention of Food Adulteration Act, it was the bounden duty of the prosecution to produce the Medical Officer also as a witness; non-examination of him would certainly give rise to a presumption that had he been produced, he would have deposed against the prosecution: (1974) 2 Chand. L.R. 63.

Where it was in evidence that something was written in the presence of the Amin which was signed by a party but the prosecution neither produced it nor examined the Amin and, thus, withheld the best evidence, *held*, an adverse inference could be drawn against the prosecution: (1975) 41 Cut.L.T. 904 (D.B.).

52. Non-examination of Investigation Officer.—The non-production of material witnesses like the Investigation Officers is a serious omission which cannot but throw suspicion on the whole prosecution case: 71 I.C. 219; A.I.R. 1955 Madh. Bh. 119: 1955 Cr.L.J. 1559 (F.B.).

Murder case—Absence of Investigating Officer—Presumption. *See* A.I.R. 1958 Ori. 92. *See* also A.I.R. 1923 Pat. 213; A.I.R. 1928 Lah. 125; A.I.R. 1929 Pat. 651; 168 I.C. 1: A.I.R. 1937 P.C. 152 (P.C.).

Where inspite of best efforts, the prosecution could not produce the Investigating Officer, no adverse inference could be drawn: 1994 (Supp.) 3 S.C.C. 729.

Non-examination of Investigating Officer —Effect: 1960 Cr.L.J. 1469 (1): A.I.R. 1960 Ker. 358.

The non-examination of the investigating Police Officer, specially in a serious case, may very often cause material prejudice to an accused. But the question ultimately depends on whether, taking all the circumstances into consideration, a Court can reasonably hold that prejudice has been caused. The investigating Police Officer is generally examined by the prosecution for two purposes, firstly, to prove the statements made before him by some of the prosecution witnesses during investigation under S. 162, Cr.P.Code, after their attention has been drawn to the same during their cross-examination, and secondly to prove the facts

noticed by him during his local inspection of the place of occurrence.

Where no material contradiction between statements of the prosecution witnesses in Court and their statements before the Police was brought out during their cross-examination, and the facts which the S.I. might have noticed at the spot during local inspection were not of any material significance, the non-examination of the S. I. would not materially affect the case: I.L.R. (1956) Cut. 241: A.I.R. 1956 Ori. 212: 1956 Cr.L.J. 1421.

Where the prosecution failed to examine an Inspector who by no means could be called a material witness but the prosecution nonetheless offered him for cross-examination and kept him ready in Court but the Counsel of the accused failed to take advantage of the offer made by the prosecution, *held*, it was not open to the accused to comment upon the so-called failure of the prosecution to examine Inspector as a witness nor adverse inference against the prosecution could be drawn: A.I.R. 1985 S.C. 1092: 1985 Cr.L.J. 1357: (1985) 3 S.C.C. 45: (1985-2) 26 Guj.L.R. 988.

Adverse inference against prosecution can be drawn only if it withholds certain evidence and not merely on account of its failure to obtain certain evidence: (1967) 1 Mys. L.J. 548: 1967 M.L.J. (Cr.) 501: A.I.R. 1967 Mys. 210.

Where the recovery memo which was alleged to have been drawn on the spot was not produced in the Court and the sub-Inspector who was alleged to have prepared recovery memo was also withheld and no public witness was picked up while conducting search, *held*, the presumption was that such evidence, if advanced, would have been unfavourable to prosecution: 1985 All.W.C. 786: 1985 All.Cr.R. 409: 1985 All.L.J. 950. *See* also (1984) 3 Crimes 254 (All.) [Prosecution is bound to prove the accuracy of site plan]; (1984) 2 Crimes 59: 1985 Cr.L.J. (N.O.C.) 50: (1984) 1 Ori.L.R. 438 [Where the prosecution failed to file in the Court the earlier first information report filed by the complainant in Court, *held*, an adverse inference could be drawn against the prosecution that if the report would have been produced and proved, it would have gone against the prosecution.]

53. Non-production of evidence by prosecution.—The conduct of the prosecution in withholding the relevant record gives rise to the inference that the record does not support its plea of the resignation having been accepted.

Where the prosecution has chosen not to place on record the full file relating to the service of the petitioner, though it produced the petitioner's letter of resignation, it has to be held that the relevant correspondence on the subject has been held back: (1976) 78 Punj.L.R. (Del.) 105.

Suppression of best evidence by the prosecution—Effect. *See* (1981) 1 M.P.W.N. 73.

Withholding of material evidence by prosecution—Effect: 1960 B.L.J.R. 242; 1974 Chand.L.R. 475 (D.B.).

In a prosecution under S. 373, I.P.Code the prosecution failed to produce a register maintained at the Police chowki which showed the names of prostitutes to show that the accused was a prostitute. *Held*, that withholding such an important documentary evidence raises a presumption against the prosecution: 1959 Jab.L.J. 614: 1960 M.P.C. 52: 1960 M.P.L.J. 177.

Where accused alleged that the original F.I.R. was destroyed and another one was substituted in its place and the Sub-Inspector failed to produce the relevant F.I.R. book or general diary notwithstanding the directions of the Court, *held*, an inference could be drawn that the original F.I.R. was suppressed and in its place some other document was substituted: A.I.R. 1981 S.C. 1230: 1981 Cr.L.J. 736.

Failure of prosecution to take samples in prohibition case and have them sent to Chemical Analyser for his opinion—Presumption is that prosecution withheld evidence as it was not likely to support their case: (1966) 68 Bom.L.R. 389: 1966 Mah.L.J. 565: I.L.R. (1966) Bom. 407.

Adverse inference from non-production of evidence. *See* A.I.R. 1967 Ori. 169; 1972 Raj.L.W. 384: I.L.R. (1972) 22 Raj. 632.

Where the sodium bicarbonate solution turned pink after a trap laid to catch the receiver of illegal gratification but the prosecution failed to preserve the solution and did not adduce any evidence thereof, *held*, it was open to the Court to draw an adverse inference against the prosecution:

A.I.R. 1980 Guj. 1: (1979) 20 Guj.L.R. 535 (F.B.).

Where though the disputed signatures were got to be examined by an expert, neither the expert was examined nor his report was produced, *held*, an adverse inference may be drawn against the prosecution: (1979) 1 M.P.W.N. 46.

Withholding evidence—Presumption—Murder trial—Prosecution evidence proving accused guilty beyond reasonable doubt—Non-production of evidence relating to finger prints by prosecution—Adverse inference cannot be drawn: (1970) 1 M.L.J. 149.

Where copies of the *khasra* and *khatauni* in possession of the Investigating Officer were not produced in evidence whereby it could be shown that the deceased was in cultivating possession of the land, the subject matter of the dispute which resulted in his death, *held*, an adverse inference could be drawn against the prosecution that the deceased was not in cultivating possession: A.I.R. 1976 S.C. 2273: 1976 Cr.L.J. 1745: (1976) 4 S.C.C. 590.

Where accused was alleged to have administered poison to his wife and the uncle of the deceased deposed that he had written letter to the deceased's father to the effect that there was threat to life of the deceased from the side of the accused-husband and further the prosecution failed to place the said letter which was in possession of Police, *held*, adverse inference could be drawn against the prosecution for non-production of the letter: A.I.R. 1977 S.C. 1164: (1977) 2 S.C.C. 124: 1977 Cr.L.J. 955.

When a fact is alleged it needs proof and failure in respect of it would injure the case of the prosecution. Non-production of documentary evidence when it could be and was bound to be available would give rise to an adverse presumption that if it was produced, it would have been derogatory for the case of prosecution. Where the prosecution failed to furnish the copy of the earlier proceedings under S. 107 of the Cr.P.Code to show enmity between the accused and the deceased, *held*, although ancillary in nature but its production was required for proof of fact, *i.e.*, enmity; so non-production of the report would give rise to an adverse presumption against the prosecution: 1991 Cr.L.J. 2815 (All.) (D.B.).

Where though a shirt with a dot of blood on it as well as the weapon of murder were seized, they were not produced before the High Court despite direction, *held*, an adverse presumption arose against the prosecution: 1982 Cr.L.J. 2289 (Him. Pra.) (D.B.).

54. Non-explanation of injuries on accused.—It is not the law or invariable rule that whenever the accused sustains an injury in the same occurrence, the prosecution has to explain the injuries, failure of which will mean that the prosecution has suppressed the truth and also the origin and genesis of the occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of the guilt of the accused beyond any reasonable doubt, the question of the obligation of the prosecution to explain the injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and in what circumstances the injuries have been inflicted on the person of the accused. It, therefore, follows that simply because the accused has received injuries in the same occurrence, it cannot be taken for granted that the deceased or the injured person was the aggressor and consequently, he had to defend himself by inflicting injury on the deceased or the injured person: (1988) 36 B.L.J.R. 774 (D.B.); 1982 Cr.L.J. 1585 (Ori.).

Existence of injuries on accused not explained by prosecution—Inference can be drawn that the prosecution has suppressed the genesis or the origin of the occurrence and has, thus, not given the true version of the case: 1979 M.L.J. (Cr.) 692.

But where injuries on both sides are not claimed to have been suffered in the same transaction on account of different versions of occurrence, the prosecution need not explain injuries to opposite party: (1985) 1 Crimes 168 (All.).

Where in a murder case the prosecution evidence consists of interested or inimical witnesses or the defence version completes in probability with the prosecution's case and the prosecution fails to explain injuries, neither minor nor superficial but substantial, on the accused sustained during the occurrence, *held*, the Court may draw the

following inferences: (*1*) the prosecution has suppressed the origins of the occurrence and suppressed the true version; (*2*) the prosecution witnesses denying such injuries are lying on a most material point and their evidence is unreliable; and (*3*) the defence version explaining the injuries, if probable, throws doubt on the prosecution case. The accused deserve to be acquitted: A.I.R. 1976 S.C. 2263: 1976 Cr.L.J. 1736: (1976) 4 S.C.C. 394.

Where as a result of violent dispute over diversion of irrigation water, the Investigating Officer arrested accused persons without investigating into their version of the incident and there was no evidence explaining the injuries sustained by the accused persons in the course of altercation which were neither of minor nature nor self-inflicted, *held*, a presumption arose that the prosecution failed to present the true version on account of suppression of genesis and origin of occurrence. [1988 Cr.L.J. 836 (S.C.); 1976 Cr.L.J. 1736 (S.C.); 1987 Cr.L.J. 1058 (S.C.), Rel. on; 1987 Cr.L.J. 693 (Madh. Pra.), Disting.]: 1989 Cr.L.J. 2205 (Madh. Pra.); 1979 W.L.N. (U.C.) 1 (Raj.).

Where in a murder case the prosecution did not explain all the injuries on the person of the accused and the accused did not show his injuries to the Investigating Officer, and no counter information was lodged with the Police nor any counter case was filed, *held*, in such a case before an adverse inference could be drawn against the prosecution for its alleged suppressions of injuries it must be reasonably shown that in all probabilities the injuries were caused to him in the same occurrence or as a part of the same transaction in which the victims on the side of prosecution were injured. [1972 Cr.L.J. 1552 (Assam), Affirmed]: A.I.R. 1977 S.C. 2252: 1977 Cr.L.J. 1930: 1977 U.J. (S.C.) 725: (1977) 4 S.C.C. 396.

55. Non-production of defence evidence.—Where a person hit by a gun shot fired by the accused was the most material witness to prove the defence version that the gun shot came to be fired accidentally and yet she was not examined without any explanation therefor, *held*, her non-examination as a defence witness is the strongest possible circumstance to discredit the defence version; an adverse inference had to be raised against the same: A.I.R. 1975 S.C. 1703: 1975 Cr.L.J. 1494: (1975) 4 S.C.C. 241.

Failure to examine material witness by defence—Failure must lead to inference that witness was deliberately withheld as he was not likely to support defence: 1965 Mah.L.J. 565: 1967 Cr.L.J. 21: A.I.R. 1967 Bom. 1.

The omission on the part of the accused to produce all important evidence in support of his plea of *alibi* which could easily have been produced raises the presumption against him under *Illus.* (*g*) to S. 114, Evidence Act, that it would, if produced, have been unfavourable to him: 1958 Cr.L.J. 1266: A.I.R. 1958 All. 746.

No adverse inference can be drawn against accused for not disclosing his defence in the preliminary enquiry stage: 8 Pat.L.T. 656: A.I.R. 1927 Pat. 292.

Murder case—Explanation by accused before trial Court but not before committing Magistrate that there was assault by deceased's party and that under apprehension of grievous hurt or death, he had fired pistol-shot at deceased—If entire material in case should spell out case of private defence, Court would acquit accused notwithstanding accused said nothing in defence, adduced no evidence and did not even put forward plea of self-defence—But when accused wants Court to believe a positive case set up by him such as *alibi* or a general exception, his failure to set up that case when opportunity to do so was afforded earlier is certainly a piece of conduct which can be taken into account in deciding whether his case is true or is only an afterthought: I.L.R. (1967) 1 Ker. 640.

In a prosecution for an offence under S. 406, I.P.Code, in respect of certain documents entrusted to the accused, the defence of the latter was that he had returned them to the complainant. The complainant had sent a written notice to the accused to return the document, but the accused sent no reply at all and gave no explanation of his conduct in that behalf. *Held*, that the Court was justified in drawing an inference adverse to the accused: 49 Cr.L.J. 690: A.I.R. 1948 Pat. 406.

As an accused cannot be compelled to produce documents in his possession for comparison of his handwriting, no presumption of any kind can be drawn against him by his voluntary non-production thereof. It is open to the Court to issue a search warrant for the seizure of those documents: 1960 M.P.L.J. (Notes) 67.

56. Non-appearance of party as witness.—The failure of plaintiffs to go into witness-box goes strongly against them: I.L.R. 11 Lah. 142: A.I.R. 1930 Lah. 1.

No adverse inference can be drawn against the plaintiff for mere non-examination of himself as a witness: A.I.R. 1974 Pat. 95: 1973 Pat.L.J.R. 509 (D.B.).

Though there is no rule of law that the plaintiff must examine himself as a witness in order to establish his case, but a Court of law is entitled to draw an inference adverse to the plaintiff if he does not have the courage to depose what he has claimed to prove facts mentioned in the plaint. A Court would be fully justified in not accepting the averments in the plaint unless there is other coercive evidence in support of it: A.I.R. 1978 Pat. 48 (D.B.).

Party not giving evidence in support of his pleading—Effect—Practice: (1963-64) 68 Cal.W.N. 611.

Facts within personal knowledge of party—Non-appearance of party as witness—Presumption: 1966 All.L.J. 904.

Witnesses do not carry conviction with a Court or tribunal when the party himself keeps away and is not ready to stand the test of cross-examination: A.I.R. 1980 Del. 110: 1980 Rajdhani L.R. 423: (1980) 17 Del.L.T. 395.

When a material fact is within the knowledge of a party and he does not go into the witness box without any plausible reason, an adverse inference must be drawn against him. A presumption must be drawn against a party who having knowledge of the fact in dispute does not go into the witness box particularly when a *prima facie* case has been made out against him. [A.I.R. 1927 P.C. 230, Foll.; A.I.R. 1958 Cal. 713, Rel. on]: 1970 Jab.L.J. 207: 1970 M.P.W.R. 284: 1970 M.P.L.J. 586: A.I.R. 1970 Madh. Pra. 225.

It is the bounden duty of a party personally knowing the facts and circumstances of the case to give evidence and to submit to cross-examination. Courts have rightly drawn a presumption against the party avoiding the witness-box, and not submitting himself to cross-examination. The party who does not enter the witness-box, runs a great risk of a presumption being drawn against him. In the case of a party on whom burden of proving a certain issue lies, the risk run by withholding himself from the witness-box may be very great. This presumption, however, is permissive. S. 114 of the Evidence Act does not in all cases, make it obligatory on Courts to act on such a presumption: A.I.R. 1958 Punj. 190 [Reversed on another point in A.I.R. 1963 S.C. 1279].

Failure of party coming forward with a case to give evidence on matters within his knowledge, ought to be a weighty factor when the value of the case put forward on his behalf is appraised: (1934) 36 Punj.L.R. 280: A.I.R. 1934 Lah. 398; 148 I.C. 45: A.I.R.1934 Lah. 63 (2).

Facts specially within knowledge of party—Non-examination of party. *See* A.I.R. 1954 Pat. 280; (1978) 2 M.P.W.N. 186. It is the bounden duty of a party personally knowing the whole circumstance to give evidence. Non-appearance as witness would be the strongest possible circumstance to discredit the truth of the case: A.I.R. 1949 Him.Pra. 7 and 11.

Suit to set aside document on ground that sale effected thereby was under undue influence—Person who accompanied executant not examined by plaintiff—Adverse inference against plaintiff can be drawn: (1969-70) 74 Cal.W.N. 680.

It is the bounden duty of a party personally knowing the whole circumstances of the case to give evidence on his own behalf and submit to cross-examination and if he fails to do so, an adverse inference should be drawn against him. Where the persons who claimed to have obtained the right of Trusteeship under impugned document were the best witnesses to speak about the state of health of the executant and the execution of documents by her refrained from entering the witness box, *held*, an adverse inference should be drawn against them for their failure to examine themselves as witnesses eventhough the burden to prove undue influence was upon the opposite party. [53 M.L.J. 392; A.I.R. 1968 S.C. 1413; A.I.R. 1981 S.C. 2128, Rel. on]: (1987) 100 Mad.L.W. 489.

Where the plaintiff has not gone into the witness box in spite of the fact that factual allegations were made against him and were supported by defendant's evidence, this would be the strongest possible circumstance to discredit the truth of his case: A.I.R. 1953 Bhopal 26.

Absence of party from witness-box—Effect: A.I.R. 1958 Cal. 713.

Adverse inference can be drawn in the case of a party ordered to appear for further cross-examination not so appearing. *See* I.L.R. (1937) 1 Cal. 203: A.I.R. 1937 Cal. 129.

It is the duty of parties to place the best evidence before the Court. The practice of refusing to enter the witness-box when called upon to do so and requiring the plaintiff to call the defendant as his own witness has been deprecated. It is clear, therefore, that where a party is shy of giving evidence in Court, the Court would be justified in drawing an inference against him: I.L.R. (1962) Bom. 186: (1961) 63 Bom.L.R. 678: A.I.R. 1962 Bom. 92.

When a party is ordered by a Court to reappear and submit to examination and cross-examination but he never cares to enter into the witness-box and deliberately keeps away, the Court is justified in drawing an inference unfavourable to his case. A party runs a great risk if he does not enter into the witness-box and himself give evidence in his case which is directly in his knowledge and which relates to the matters in controversy: A.I.R. 1949 Him. Pra. 4.

The explanation of any admission or conduct on the part of a party must, if the party is alive and capable of giving evidence, come from him and the Court would not imagine an explanation which a party himself has not chosen to give. Further, an acceptable explanation does not appear to be conceivable. But when such a party fails to enter into the witness box, an adverse inference can be drawn against such a party: A.I.R. 1971 All. 29 (D.B.).

Where the question is whether one of the parties to the suit is a "displaced person" the party itself should come into the witness-box. Best evidence must always be produced and a party who has personal knowledge of relevant facts in issue must put himself in the witness box in support of his own case and submit himself to the cross-examination by his adversary. Failure of the party, coming forward with a case, to give evidence on matter within his knowledge, ought to be a weighty factor, when the value of the case put forward on his behalf is appraised: (1959) 61 Punj.L.R. 757: I.L.R. (1959) Punj. 1565: A.I.R. 1961 Punj. 91.

True it is that non-appearance of a party (personally knowing the whole of the circumstance) as a witness discredits the truth of his case. That is a salutary principle resting on *Illus.* (*g*) to S. 114. But where in a suit for damages for non-delivery against a Railway by the endorsee of a railway receipt, the question is whether consideration passed for endorsement and a trusted karmachari of the plaintiff firm (endorsee) knowing all the circumstances of the payment of consideration for endorsement of the railway receipt, is examined as a witness, the non-examination of the partners of the plaintiff firm who in fact knew nothing about the matter is not sufficient to raise the presumption of non-payment of consideration: (1962-63) 67 Cal.W.N. 279: A.I.R. 1963 Cal. 399.

Although non-appearance of the Director of the plaintiff-company personally knowing the whole of the circumstances and verifying the plaint as a director of the plaintiff company as a witness would discredit the truth of the case, where a trusted employee of the company knowing all about the relevant facts and circumstances, was examined; it will be wrong to make a presumption adverse to the plaintiff company only because the Director was not examined. What S. 114 prescribes is that the Court may presume, not that the Court must: A.I.R. 1964 Cal. 209.

A defendant's deliberate avoidance of the witness-box raises a presumption against his contention: A.I.R. 1957 All. 346; A.I.R. 1957 Raj. 264: 1957 Raj.L.W. 267.

Generally speaking there is a good deal to be said for the contention that a suit should succeed on the ground that the defendant had not cared to enter the witness-box and testify as to the truth of his case. But if a defendant is of opinion after the plaintiff's case had been completed that the evidence was so discrepant and doubtful as to make it impossible for any Court to believe it, then if he so liked to take the risk, he is justified in not giving evidence: 1940 A.M.L.J. 93.

The words "may presume" in S. 114 leave it to the Court to make or not to make the presumption, according to the circumstances of the case. Thus, no adverse presumption need be drawn against the defendant who fails to depose in a suit filed against him when there is other evidence both documentary and oral: A.I.R. 1956 Him. Pra. 4. *See* also 1982 M.P.W.N. 31.

The defendant's failure to go into the witness-box raises a strong presumption against the truth of her case. The fact of her being a

pardanashin lady is not sufficient excuse for her not getting herself examined even on commission: 1937 O.W.N. 1022.

When a defendant fails to appear in the witness-box to support his case, an inference can be raised that in case he would have entered the witness-box, he would not have supported his own case: (1995-2) 43 B.L.J.R. 1010 (D.B.).

Where the defendant failed to enter into the witness-box, *held*, a presumption could be raised that she deliberately withheld herself from the witness-box to avoid some vexing questions in cross-examination: A.I.R. 1973 Gau. 90.

The common principle of law is that if the opposite party can by cross-examination discredit the plaintiff's witness and shows that there is no case left for the opposite party to answer, *held*, the opposite party need not enter the witness-box; it is not open for the plaintiff in such a case to seek an adverse inference against the opposite party for not examining itself: A.I.R. 1986 Cal. 61: (1984-85) 89 Cal.W.N. 1021.

Where the mother of the child had proved certain letters stating that they were written and signed by its father, the omission on the part of the father to appear in the witness-box must lead to adverse inference against him: 29 Cut.L.T. 584; 30 Cut.L.T. 315: I.L.R. (1963) Cut. 415.

Where the question was whether the story of adoption of defendant was true and defendant who must have been not less than 13 or 14 years old at the time of adoption does not examine himself although he was in position to tender evidence as to the adoption, his absence from the witness-box must tell against his case: A.I.R. 1958 Andh. Pra. 22.

Suit for breach of contract—Defendants denying any knowledge of contract—Defendants not going into witness-box—Inference need not be adverse to defendants: 149 I.C. 1119: A.I.R. 1934 Lah. 59.

Where the successful candidate did not examine himself as a witness to controvert the facts testified to by the witnesses of the election petitioner when no onus to prove those facts lay upon the successful candidate, *held*, no adverse inference could be drawn against him for his not entering the witness-box: A.I.R. 1975 S.C. 1178: 1975 U.J. (S.C.) 333.

Debts—Orissa Money-lenders Act (III of 1939), S. 8—Defendant asserting that plaintiff had advanced money to number of persons—Plaintiff though present in Court not coming forward to deny assertions—Presumption: I.L.R. (1965) Cut. 419: 31 Cut.L.T. 586.

Where a *karta* taking advantage of his brothers minority had got recorded in the Survey Settlement Record of Rights their respective shares in the ancestral land as $^3/_4$th and $^1/_4$th, and he also chose neither to enter the witness box nor to produce any deed of settlement in support of the recorded shares, *held*, the presumption under the Hindu law was that they took the land equally and not as recorded: A.I.R. 1991 Pat. 186: (1991) 2 Hindu L.R. 702.

Granting of licence to members of his family by the tenant for love and affection to run business in a part of the demised premises does not constitute transfer contemplated under S. 13(1)(*a*) of the W.B. Premises Tenancy Act, 1956; merely because the tenant was 90 years old residing in Punjab and did not examine himself would not justify the inference under S. 114(*g*). [A.I.R. 1974 S.C. 280, Rel. on]: A.I.R. 1984 Cal. 145: (1984) 1 Cal.H.N. 175.

Where a landlady comfortably residing with her sons in their house sued for eviction of her tenant from her own house on the ground of her *bona fide* requirement under S. 14(1)(*e*) of the Delhi Rent Control Act, 1958, *held*, her need not being apparently *bona fide*, it is incumbent upon her to come into the witness-box; upon her failure to do so, an adverse inference may be drawn against her: A.I.R. 1994 N.O.C. 220 (Del.).

Where in eviction proceedings on ground of *bona fide* requirement, the landlady was not examined in support of her own case, *held*, an adverse inference could be drawn against the landlady as she was the best person to testify about her *bona fide* requirement. [A.I.R. 1981 Bom. 1, Rel. on]: A.I.R. 1982 Ori. 183: (1982) 54 Cut.L.T. 159 (D.B.). But *see* A.I.R. 1987 Raj. 16: 1986 Raj.L.W. 523 [It cannot be laid down as a very general proposition that if the landlord or landlady does not examine himself/herself, an adverse inference has to be necessarily drawn. Ordinarily, a person for whom there is need for getting the suit premises vacated, should appear as a witness and make himself available for cross-examination by the other side. But the *bona fide* need can be proved by other evidence, both oral and documentary and even by circumstances and it is not correct to state

that in every case the plaintiff must enter the witness-box and depose about the requirement. Thus, where landlady's general power-of-attorney holder had been examined, *held*, non examination of her did not affect her case. (1979) 1 Ren.L.R. 743 (Del.), Dissent. from].

Where though the landlady, a *pardanashin* lady, did not appear in the witness-box, but her husband looking after the house entered the witness-box and stated all relevant facts, *held*, no adverse inference could be drawn: (1980) 2 M.P.W.N. 108. *See* also (1981) 19 Del.L.T. 407 [Where evidence of the landlady's husband, who was also her general attorney, was held to be sufficient to entitle her to an order of eviction, though she herself had not appeared as witness.]

Where in an eviction case on the ground of the landlady's *bona fide* requirement of the demised premises for her personal use she did not appear as a witness in the Court on the ground of her ailing health but the trial Court drew an adverse inference against her as the medical evidence of her poor health was incomplete and lacking in details, *held*, the Court was not justified; whether she was in poor health or not could not be decided on the hair splitting appraisal of evidence; it was on record that she had appeared as a witness in two other cases; no adverse inference of her not being in poor health could be drawn; there was no reason other than her poor health which prevented her from appearing as a witness; eviction ordered in all the three cases: (1989-1) 37 B.L.J.R. 563.

Where the property attached before judgment under O. 38, R. 5 of the C.P.Code in a suit for recovery in possession of its pledgee was sold with the Court's permission under S. 176 of the Contract Act, 1872 for satisfaction of the pledge and was held by the Courts below that it was not available for satisfaction of the decree passed in the suit and the High Court in the Letters Patent appeal reversed the concurrent findings on the ground that an adverse inference ought to have been drawn against the pledgee and the purchaser from him for their failure to enter the witness-box, *held*, such inference could not be drawn as there was a clear admission in the agreement between the decree-holder and the judgment-debtor that the latter owed money to the pledgee as also to others; since attachment before judgment was a object to the pledgee's lien, the non-examination of the pledgee and the purchaser was of no effect; the lower appellate Court's order restored: A.I.R. 1981 S.C. 2235: (1982) 2 Bom.C.R. 88.

Where a mortgage by the father was impeached as not for legal necessity but the mortgagor's sons chose not to enter the witness-box to testify as to the family needs when the loan was raised or the manner of its utilization, *held*, it is legitimate to draw the presumption that their evidence would have favoured the other party seeking to sustain the mortgage: A.I.R. 1974 P.&H. 7 (D.B.).

Where the distinct charge in the evidence of reputation from the witness-box was (*1*) that the defendant was a prostitute and carried on prostitution and (2) that she took the house on rent to run a brothel there that is the *prima facie* case. Where she does not come herself nor calls any witness to delay those serious allegations of fact, whether the Judge should believe one witness or another or one case or another in such a context of fact is not then a question of *prima facie* case. It is then a question of the weight of evidence and its credibility. The very fact that the defendant neither came to the box herself nor called any witness to contradict evidence given on oath against her shows that these facts cannot be denied. What was *prima facie* against her became conclusive proof by her failure to deny: A.I.R. 1958 Cal. 713.

Where in a motor accident claim case the insurance company contended that non-production of the owner of the vehicle and his driver for examination raised an inference that the vehicle at the time of causing the accident was being driven rashly by an unauthorised person, *held*, the owner had no obligation to examine himself or his driver. If the Tribunal thought that the request to examine those two persons should be allowed after evidence had been closed, a reasonable opportunity should have been extended to the claimants before any adverse inference could be drawn for non-examination: A.I.R. 1982 Ori. 51 (D.B.).

Where in a case where the tractor involved in accident was not insured and neither the driver nor the owner of the vehicle chose to come into the witness-box or adduce any other evidence to contest the claim of claimants, *held*, there was presumption that the vehicle was being driven by the driver for

and on behalf of its owner; owner as well as the driver were liable to pay compensation. [1967 Acc.C.J. 150, Rel. on]: A.I.R. 1984 P.&H. 425.

Where accused driver negligently caused an accident and, thus, killed a boy who was on footpath and the driver failed to appear in the witness-box to prove circumstances which would prove that he was not negligent, *held*, an adverse inference could be drawn for his non-appearance: (1978) 2 Karn.L.J. 197: A.I.R. 1978 N.O.C. 261 (D.B.).

Suit for damages resulting from rash and negligent driving—Driver absconding—No inference can be raised from his non-examination: (1953) 2 M.L.J. 532: A.I.R. 1953 Mad. 981: I.L.R. (1954) Mad. 226.

Where a motor cyclist entering the main road from the side lane and the car going on the main road collided and resulted in the death of the motor cyclist and it required to be determined as to which of the two vehicles was being driven negligently, *held*, the non-examination of the car driver, though available, by the car owner would justify an adverse inference against the car owner: A.I.R. 1976 Ori. 224: (1976) 42 Cut.L.T. 1129: (1976) 2 Cut.W.R. 551 (D.B.).

Where a cyclist knocked down by a bus died in the accident and the bus owner did not examine the driver in the motor accident claim case, *held*, an adverse inference can be drawn against the bus owner: A.I.R. 1976 Ori. 213: (1976) 1 Cut.W.R. 119 (D.B.).

Where in a case of motor accident claim the nature of the injuries on the claimant was such that the driver would have been the best person to explain how the claimant sustained the injuries but the driver of the vehicle was not examined for explaining the cause of accident, *held*, it could be safely concluded that on account of negligent driving of the vehicle the claimant sustained the injuries and he was entitled to compensation: A.I.R. 1988 Ori. 229.

Where the deceased, the sole earning member of his family, travelling with wife in the car died in the car's collision with a truck, at Aligarh and the car driver disappeared, *held*, his non-examination by the claimants residents of Hazaribagh in Bihar, as a witness in the claims case could not justify adverse inference against the claimants; non-production of the car driver was not deliberate but attributable to the severe handicap under which the claimants were functioning: A.I.R. 1983 All. 409 (D.B.).

Where in a motor vehicle accident the car driver died and the bus owner, though contending that the collision was occasioned by the car driver's negligence, did not examine the bus driver without offering any explanation therefor, *held*, the Court would be justified in drawing an adverse inference against him: A.I.R. 1977 Gau. 31 (F.B.).

Suit for specific performance of contract—Want of notice—Burden initially lies on subsequent purchaser—Burden is light and mere denial is sufficient to discharge burden—Both parties giving evidence—Question is one of appreciation of evidence—Husband of subsequent purchaser deposing about wife's want of knowledge about agreement—This portion not challenged in cross-examination—Initial burden, *held*, discharged—Importance to her avoidance of witness-box not attached: 1968 B.L.J.R. 28.

S. 16(*c*) of the Specific Relief Act, 1963 is prohibitory; there can be no specific performance of a contract in favour of a party unless it enters the witness-box to give formal evidence of its being ready and willing to perform his part of the contract and be cross-examined; if he fails to do so, an adverse inference has to be drawn against it: A.I.R. 1983 Mad. 169: (1983) 96 Mad.L.W. 88: (1983) 1 M.L.J. 467 (D.B.).

Where the defendant called upon the plaintiff to pay the amount due on the promissory notes and neither the plaintiff nor his accountant were present at the time of execution of the document and the plaintiff neither examined himself nor his accountant but produced another person who was a witness to the execution of impugned documents, *held*, no adverse inference could be drawn against the plaintiff for his failure to produce himself or his accountant before the Court: A.I.R. 1973 Cal. 465.

Non-examination of woman alleged to be married—Inference must be that had she been examined, she could not have supported the plea of her marriage: 1961 M.P.L.J. 244: 1961 Jab.L.J. 547: A.I.R. 1961 Madh. Pra. 93; A.I.R. 1971 Ori. 49 [Where the plaintiff, first-wife, challenged relationship of another lady and her husband as husband and wife,

failed to appear in the Court without any explanation, *held*, fact of marriage of that lady with her husband was established.]

Since the ground for nullifying a marriage under S. 12(1)(*b*) of the Hindu Marriage Act, 1955 is the insanity of a spouse at the time of marriage, *held*, no adverse inference against the wife can be drawn merely because of her failure to come to the Court. Insanity may be curable; but what is crucial is insanity at the time of marriage; her non-appearance in the Court may be a relevant factor but not an indication that she was insane at the time of marriage. [A.I.R. 1970 Bom. 312, Disting.]: A.I.R. 1975 Cal. 109: (1971-72) 76 Cal.W.N. 448 (D.B.).

57. Non-production of witness.—The question of believing or disbelieving a witness would arise only after examination and a party cannot decline to produce a witness merely on the presumption that the witness, if produced, would be treated as interested: (1981) 94 Mad.L.W. 192: 1981 Hindu L.R. 362 (D.B.).

Undoubtedly, if a fact (genuineness of a land grant) is satisfactorily proved from evidence on record, *held*, that fact cannot be taken as disproved merely because other witnesses were not produced; but in the absence of satisfactory proof, the withholding of the most important witness for no valid reason, adverse inference has to be drawn. [A.I.R. 1981 S.C. 2235, Disting.]: A.I.R. 1986 Sikkim 18.

Where a party fails to call as his witness the principal person involved in the transaction who is in a position to give a first-hand account of the matter in controversy and throw light on them and who can refute all the allegations of the other side, it is legitimate to draw adverse inference against the party who has not produced such principal witness: 83 Cal.L.J. 388: A.I.R. 1949 Cal. 457.

Failure to call most important witness by party—Adverse inference against party will be drawn: (1965-66) 70 Cal.W.N. 164: (1966) 1 Comp.L.J. 10: 37 Com. Cas. 256: A.I.R. 1967 Cal. 75.

Non-examination of witnesses—Court "may presume" and not "must presume" adversely: (1966-67) 71 Cal.W.N. 51; A.I.R. 1969 Cal. 293.

Non-production of witnesses—Presumption: 1957 Cr.L.J. 263 (All.).

Non-examination of witness—Reasons unconvincing—Adverse inference has to be drawn: (1966) 1 An.L.T. 21: (1966) 1 An.W.R. 209. *See* also (1981) 1 M.P.W.N. 102 [Where though the material witness was not examined but his non-examination was explained.]

Non-production of witness who could not have thrown any light upon incidence—No adverse inference can be drawn against party: I.L.R. (1952) Nag. 700: A.I.R. 1953 Nag. 154.

Failure to examine witness—Inference from—A.I.R. 1968 Mys. 18, reversed on another point in A.I.R. 1969 S.C. 1034.

No adverse inference could be drawn for non-examination of witness closely related to the opponent: 1982 M.P.W.N. 68; 1982 Jab.L.J. (Note) 2.

Non-examination of material evidence by defendant, *held*, is to give rise to adverse presumption against the veracity of the case set up by defendant: 1979 Jab.L.J. (Note) 62; (1980) 2 M.P.W.N. 70 [Where the material witness was in the employment of the defendant-State and, thus, could have been conveniently examined by the defendant rather than by the claimants, *held*, adverse inference could be drawn against the State.]

Where the plaintiffs incurred additional expenses as they were asked to bring sand from other querries by the defendant than that was agreed upon between the parties and the plaintiffs pleaded that the defendant's Executive Engineer assured them that additional cost so incurred by the plaintiffs would be paid but when plaintiffs were not paid said cost they filed a suit for recovery of same and inspite of categoric evidence by the plaintiff, the defendant failed to examine the concerned Executive Engineer, *held*, an adverse inference could be drawn against the defendant: (1993) 2 M.L.J. 228 (D.B.).

Where in a suit for recovery of money, the defendant admitted that the promissory notes were on his letter-pads, *held*, no adverse inference could be drawn against the plaintiff for non-examination of the defendant's accountant who had introduced the parties; in fact such an adverse inference could be drawn against the defendant for not examining the introducer as he was his accountant: (1991-2) 11 Guj.L.H. 65.

Where by an application a party obtained the Court's permission to examine certain

witness on commission by answering to interrogatories which it duly filed in the Court but did not get them served, *held*, the mere fact that she did not get them served and they were not examined is no ground to draw an adverse inference against the party; it is for the party to chose the witnesses it desires to examine: A.I.R. 1972 All. 219 (D.B.).

Where the caveator denied the testamentary capacity of the executor, an 80 years old ailing lady under medical treatment as well as the due execution of the Will and the propounder neither produced doctors then treating her to prove her testamentary capacity and one of the attesting witnesses, his *pairokar* impleaded as a defendant; an adverse inference under S. 114(*g*) may well be drawn against the propounder of the Will: A.I.R. 1971 All. 304.

The important requirement of S. 114 (*g*) is that it should be shown that the party is deliberately withholding the evidence. Thus, where there was nothing on the record to show that the doctor who had treated the petitioner for the injuries she received on account of cruel treatment of the husband and another witness who had informed her father, were available to the petitioner and yet she had not examined them, *held*, no adverse inference could be drawn against her on this ground alone: (1986) 6 Guj.L.H. 861: (1986-2) 27 Guj.L.R. 1303.

Where in his suit for divorce on the ground of cruelty, the husband failed to examine any of his family members said to have seen the incidents of the wife's cruelty; an adverse inference against him could be properly drawn: A.I.R. 1982 Cal. 474 (D.B.).

The party on whom the burden is placed for proving an issue must produce the best evidence. If the best evidence is not produced every presumption can be raised against him from withholding the best evidence. Where husband filed a petition for divorce on the ground of unsoundness of mind of the wife but in support of his case he did not examine any doctor and no doctor from whom the wife was allegedly treated at dispensary nor any doctor who might have treated her at the mental hospital was at all examined and further no prescription either which was prescribed for her treatment was produced or got produced, *held*, an adverse inference could be drawn against the husband: 1980 Hindu L.R. 528 (Del.).

Where the husband seeks divorce on the ground of wife's mental disorder but he neither examines his own parents in support of his allegations nor produced doctors who treated her, in support of his case, *held*, the Court is entitled to presume everything against the spouse alleging mental disorder of the other: (1990-91) 95 Cal.W.N. 486: A.I.R. 1991 Cal. 123: (1991) 1 Cal.H.N. 244: (1991) 1 Cal.L.T. (H.C.) 447 (D.B.).

Where a husband filed a petitioner for divorce on the ground that the wife was of unsound mind but he failed to give any definite evidence regarding unsoundness of mind of his wife, *held*, all adverse presumptions could be drawn against husband's allegation: (1987) 1 Hindu L.R. 19 (P.&H.).

Where the husband sought the declaration of marriage as nullity on the ground that his wife was a lunatic but the father of respondent-wife failed to examine a psychiatrist who opined that she was not suffering from any unsoundness of mind, *held*, merely because, the respondents did not get the psychiatrist examined, it could not be said that adverse inference against the mental soundness of the respondent wife should be made by the Court: A.I.R. 1973 Cal. 545 (D.B.).

Where the divorce was sought on the ground that the wife was suffering from incurable schizophrenia, *held*, no adverse inference could be drawn against the wife for non-examination of her mother; husband has to prove his own case and he cannot succeed on the weakness of the wife's case: A.I.R. 1982 Cal. 138: (1982) 2 Cal.L.J. 462: (1981-82) 86 Cal.W.N. 167 (D.B.).

Where a husband seeking dissolution of marriage under S. 13(1)(*b*) of the Hindu Marriage Act, 1955 on the allegation that the wife had walked out of the matrimonial home in the presence of the husband's Counsel, who was not examined as a witness, *held*, an adverse inference could be drawn against the husband that the wife did not desert but was pushed out of the matrimonial home: A.I.R. 1984 N.O.C. 117: 1984 B.L.J.R. 182 (D.B.).

Where in a matrimonial case filed by the husband for judicial separation on the ground of desertion by the wife, the question was whether the wife left the matrimonial house with the consent or knowledge of the husband's parents and whether an inference adverse to the petitioner could be drawn

from his not calling his mother as a witness, (the petitioner's father being away at Tokyo): *Held* (Per Majority; *Subha Rao, J.*, contra) that when the evidence supporting the story of consent adduced by the wife was rejected, it was not incumbent on the petitioner to adduce the negative evidence of his mother, etc., at the risk of an adverse inference being drawn against him in the event of his not doing so.

Per *Subha Rao, J.*, contra:—When the respondent and her father depose that they took the consent of the petitioner's parents and if the parents of the husband did not choose to come to the witness box to deny it, a Court ordinarily should accept the evidence of the father and the daughter unless their evidence was *ex facie* unnatural or inherently improbable (which was not, in the instant case): (1964) 66 Bom. L.R. 297: (1965) 1 S.C.A. 310: A.I.R. 1964 S.C. 40.

Suit for declaration of title and recovery of possession of land by tenant—Description of land made in plaint different from that in other records—Question whether rent-receipts produced to evince tenancy were in respect of other land not in dispute—Rent receipt-book bearing signatures of various members of defendant's family—None of them coming forward to deny statement of tenant that rent paid was in respect of suit land—Adverse inference must be drawn: 32 Cut.L.T. 478: I.L.R. (1966) Cut. 284.

Where in an eviction petition under S. 13(2) (*i*) of the East Punjab Rent Restriction Act, 1949 on the ground of non-payment of the arrears of rent, the tenant pleaded payment of rent to the landlord's mother supported by receipts issued and thumb-marked by her and attested by the marginal witness examined in defence but the landlord, despite having availed the opportunity to adduce evidence in rebuttal did not examine his mother or the scribe of the receipts, *held*, the landlord's failure to examine them raised a strong presumption in favour of the receipts being genuine: A.I.R. 1979 P.&H. 154.

In the case of an alienation by a Hindu widow which is impeached, the vendor widow is the best person to depose to the fact if any enquiry was at all made. The vendor not having been examined, adverse inference is bound to be drawn against the defendant: I.L.R. (1958) Cut. 469.

Where seller was not examined to rebut the legal necessity established by the purchaser, *held*, an adverse inference could be drawn: 1982 M.P.W.N. 68.

Where an agreement sought to be specifically enforced was attested by two witnesses and registered, it was the duty of its propounder to adduce their evidence in Court; on non-examination of the attesting witnesses and the scribe, when they were available, presumption may be raised that if examined they would have gone against the propounder: (1988-2) 102 Mad.L.W. 292 (D.B.).

Where the defendant (vendee) in a suit for specific performance of a contract of sale did not produce two material witnesses named in his list and who could clarify why earnest money of Rs. 500 and two other agreements were not mentioned in the sale deed during their cross-examination on behalf of the plaintiff, *held*, it can, under the circumstances, be presumed that had the two witnesses been produced, they would not have supported the defendant's version: A.I.R. 1973 Madh. Pra. 224: 1973 M.P.L.J. 830: 1973 Jab.L.J. 559.

Where the vendor of the property to which the declaration of title was sought was not examined as a witness with no explanation therefor, and it was found that no such person could be found at his purported address given in the sale deed and his affidavit, *held*, the vendor was a fictitious person; no value could be attached to his affidavit: A.I.R. 1982 Cal. 294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.).

Where vendors sold a plot to the plaintiff and another to the defendant vide registered sale deed and the defendant encroached upon the plaintiff's plot and constructed a house whereupon the plaintiff sued him but the defendant contended that the plaintiff had been seeing the construction being raised on the spot and consequently, with full knowledge of this fact he had purchased the plot in dispute, *held*, the best persons who could depose on the point of estoppel were the vendors and as no efforts were made to summon and examine either of them, an irresistible presumption under S. 114, *Illus.* (*g*) could conveniently be raised against defendant to the effect that those persons would not have supported him had any one

of them been examined: (1994-2) 107 Punj.L.R. 751.

Where the plaintiff filed a suit for possession of properties on the ground that the deed of surrender executed by her in favour of her husband's brother was invalid as she was a minor on the date of execution of said document and there were discrepancies and erasures in the documents on which reliance was placed by the plaintiff but the plaintiff failed to examine her father who was an identifying witness to the Deed of Surrender and brother who was conducting and looking after the litigation on her behalf and, further, an application made by her brother went to support the birth extract relied upon by the defendant, *held*, an adverse inference could be drawn against the plaintiff for her said failure: A.I.R. 1985 S.C. 658: (1985) 2 S.C.C. 100.

Where land belonging to a temple, too old and to which the public in general had access for worship and performing other religion ceremonies is a public temple even if there is no evidence about the person who had actually endowed it and on the *shebait's* suit against the unauthorised sale of temple land, neither the executor of the sale deed was produced as witness and the sale deed was registered after 13 years' delay with no explanation therefor, *held*, adverse inference against non-production of the executor of the sale deed as a witness could be drawn; sale justly set aside: A.I.R. 1983 All. 202.

Where though the donor knew that the donee was claiming title through him, but he did not object to it, *held*, no adverse inference could be drawn for donor's non-examination: A.I.R. 1979 N.O.C. 65 (Cal.).

Suit by members to set aside compromise entered into by manager of joint Hindu family—Manager though material witness not examined—Adverse inference against plaintiffs can be drawn: 31 Cut.L.T. 1074: A.I.R. 1965 Ori. 13.

Claim of *R* that he was adopted son of *S*—*R* asserting that ceremony of tying turban on him was performed by *G*—Opponents admitting *G* was alive but not producing him in evidence—Adverse inference can be drawn: I.L.R. (1965) 15 Raj. 529: 1964 Raj.L.W. 168.

Consignment found broken—Inference from non-examination of person booking the consignment not to be drawn: 1966 M.P.L.J. (Notes) 150.

Misconduct proceedings—Failure to examine witness—Adverse inference. *See* A.I.R. 1957 S.C. 425: 1957 M.L.J. (Cr.) 254.

If the judgment-debtor who has within his special knowledge certain facts and who is in exclusive possession of the documents, failed to examine himself and withholds the document in his possession, he cannot turn round and say that the decree-holder has not discharged his burden. Thus, where the petitioner judgment-debtor who owned certain immovable properties claimed protection under the T.N. Debt Relief Act, 1980 but he neither disclosed the rents realised from said house properties nor examined himself, *held*, an adverse inference could be drawn against him and he was not entitled to the benefits under the said Act: (1986) 99 Mad.L.W. 392.

Where an otherwise not compulsorily registerable document sought to be specifically enforced was claimed to have been executed and registered on a particular date as the *panchayat* held at that time had directed the executor to do so, a point hotly contested by the opposite party and neither the scribe nor the attesting witnesses were examined by the executing party, *held*, an adverse inference could be drawn against it for withholding the best evidence: (1986) 2 M.L.J. 470 (D.B.).

Prosecution under S. 583, Calcutta Municipal Act (XXXIII of 1951)—Contention that adverse presumption should be drawn from non-examination by prosecution of officers of Corporation who inspected premises immediately before launching of prosecution—*Held*, presumption available to Court could not be extended to such limit when Corporation had already examined no less than 8 witnesses from locality including acting Sanitary Officer, doctor, practising Advocate and Officer-in-charge of surrounding properties: (1968-69) 73 Cal.W.N. 32 .

58. Non-production of documents.—*See* A.I.R. 1959 Pat. 335; A.I.R. 1967 Cal. 390. Court will not draw a presumption under S. 114 (*g*) against a person, for his non-production of a document, where it is not shown that he had withheld this evidence or had any concern in doing away or suppressing the evidence: A.I.R. 1958 Bom. 296: (1958) 60 Bom. L.R. 776: I.L.R. (1959) Bom. 229; (1981) 1 M.P.W.N. 102.

Failure of party to produce document likely to throw light on point of controversy

though document in possession of party—Inference is that if he had produced it, it would have gone against his own contention: 1966 B.L.J.R. 808: A.I.R. 1966 Pat. 434; 1973 Sim.L.J. 163.

All relevant documents admitted to have been in existence not placed before Court by party concerned—Adverse inference has to be drawn against party: (1964) 1 S.C.A. 593: (1964) 2 S.C.R. 933: A.I.R. 1964 S.C. 136; 1982 M.P.W.N. 187; 1981 M.P.W.N. 171.

Non-production of important document in possession of party and non-examination of important witness under its control—It is a circumstance against the party: A.I.R. 1961 Pat. 158.

Non-production of material document—Adverse presumption: (1956-57) 61 Cal.W.N. 78.

A party to a suit desiring to rely upon certain state of facts should not, relying upon the abstract doctrine of proof, withhold from the Court the written evidence in his possession which would throw light upon the proposition. The opposite party would be entitled to the benefit of adverse presumption arising from such non-production of relevant documents: A.I.R. 1962 Ori. 202.

Documents withheld—Natural inference will be adverse to the case of the party withholding them: 1957 B.L.J.R. 608: A.I.R. 1957 Pat. 633.

Relevant document admitted to be in existence not produced—Adverse inference has to be drawn against party: 1969 Raj.L.W. 107: I.L.R. (1968) 18 Raj. 1212; 1978 Jab.L.J. (Note) 78 [Non-filing of sale deed or copy thereof.]

Where a party fails to produce a document in his possession it may be presumed that the recital therein is against him: 1962 Jab.L.J. 220: 1961 M.P.L.J. 410.

The presumption that the Court is expected to make under S. 114 is a permissive presumption in the sense that the Court may in a proper case presume and normally it will do so if it is established that there is a relevant document and that it has been actually withheld without any reason: A.I.R. 1959 Cal. 479; I.L.R. (1987) Ker. 3867 [Drawing inference for non-production of relevant document is optional and not obligatory.]

Non-production of documentary evidence in possession of a party to a litigation raises an adverse inference against him, more particularly when the onus of proof of the extent of loss is on such a party: 1965 B.L.J.R. 679: A.I.R. 1965 Pat. 179.

The non-production of certain material documents by the plaintiffs in whose possession these documents are, raises a strong presumption against the plaintiffs: 25 Cut.L.T. 345.

When the burden is on the plaintiff to prove a contract, if any, and he fails to obtain production of the documentary evidence of the contract, no adverse inference can be drawn against defendant on the assumption that he must be possessing a copy of the same: (1971) 1 Cut.W.R. 645.

The note to *Illus.* (*g*) in S. 114 also shows that no presumption should be drawn if a man refuses to produce a document which would bear on a contract of small importance on which he sued but which might also injure the feelings and reputation of his family. The note gives the clue as to how the presumption should be applied, *i.e.*, regard should be had to the facts and circumstances of each case. It is not necessary to follow the procedure of giving a notice for the production of documents under O. 11, C.P. Code or to summon the documents under O. 16, C.P.Code the only important condition is that the party should prove that the document is in existence and is in the possession or custody of the party against whom the adverse inference is sought to be drawn: (1959) 2 An. W.R. 458: A.I.R. 1960 Andh. Pra. 101.

It is perfectly open to a party to refrain from producing any document which he considers irrelevant; and if the opposite party is dissatisfied, it is for him to apply for an affidavit of documents and he can so obtain inspection and production of all that appear to him to be relevant and proper. If he fails to do so, neither he nor the Court at his suggestion, is entitled to draw any inference as to the contents of such documents: I.L.R. 24 Pat. 541; 25 Cut.L.T. 189: I.L.R. (1959) Cut. 167; A.I.R. 1960 Andh. Pra. 331.

Material document not produced by party—Adverse inference can be drawn against him even if initial onus of proof did not lie on him: 1962 M.P.L.J. (Notes) 290.

Plaintiff not filing all documents relevant to case but only some from his possession—

Defendant not calling upon plaintiff to produce documents whose existence was admitted by witnesses of plaintiff—No adverse inference against plaintiff for such non-production of documents can be drawn—But Court can take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the defendant's case: 1967 S.C.D. 6: 1966 (Supp.) S.C.R. 436: A.I.R. 1967 S.C. 256.

Non-production of documents asked for by the Authority—Authority would be entitled to draw inferences as it might think justified: A.I.R. 1967 S.C. 1815; (1979) 1 M.P.W.N. 237 [Document not produced inspite of notice to produce.]

Adverse inference may be drawn against a party for its failure to produce the documents in its possession but there must be some evidence on the point which a party wants to prove though it may be open to that party to lend support to that evidence by asking the Court to draw an adverse inference against the party who being in possession of the document does not produce it. In case of non-compliance of the notice to produce the documents, it may be permissible for the party giving notice to adduce secondary evidence of the contents of the same. But in complete absence of such evidence, nothing can be presumed as to the contents of the document: 1974 Raj.L.W. 13.

Where in a suit for the recovery of certain amount, the defendant-State was directed to produce original documents which were in its possession but it failed to produce them even after the lapse of a period of five years, *held*, an adverse inference could be drawn against the defendant on account of the non-production of the original documents which were admittedly important and relevant in the suit: A.I.R. 1994 Raj. 114.

There is no duty on a litigant to produce documents in respect of which parties are not at issue and adverse inference is drawable only where a relevant document which would throw light on a point of controversy is withheld: (1976) 1 Cut.W.R. 410.

Party failing to produce documents—Opposite party not calling for the same, nor themselves producing—No adverse inference can be drawn: 93 Cal.L.J. 36: A.I.R. 1954 Cal. 480.

Non-production of relevant documents by person on whom no burden of proof lies—No adverse inference against him: I.L.R. (1969) Cut. 796.

Court is not to draw adverse inference for failure to call for documents in possession of a person not a party to the litigation. [A.I.R. 1968 S.C. 1413, Disting.]: (1971) 2 Cut.W.R. 292.

Even if the burden of proof does not lie on a party but if being in possession of important documents which throw light on the facts in issue and constitutes best evidence, it does not produce them in the Court, *held*, an adverse inference can be drawn against it; it cannot be allowed to seek shelter behind the abstract doctrine of the burden of proof. [A.I.R. 1968 S.C. 1413, Rel. on]: A.I.R. 1985 Mad. 321: (1985) 98 Mad.L.W. 248 (D.B.).

It is not possible to draw an adverse inference against a party for non-production of document about whose existence there is no positive finding: (1959) 2 An.W.R. 339: 1959 An.L.T. 799.

Non-production of important document—Presumption—Absence of evidence to show that document was with the party or within its power and that it was withheld from Court—No adverse inference can be drawn: 33 Cut.L.T. 621.

Where the evidence on record did not show that documents not produced in the Court were within the possession or power of a party, *held*, no adverse inference for their non-production can be raised against that party. [A.I.R. 1961 S.C. 1277, Rel. on]: A.I.R. 1972 Pat. 186.

It is well settled that an adverse inference can only be drawn where a document in the possession of a party is not produced before an Authority, but such adverse inference cannot be drawn if the document does not exist or is not in the possession of the party from whom it has been called: 1977 Lab.I.C. 803: 51 F.J.R. 371 (Pat.) (D.B.).

When the Court is of the view that the document in question is not traceable in the office of the company, no presumption can be drawn against the company for its non-production: 1973 Jab.L.J. 1056: 1972 M.P.L.J. 1053.

The mere inability of a party to produce a document when there is a positive

explanation that it was lost during the turbulent conditions prevailing in the village where the party was residing, does not give rise to any presumption of fact against him, *i.e.*, the presumption that if produced it would be unfavourable to him: I.L.R. (1951) Hyd. 570: A.I.R. 1952 Hyd. 22.

It does not behove the State Government to keep back even any such document, the production of which may possibly not be in its own interest, yet necessary for a just decision of the case. Withholding of documentary evidence for a litigant, professed and held to be a virtuous, can hardly be said to be desirable. Thus, where the plaintiff instituted a suit for declaration that he was entitled to the salary of a trained graduate teacher from June, 1963, as he had acquired the requisite qualification at that time and he referred to a memo issued by the State Government and addressed to the Accountant General, informing him that graduates, who have passed C.T. examination, would be treated as trained graduate teachers entitled to a certain scale of pay but the State-defendant failed to produce said document and pleaded it to be a "privileged document," *held*, if there was such a communication, as claimed by the plaintiff and not denied by the State, the document must be in possession of the State. There was no reason or rhyme in claiming any privilege regarding such a document, which merely informed the Accountant General about the scale of pay, which was made payable to a trained graduate teacher. Thus, an adverse inference could be drawn against the State for non-production of said document. [A.I.R. 1974 S.C. 130; A.I.R. 1979 S.C. 1144, Rel. on]: A.I.R. 1987 Madh. Pra. 156.

Non-production of material documents—Defendant not producing receipts which he had taken from plaintiff at the time of each payment—Adverse presumption against defendant justified: A.I.R. 1961 Ori. 148.

In a suit for possession of bakasht lands admittedly belonging to the plaintiff, the defendant setting up raiyati rights in derogation of the rights of landlord to possess must prove it. In such a case it is not possible to raise any adverse presumption against the plaintiff by reason of the non-production of documents such as village papers which if produced would have thrown some light on the question of possession before the date of notification: 1959 B.L.J.R. 107.

Where there is a dispute as to the area actually settled with the defendants, and the receipts given by the plaintiff for the nazarana paid, which would enable the ascertainment of the actual area settled, are not produced by the defendants, it goes to show that the defendants are deliberately keeping them back as they went against them: 1940 R.D. 608: 1941 All.W.R. (Rev.) 95.

Where the fact of *A* being competent to sell the land to the defendants is specifically denied and put into issue, the defendants are bound to produce the alleged power-of-attorney or to cause it to be produced, and where it is neither produced nor proved, the finding must be that *A* was not competent to sell the land. But non-production of the power-of-attorney does not necessarily imply that the transfer was fraudulent or collusive.

It may at the most raise a suspicion but suspicion is not enough. *Illus.* (*g*) to S. 114 only supports the presumption that *A* had no power to sell the land and not that the sale deed was fraudulent: A.I.R. 1957 Manipur 25.

Where the certified copy of a Will executed and registered in 1941 in Burma was produced by a party in the Court in India and the question arose as to who had kept back the original, *held*, it could not be the propounder of the Will who had produced the certified copy, for non-production of the original could not be to her advantage; it could have been kept back only by a party which had been bequeathed the testator's property in Burma and which may get a share in the testator's property left in India if the testator is shown to have died, if the Will is not proved, intestate; an adverse inference, therefore, could be drawn against that party which would benefit from the Will remaining unproved: A.I,R, 1973 Mad. 421: (1972) 2 M.L.J. 508: (1973) 86 Mad.L.W. 122 (D.B.).

Where the assignees of certain Government land under a patta alleged that it was issued to them before certain year but did not produce the patta in support of their contention, the non-production of pattas which is the best evidence in regard to the year in which the assignment was made, must entail an adverse inference that if these documents

had been produced, they would have contradicted the version as given by the plaintiffs: A.I.R. 1964 Andh. Pra. 450.

Whether or not a permanent tenancy was granted is question of construction of the sanad. Only the sanad could show what interest was granted by it to the defendants. And if the defendants deliberately withhold this document, the Court should make every presumption against them to their disadvantage consistent with the facts. The document if produced would have shown that the tenancy is not permanent: (1966) 1 S.C.A. 323: 1966 S.C.D. 903: (1966) 2 An.L.T. 291: (1966) 1 S.C.W.R. 309: A.I.R. 1966 S.C. 629.

Application by landlord under S. 14 of the Delhi Rent Control Act (LIX of 1958) for ejectment of tenant—Plea in appeal by tenant that original notice of demand did not bear signature of person giving such notice on behalf of landlord—Plea not taken in written statement—Original notice in possession of tenant but not produced at the hearing of the case before Rent Controller—*Held*, the Court will be justified in presuming that had it been produced it would have gone against the contention of the tenant—The mere fact that the main onus to prove the case was on the landlord was immaterial—The appellant-tenant by suppressing the notice in spite of being in possession of the same, cannot be allowed to take advantage of abstract doctrine of the onus of proof: (1963) 65 Punj.L.R. 1019: I.L.R. (1964) 1 Punj. 28.

Where the plaintiff claiming authorisation by other members of the managing committee to give demand notice to tenant did not produce the document, *held*, adverse inference could be drawn against him: 1979 M.P.L.J. 266: 1979 Jab.L.J. 164.

The landlord sought to evict the company as a tenant and though the tenancy was created in the name of its Managing Director personally but he was not impleaded in the petition. The documents showing that the company was the tenant were not produced by the company. There was no evidence as to the point of time when the tenancy of the managing director was determined or surrendered to the company and the company was not proved to be the tenant when the eviction petition was instituted. *Held*, no presumption under S. 114(*g*) could be raised against the company or against the managing director who was not impleaded as a party; the company could not be presumed to be the tenant for keeping back the documents: (1989) 38 Del.L.T. 94.

Where in a proceeding under the Bihar Public Land Encroachment Act, 1956 the alleged encraocher's plea that she was settled on the public land and put in possession by a rent receipt in 1944 was not denied by the State, directly or indirectly, and the receipts were on record, *held*, no adverse inference could be drawn against the alleged encroacher for not having brought on record the deed of settlement: (1990-2) 38 B.L.J.R. 1092.

Where a question arose as to the amount of compensation to be awarded on account of land acquisition by State and the Land Acquisition Officer deposed that he had received a list of tenants from the owners of the disputed shops and that the list contained the rent which was being paid by the tenants but no such document was produced by the State, *held*, an adverse inference could be drawn against the State for non-production of said document: A.I.R. 1981 Pat. 81 (D.B.).

Where the mortgagor had pleaded payment of the mortgage money without particulars of the date or time or name of the person having made the payment which, according to the mortgagor was recorded on the back of the mortgage deed, the proof whereof, however, was only hearsay, but the mortgagee did not produce the deed and testified on oath that the deed had been lost and emphatically denied having received the payment, *held*, no adverse inference could be drawn against the mortgagee for non-production of the mortgage deed. [A.I.R. 1967 S.C. 1134, Foll.]: A.I.R. 1982 All. 503.

Where the pre-emptors had, even before the decree, disposed of their co-sharers rights in the lands they desired to pre-empt but alleged that even they had co-ownership rights to sustain the suit but they did not produce the sale deed, *held*, it was rightly presumed that if the deed was produced, it would have gone against the pre-emptors: A.I.R. 1974 S.C. 2367.

Where the plaintiff contended that he had the means to pay the consideration stipulated in the agreement to sell and for that purpose he had deposited the required sum in the bank but the defendant did not enquire from the plaintiff either the name of the bank in which he had deposited the amount

or whether he had any passbook in respect of the said bank account, nor was the plaintiff called upon to produce the passbook either by the defendant or by the Court, *held*, in such circumstances no adverse inference could be drawn against the plaintiff for not producing the passbook. [A.I.R. 1967 S.C. 1134, Foll.]: A.I.R. 1988 S.C. 1074.

P alleging existence of contract for payment of goodwill money between him and *D*—When *D* possessed account books, he could have produced them to refuse *P*'s plea—*D* cannot be heard to say, relying on abstract doctrine of onus of proof that it was no part of his duty to produce them unless he was called upon to do so: A.I.R. 1968 Raj. 278.

Question whether deceased was regular worker—Non-production of rolls of employees goes against employer: A.I.R. 1961 Ori. 214.

Direction by company Judge to company to produce certain documents—Documents produced and inspection of documents desired by petitioner allowed—Company objecting to further inspection of documents produced—No adverse inference against company can be drawn: (1964) 1 Comp. L.J. 117: A.I.R. 1963 Ori. 189.

Winding up of banking company—Settlement of claims of depositors—Question of implied authority by depositor—Onus of proof—Non-production of documents by depositor—Adverse inference: I.L.R. (1962) Cut. 554: A.I.R. 1963 Ori. 42.

In an action for negligence the defendant deliberately failed to produce, in spite of an order of the Court, reports and documents kept by the defendant in its canal office which would have thrown light on the question of negligence of the defendant. *Held* (Per *Sarker and Mudholkar, JJ.*), that in the circumstances an adverse inference that the defendant was negligent in the management of the canal arose from the non-production of documents: (1964) 2 M.L.J. (S.C.) 185: (1964) 8 S.C.R. 273: A.I.R. 1965 S.C. 17.

Where plaintiff lodged complaints with Delhi Electric Supply Undertaking that a loose wire was hanging on his staircase and current was running through it but no one paid attention nor the hanging wire was removed and on the fateful day plaintiff's son was electrocuted on coming in contact with said wire and though defendant's own witness admitted that DESU maintained separate complaint register regarding the complaint of a naked hanging wire but neither the said register nor copy of the plaintiff's complaint was produced, *held*, for the non-production of those material documents an adverse inference could be drawn against the defendants that had those documents, namely, complaint register of hanging wire and the original complaint lodged by the plaintiff, been produced, it would have gone against the defendants and would have falsified defendant's defence that deceased fiddled with electric wire illegally and unauthorisedly: A.I.R. 1995 Del. 164.

Inquiry by management regarding misconduct of workman—Certain document not called for by workman nor any question put to the witness examined on behalf of management as to why the document was not produced—Labour Court was not legally entitled to draw inference against management on account of its non-production: I.L.R. 40 Pat. 163: A.I.R. 1961 Pat. 232.

Where the plaintiff had made an unsuccessful attempt to produce an important document at a late stage of the suit, he cannot be said to have suppressed it so as to support an adverse inference against him. Further, it is not obligatory on the Court to draw any such inference if there is other evidence on the basis of which it could come to a decision on the question at issue: A.I.R. 1962 Mys. 260.

Where the party desiring to prove due publication of certain notification failed to produce documentary evidence in that regard, *held*, it could be presumed that such evidence if produced would have been unfavourable to the person withholding it under S. 114, *Illus.* (*g*): A.I.R. 1982 Bom. 284: (1981) 83 Bom.L.R. 586: 1982 Mah.L.J. 229.

Where the election of a Sarpanch under the A.P. Gram Panchayats Act, 1964 was impugned on the ground of electors having cast votes in the election of the Sarpanch of another Panchayat and the petitioner, besides not producing any details or evidence of such double voting, merely sent a copy of the election petition to the Block Development Officer of the other Panchayat through Court but the used ballots of the other Panchayat was not sent to the Election Tribunal, *held*, this furnished no ground to draw any adverse inference against the petitioner under S. 114(*g*): (1983) 1 An.W.R. 147.

59. Non-production of accounts.—Entries in account books by themselves are not evidence unless acceptable proof thereof is forthcoming. Account books kept in the regular course of business of a transaction is merely a compilation of all the day-to-day dealings, written up in books, vouchers, etc. Hence account books by themselves do not

stand on any better footing than a bill or voucher issued in the regular course of business. While books of accounts and bills are distinct and separate they both suffer from the same infirmity that by themselves they do not prove the transaction unless acceptable proof *aliunde* is forthcoming.

S. 114 of the Evidence Act is a rule of guidance and the presumption arising therein being only a permissive presumption, it is not absolutely obligatory on the part of the Court to draw such a presumption in every case. It gives an option to the Court whether to draw any presumption or not having regard to the other circumstances of the case. Where a suit transaction is proved to the satisfaction of the Court by acceptable evidence of bill books or vouchers, the mere non-production of the account books relating to those transactions cannot compel the Court to draw any adverse inference against the party failing to produce the account books: (1967) 2 M.L.J. 475: (1967) 80 Mad.L.W. 402: A.I.R. 1968 Mad. 203.

In a suit for accounts the non-production of account books by the party who has the custody of them justifies the presumption under S. 114, *Illus.* (*g*) of the Evidence Act, that they have been withheld, because, if produced, they would be unfavourable to his case. If he is the plaintiff and is claiming accounts though withholding them, his suit is liable to be dismissed. This principle also applies to a suit for administration. If the defendant in such suit, who is liable to render accounts, withholds the accounts, every presumption should be made against him: A.I.R. 1951 Trav.-Co. 87: 1950 Ker.L.T. 348.

If a defendant either suppresses his accounts or has falsified them, the Court will presume every thing most unfavourable to him consistent with the established facts: A.I.R. 1935 Mad. 152: 65 M.L.J. 558; 11 O.W.N. 880: A.I.R. 1935 Oudh 171; A.I.R. 1928 Lah. 397; A.I.R. 1937 Mad. 816: (1937) 2 M.L.J. 559.

An adverse inference should ordinarily be drawn against a person who does not produce his books irrespective of the burden of proof provided the books are relevant to the question in issue. But where according to the plaintiff's case his books are not relevant, no inference can be drawn against him for non-production of his books. If the defendant thinks that there are entries in them which would help him, it is his duty to call upon the plaintiff to produce the books for his inspection and thereafter to put the entries in evidence: I.L.R. (1951) Nag. 909: 1951 Nag.L.J. 544: A.I.R. 1951 Nag. 347.

Where the non-production of accounts on either side is plausibly explained no inference can be drawn against either one side or the other from that circumstance: 10 O.W.N. 827: A.I.R. 1933 Oudh 412. *See* also I.L.R. (1936) Nag. 142: A.I.R. 1936 Nag. 130 [Non-production of evidence which is not relevant and necessary—Prosecution under S. 408, I.P. Code.]

Accounts and their non-production—Party failing to produce accounts but only giving oral evidence—No attempt made by opposite party to call for accounts would be best evidence, at the most oral evidence may not be acceptable but no adverse inference can be drawn from non-production of accounts: (1967) 1 S.C.R. 153: A.I.R. 1967 S.C. 1134.

Where the defendant did not produce the account papers which had no bearing with regard to the alleged transaction of agreement of sale with the plaintiff and moreover, the plaintiff did not call for the production of those account papers, *held*, no adverse inference could be drawn against the defendant. [A.I.R. 1967 S.C. 1134, Rel. on]: A.I.R. 1978 Cal. 4 (D.B.).

The failure to produce the books of account entitles the Court in the case sub-judice to raise a presumption that the entries therein relating to partnership were contrary to the plea that the firm was a joint family firm: (1958) 60 Punj.L.R. 235: A.I.R. 1958 Punj. 159: I.L.R. (1958) Punj. 1115.

Party not producing relevant account books, which it is in its power to produce, to falsify other account books alleged by the party to be false is a circumstance that would be taken against it: 1959 B.L.J.R. 769: A.I.R. 1960 Pat. 271.

The inference from the non-production of accounts can only be drawn in the light of the other circumstances appearing in the case: 21 Cut.L.T. 322: A.I.R. 1955 Ori. 60.

It cannot be said that the Supreme Court in A.I.R. 1967 S.C. 1134 has laid down an invariable or inflexible rule that no adverse inference can be drawn without prior calling for of the evidence either documentary or oral from the custody of the defendant. It has to be decided in each case on its facts to find out whether the evidence is really in the custody of the defendant and in the facts and circumstances there is a clear obligation on the part of the defendant to produce it. Where there exists such an obligation,

non-production can very well justify the Court to raise an adverse inference even though such evidence had not been specifically called for by the plaintiff from the defendant: A.I.R. 1985 Cal. 200 (D.B.).

Party not producing accounts which he claims to have maintained—Adverse inference could be drawn: (1969) 19 Law Rep. 344 (Mys.); (1971) 2 Mys.L.J. 168; (1979) 2 M.P.W.N. 93 [Despite repeated demands party not producing stock register—*Held*, adverse inference to be drawn.]

If the books of accounts are expected to be in the custody of a person and if that person does not produce those accounts or does not offer an explanation for not producing such accounts, it could be inferred that such accounts, if produced, would not support his case: (1972) 1 M.L.J. 141: (1972) 85 Mad.L.W. 857 (D.B.).

Non-production of register or account book—Adverse inference: 1957 Pat.L.R. 259.

Non-production of his own accounts by party when called upon to do so—Adverse inference may be drawn against the party: A.I.R. 1965 Ker. 156.

It is not obligatory on the part of the party to produce the documents or account books unless it is directed to do so by the Court at the instance of the other party and it is always optional and not obligatory upon the party to produce the entire evidence in its possession. Further, the consideration of the entirety of the facts and circumstances is a determinative factor though there is no presumption under S. 114(*g*). Where one of the parties is directed to produce the documents or account books in its possession, *held*, withholding of or evasion of production of such documents leads to the adverse inference and presumption under S. 114(*g*). If the party is satisfied that it could non-suit the other party by the very documents or evidence in possession of the other party itself, it is for the party to move in the matter and initiate steps for calling upon the party to produce such documents or account books: (1987) 1 An.L.T. 722.

Where defendants are under a duty to produce their books when summoned or to account for their failure to do so and, if they have done neither, a presumption arises under S. 114, *Illus.* (*g*), Evidence Act that the books if produced would have been unfavourable to their case: A.I.R. 1955 Vindh. Pra. 6; I.L.R. (1953) Cut. 343: A.I.R. 1953 Ori. 315; I.L.R. (1957) Punj. 430: A.I.R. 1957 Punj. 108.

Where defendant was guilty of withholding of the best evidence on the point in controversy, *held*, an adverse inference should be drawn by the Court that if the account books and correspondence between the parties had been produced by the defendant, the same would have gone against him. [A.I.R. 1968 S.C. 1413, Rel. on]: A.I.R. 1988 Del. 332.

Where defendant did not produce books of account in his possession, *held*, an adverse inference could be drawn against him, though he had not been expressly called upon to do so. [A.I.R. 1968 S.C. 1413, Rel. on]: A.I.R. 1979 N.O.C. 142 (Cal.) (D.B.).

Unless evidence shows that the account books called for but not produced had primary entries relating to the suit transaction, *held*, no adverse inference can be drawn for their non-production: (1971) 1 Cut.W.R. 407.

Where a defendant fails to produce his account books before the Court in time, and they are rejected by the Court when produced as having been produced too late, the penalty for this conduct of the defendant is only to deprive the defendant of the benefit of the evidence afforded thereby. But it is not open to the plaintiff who has opposed their production to contend that an adverse inference ought to be drawn against the defendant from their non-production: 1939 Mad.W.N. 841: A.I.R. 1940 Mad. 273, followed in A.I.R. 1960 Andh. Pra. 331.

It is a principle of law that if no books of account at all are kept or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld, and an account is directed by a Court, every presumption will be made against the party to whose negligence or misconduct the non-production of proper account is due. If a party has books of accounts in his possession and will not produce them, an account may, nevertheless be arrived at by presuming everything against him: I.L.R. (1943) Kar. 429: A.I.R. 1944 Sind 73.

Where in the course of a trial, the Court is satisfied that a document having an important bearing on the dispute which is pending trial is withheld by a party, an inference adverse to the party withholding the document, that if produced, the document would not support that party's case, may properly arise. But where there is no evidence on the record to show that the document was with the plaintiffs or within their power and that it was withheld from the Court, the Court would refuse to raise an adverse inference against the plaintiffs: (1961) 3 S.C.R. 396: A.I.R. 1961 S.C. 1277.

Defendant asking plaintiff to produce account books maintained by father of plaintiff, for particular year—Defendant must first establish affirmatively that plaintiff's father maintained accounts in that year—In the absence of such proof no adverse inference can be drawn against plaintiff for their non-production: I.L.R. (1961) Cut. 635.

A pre-requisite to the drawing an adverse inference from the non-production of the account-books is its being established that the plaintiff was maintaining accounts and yet failed to produce them into Court: A.I.R. 1958 Andh. Pra. 630.

Where there was no evidence that the defendant was in fact in possession of the books of account at the relevant time and that he was suppressing the same with the intention that the plaintiff's case might not find corroboration, *held*, no adverse inference could be drawn against the defendant for non-production of the account books: A.I.R. 1973 Guj. 57.

An adverse inference under S. 114 can be drawn against a party only when such party being in possession of account books suppresses them.

Thus, where plaintiff who was not maintaining any books of account filed a suit on pro-note, *held*, an adverse inference could not be raised against the plaintiff for his failure to produce the account books: 1982 M.P.L.J. (N.O.C.) 2.

Though the Court can raise an adverse inference against a party withholding evidence available with him but it was necessary to prove that the relevant books were in existence and could be produced. Where plaintiff contended that impugned theatre owed its origin to the joint family resources and an adverse inference should be drawn against the defendant for non-production of account books which would go to establish plaintiff's case, *held*, if really the plaintiff considered that there were account books or other files which would go to establish his case, it was he who should have taken action and called upon the defendant to produce that relevant document: 1981 Hindu L.R. 686 (Mad.) (D.B.).

Where the Court accepts the reasons given by the plaintiff for non-production of the accounts, the Court cannot draw any adverse inference against the plaintiff for non-production of those documents. Moreover, the presumption is only a piece of evidence but by itself it cannot be relied to defeat the claim of the plaintiff. Where there is positive evidence on the record coupled with the admission by the defendants of the passing of the consideration, no adverse inference can be drawn against the plaintiff for non-production of the documents: I.L.R. (1963) 15 Assam 104: A.I.R. 1963 Assam 41.

Presumption under — Rebuttal — Presumption not rebutted simply because plaintiff suing on negotiable instrument does not produce his account books *suo motu*: 1963 Ker.L.T. 122.

Where plaintiff who kept account books regularly in the regular course of business, though withheld bill book but produced his *rokad*, *held*, no adverse inference could be drawn: (1979) 2 M.P.W.N. 216.

Non-production of accounts admitted to be in his possession by *karta* of H.U.F.—Does not amount to suppression of accounts—No adverse inference can be drawn on that basis against the *karta*: A.I.R. 1967 Andh. Pra. 247.

As to presumption from non-production of account books by a company when no explanation for such non-production is given, *see* (1929) 31 Bom.L.R. 1310: I.L.R. 53 Bom. 192: A.I.R. 1930 Bom. 84; A.I.R. 1937 Mad. 816: (1937) 2 M.L.J. 559; I.L.R. (1942) Nag. 543: 1942 Nag.L.J. 121: A.I.R. 1942 Nag. 39; A.I.R. 1942 Rang. 52; 1946 Pat.W.N. 66: A.I.R. 1946 Pat. 66.

As to presumption from non-production of old account books, *see* 1936 All.W.R. 547.

For a case in which an unfavourable presumption was drawn for non-production of books, *see* A.I.R. 1954 Cal. 179. Where the plaintiff failed to produce account books in their possession in order to show whether particular debts were discharged or not, *held*, that a presumption should be raised against them for non-production of such account books: 1956 Raj.L.W. 366: A.I.R. 1957 Raj. 256.

Where a person fails to produce the accounts in his possession showing the amount of expenses he has incurred which fact is proved by other evidence, one would be justified in presuming from the non-production of such accounts that he was exaggerating the expenses incurred by him; but simply because of this non-production one could not be justified in coming to the conclusion that

no expenses had been proved: A.I.R. 1934 All. 71. *See* also 1936 All.W.R. 547; A.I.R. 1942 Rang. 52; I.L.R. (1942) Nag. 543: A.I.R. 1942 Nag. 39.

Where the defendants alienees had not specifically denied the allegations in the plaint in respect of the extent of the income from the properties, *held*, that no question of drawing an adverse inference against the plaintiff on account of the non-production of the account books arose in the suit for the relief that the debts incurred by his father were not binding on him: 1956 Nag.L.J. 98: I.L.R. (1955) Nag. 744: A.I.R. 1956 Nag. 76. *See* also A.I.R. 1957 Madh. Pra. 194.

Law is well settled that no adverse inference is to be drawn against a party under S. 144, *Illus.* (*g*) of the Evidence Act unless in fact the party is in possession of a document and fails to produce it. But in view of the statutory provisions in S. 7(*a*) of the Orissa Money-lenders Act and R. 11 of the Rules thereunder this contention is not available to a registered money-lender.

Thus, in a suit by registered money-lender on promissory note, the account book would be the best evidence to show whether cash was paid or not and when it is not produced the Court of fact would be entitled to draw an adverse inference under S. 114, *Illus.* (*g*) of the Evidence Act, that the account books if produced, would not show an entry regarding the advance of cash under the promissory note in the suit, though the onus of proof regarding non-passing of consideration is on the defendant, and the defendant had not in fact called upon the plaintiff to produce his account books. A.I.R. 1915 P.C. 96, *held*, overruled by subsequent decisions of P.C. and S.C. decisions: I.L.R. (1965) Cut. 445: 32 Cut.L.T. 194: A.I.R. 1966 Ori. 66.

Suit under Money-lenders Act—Non-production of account books by money-lender in Court—Effect—Suit decreed—Illegal exercise of jurisdiction: A.I.R. 1958 Ori. 85.

Where in a suit by a money-lender upon a promissory note, the defendant does not allege any payments towards the loan, but contends that the plaintiff was not his creditor, *held*, no adverse inference can be drawn against the plaintiff for non-production of account-books, since that would not be of any help to the defendant: I.L.R. (1958) Cut. 45: A.I.R. 1958 Ori. 111.

Non-production of the books of account required to be maintained under S. 7, Orissa Money-lenders Act, 1939—A Court is competent to draw adverse inference though it is not mandatory for a Court to do so—Even if an adverse inference was drawable that presumption would be rebutted by the presumption under S. 118 of the Negotiable Instruments Act: (1971) 1 Cut.W.R. 949.

Where a professional money-lender suing on a negotiable instrument pleaded and testified that he had entered the amount advanced in his account books which he could produce within four hours but when his books were summoned, he adopted delaying tactics and did not produce them, *held*, the plaintiff's case of having advanced the money stood rebutted by the inference drawn against him for deliberate non-production of the account books; rebuttal need not be by direct evidence; it may as well be based on presumptions of law: A.I.R. 1992 Mad. 132: (1991-2) 108 Mad.L.W. 487: (1991) 2 M.L.J. 183.

Where in a money-lender's suit on mortgage, the defendant produced the deed and pleaded discharge but the plaintiff contended that the defendant had fraudulently taken away the deed, but the plaintiff, despite challenge, did not produce his books of account, *held*, the presumption that the mortgage stood discharged, even if so endorsed by the defendant himself, an adverse inference for non-production of account books was rightly drawn: (1982) 1 Karn.L.J. 45.

Non-production of account books by a registered money-lender in a suit based on promissory note—Defendant completely disowning the transaction—In view of the defence case no prejudice can be said to have been caused by the non-production of the books of accounts—Plaintiff cannot be made to suffer: (1971) 1 Cut.W.R. 949.

Where a suit based on hand-notes was decreed on copious documentary evidence and the presumption under S. 118 of the Negotiable Instruments Act, 1881 as to passing of consideration was available, *held*, the Court is not bound to draw an adverse inference against the plaintiff for non-production of account books; not being a question of law, it cannot be interfered with in the second appeal: A.I.R. 1986 Pat. 154: 1985 Pat.L.J.R. 126.

In a suit on a promissory note, on proof that the plaintiff-promisee has an account in respect of that transaction and on being called upon to produce it, if he does not produce the same, then only an adverse inference against him can be drawn and not otherwise: 32 Cut.L.T. 994: I.L.R. (1966) Cut. 598.

Suit on pro-note—Allegation by creditor, of payment by debtor— Failure to produce tippan book in which all payments were admitted by creditor to have been entered, would raise adverse presumption against him: A.I.R. 1960 Mys. 220.

Where defendants alleged that hundi was executed fictitiously in order to help the plaintiff but they failed to produce the account books, *held*, a presumption could be raised against the defendants that if they had been produced, an entry of said loan would have been found in the account books: A.I.R. 1983 All. 54.

Where the defendant stated that with respect to the hundis which he had pledged with the bank, he had maintained account showing the amount lent to various persons who had executed hundies and the amount received from them, but he failed to produce the account books, *held*, in order to show that he had not collected any amount from the drawers of the hundies pledged with the bank, the best evidence would have been to produce the account books or to examine the drawers. From the fact that he had withheld the account books, the only inference that could be drawn was that if he had produced the account books they would have gone against his interest: A.I.R. 1971 Mys. 156: (1970) 2 Mys.L.J. 577 (D.B.).

A plaintiff who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration, *held*, should produce the said account books, for he is in possession of the same and when such a relevant evidence is withheld by the plaintiff, S. 114 enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff: (1987) 100 Mad. L.W. 925.

In a suit for money due on sale of goods, the Court is justified in not drawing an adverse inference under S. 114 against the plaintiff for non-production of account-books when it finds that the bill books produced by the plaintiff in evidence are genuine and not got up for the occasion and they have the proved dealings and transactions in question. S. 114, being a rule of guidance, the presumption arising therein being a permissive presumption, it is not absolutely obligatory on the part of the Court to draw such presumption in every case where account-books are not produced. When other evidence which is equivalent to or which can be characterised as substitute for account-books is available for the Court to come to a reasonable conclusion thereat, it could do so.

Books of account and bills are distinct and both suffer the same infirmity, namely, they do not prove by themselves.

When the plaintiff has admitted in his evidence that he has account-books but has not produced them and the defendant in his cross-examination does not put to him a specific question to the effect that the account books if produced would not find the suit transactions, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of the account books: (1967) 2 M.L.J. 475: (1967) 80 Mad.L.W. 402: A.I.R. 1968 Mad. 203.

Where serious allegations of collusion between the Medical Officer and the plaintiff claiming price for the heavy spurt of drugs supplied by it to the State in utter disregard of departmental circulars, the plaintiff assessed to income and sales tax and maintaining regular account books did not produce the same in the Court and the suit was decreed on the basis of indents, part payments, acknowledgments and extracts from accounts, *held*, the trial Court should have drawn an adverse inference against the plaintiff; decree set aside and the suit remanded: (1993) 2 Kam.L.J. 164 (D.B.).

Mere payment by cheque is not a *prima facie* evidence of advancing loan because the cheque is deemed to have been issued on consideration. However, it is necessary to remember that it is not an irrebuttable presumption of law. It is permissible in law to show by other evidence that the cheque issued was not to extinguish the existing debt but it was for the money lent. Thus, where the defendant admitted receipt of money under cheques but pleaded that payment

through the cheques was towards the contract work done by him to the plaintiff which was specifically denied by the plaintiff and as the defendant failed to produce the accounts and a copy of the bills pertaining to the contract work claimed to have been maintained by him, *held*, the presumption stood rebutted and an adverse inference had to be drawn against the defendant that if the defendant had produced the records as averred by him, the same would have gone against him: A.I.R. 1992 Karn. 347: (1992) 2 Karn.L.J. 659.

Suit for damages for wrongful dishonour of cheque—Bank withholding account books and other record—Inference that the documents if produced would go against bank and would show that the drawer had sufficient funds would be proper—Negotiable Instruments Act, 1881, S. 31: A.I.R. 1963 Ker. 306.

In a suit for partition the plaintiff had not relied at the trial stage on certain account books in the possession of defendant for showing that the business was joint family business. Nor had he taken any steps for their production by the defendant. In an appeal against the dismissal of his suit it was contended by the plaintiff that an adverse inference should be drawn against the defendant for his failure to produce the document at the trial stage.

Held, that it was not open to the plaintiff to make use of the position arising out of non-production of the books particularly when they were irrelevant to the case: 25 Cut.L.T. 189: I.L.R. (1959) Cut. 167.

Whenever there is the best evidence available, oral evidence cannot be a substitute for the same. Where in a suit for eviction, the petitioner, partners of a firm, contended that as their jewellery business had diminished due to promulgation of Gold Control Order they required the impugned premises for starting a new business but no account books were placed before the Court to substantiate said claim, *held*, an adverse inference could be drawn against them for withholding the best evidence available to them: A.I.R. 1971 Mys. 227: (1971) 1 Mys.L.J. 322.

In a suit for eviction on the ground of subletting, the tenant and the alleged sub-tenant failed to produce their account books and ledgers despite a notice by the landlady, *held*, an adverse inference could be drawn as to had the account books and ledgers been produced, they would have shown that rent was received by the tenants from the sub-tenant: A.I.R. 1989 S.C. 865: (1989) 1 S.C.C. 556.

Where in a case for recovery of rent from sub-lessee, the plaintiff lessee failed to produce account books for previous years but he contended that he maintained accounts wherein entries regarding payment of rent were made and he categorically said that he could produce the account books, *held*, an adverse inference could only be drawn against a person who did not produce or offer to produce. So it was the defendant's duty to call upon the plaintiff to produce when he offered to do so. No inference could be drawn against the plaintiff for non-production of his account books: A.I.R. 1989 Del. 184: 1989 Rajdhani L.R. 83.

Where in a suit for realisation of the arrears of rent, the tenant contended that the impugned payment of Rs. 400 was partly towards the consideration and partly towards interest and though the defendant was maintaining regular books of accounts he failed to produce them before the Court, *held*, such account books being the best evidence, an adverse inference could be drawn for non production of such books: A.I.R. 1977 Ori. 76: I.L.R. (1977) Cut. 263.

Where in a suit for compensation on account of requisition of the property of the appellant, though the appellant maintained account books in respect of construction and repairs to the building but he failed to produce the same, *held*, an adverse inference could be drawn for non-production of such account books. [A.I.R. 1928 P.C. 39, Foll.; A.I.R. 1968 Pat. 352, Affirmed]: A.I.R. 1977 S.C. 638: (1977) 1 S.C.C. 592.

The plaintiff had placed an order with the defendant for supply of certain goods. In a suit for damages suffered by the plaintiff as a result of inferior quality of the goods supplied, the defendant repudiated his liability on the ground that he was merely acting as a commission agent and as such was not liable. The defendant, however, did not produce the order for supply of goods or his account books in evidence which would have clearly shown the capacity in which he had entered into the contract. *Held*, that in the circumstances, an adverse inference that the defendant was acting as the vendor and not as a

commission agent could be drawn: I.L.R. 40 Pat. 950: A.I.R. 1963 Pat. 407.

The Forest Department had executed a contract to sell forest produce and the contractor paid consideration thereunder in instalments. But subsequently, he sued for recovery of said amount minus the profits earned by him on the plea of the contract being invalid for non-compliance of the requirements of Art. 299(1) of the Constitution of India but to prove the profits earned by him, he did not produce the primary evidence of the *katcha* account books maintained by him but produced *pucca* books to which the *katcha* accounts had been transferred, *held*, an adverse inference could be drawn against him for non-production of *katcha* account books: A.I.R. 1973 Madh. Pra. 274: 1973 M.P.L.J. 286: 1973 Jab.L.J. 479 (D.B.).

Where the surveyor had deposed that the land was a forest but kept back his survey report without any reason or explanation therefor, *held*, an adverse inference for concealment of the document could be drawn against the party putting him into the witness box: A.I.R. 1976 Cal. 389 (D.B.).

Where the respondent claimed ownership of certain land on the basis of a gift deed which was registered on 23-8-1951 though it was executed on 2-1-1951 and the petition-writer who scribed the gift deed did not produce his register of documents required to be maintained by him under the rules, *held*, the register of the petition-writer was not a document maintained or in the possession of the plaintiffs; they were not responsible for its non-production, so no presumption could be raised against them for failure of its production by the petition-writer; at best non-production could affect the value of evidence of the petition-writer: A.I.R. 1971 S.C. 2177.

Where the question is whether a particular person at a particular place where he was alleged to have made a certain statement and the account books of that person are relevant only to show that he was at that place, then a failure on the part of such person to produce them may entitle the Court to draw an adverse inference that he was at that place when the statement was alleged to have been made by him, but it would not justify an inference that he made the statement attributed to him. That must be proved by other evidence: I.L.R. (1954) Nag. 126: 1954 Nag. L.J. 262: A.I.R. 1954 Nag. 236.

Where the plaintiff contended that he withdrew money from the bank and advanced to deceased promissor but he failed to produce his pass book in support of his stand, *held*, an adverse inference under S. 114, *Illus.* (*g*) could be drawn against the plaintiff for non-production of pass book: (1987) 100 Mad.L.W. 702.

Accused charged under S. 408, I.P.Code—Contention that period during which the offence was alleged to be committed exceeded one year—Complainant not producing account books and papers relating to the offence though in his possession—*Held*, it was a legitimate inference that if they had been produced, they would not have supported the allegation made in complaint that defalcations covered a period of only one year: A.I.R. 1934 Pat. 132: 35 Cr.L.J. 693: 15 Pat.L.T. 647: 148 I.C. 519.

Defendant not producing accounts—Court can draw inference that if produced they would go against defendant—Documents from Registers of temple property—Tops of documents containing title of register appearing to be deliberately torn—Inference adverse to defendant held could reasonably be drawn from surrounding circumstances: (1970) 2 S.C.A. 143: (1970) 2 S.C.R. 275: A.I.R. 1970 S.C. 2025.

Material documentary evidence (Bahikhata) deliberately withheld by party from Court in spite of opportunity to produce same—It may well be presumed that entries contained therein are against that party: A.I.R. 1964 Him. Pra. 5.

Ledger account opened at instance of defendant—*Prima facie* relevant to ascertain liability of defendant—Non-production of credit memo book by plaintiff: A.I.R. 1965 Assam 10.

Where the insurer neither pleaded its liability to be limited by statute nor did it produce the copy of the insurance policy to substantiate its contention, *held*, the Tribunal could properly draw an adverse inference against the insurer and direct it to pay the entire compensation awarded to the claimant in respect of the accident: A.I.R. 1994 N.O.C. 54 (Gau.) (D.B.).

Where Official Liquidator sought to recover certain amount on behalf of a company from respondents and it was claimed that account of the respondent to whom

appellant company owed certain sum was adjusted against the account of his father, who in turn owed money to the company and, thus, no amount was due in favour of the company but the respondents did not summon the books of the company and though respondent son had accounts with the company he failed to produce pass books in support of his argument, *held*, plea of discharge pleaded by respondents was unacceptable. [A.I.R. 1948 Mad. 171 and A.I.R. 1958 Ker. 124, Rel. on]: A.I.R. 1981 Karn. 245: (1981) 1 Karn.L.J. 35.

Where other documentary evidence like attendance registers of employees and servants for several years was produced but not for 1970 when admittedly such a register existed, *held*, the non-production of that register being not of material assistance in the facts and circumstances of the case, it was not incumbent on the Court to raise adverse presumption against party in possession of the register; there is no compulsive element in S. 114(*g*) to draw an adverse inference against the party whenever or wherever it fails to produce the document; the discretion to draw or not to draw the inference lies with the Court: A.I.R. 1975 Cal. 98 (D.B.).

Where a claim for bonus is being investigated by the Industrial Tribunal and the workmen upon whom the onus lies to establish their claim do not give any evidence in support of their claim, the mere non-production of the balance-sheet by the company even though called upon to do so, would not justify the raising of presumption under S. 114, *Illus.* (*g*), Evidence Act. Even if the company has stated that there was no financial inability to pay the claim that does not necessarily mean that it had an available surplus or that the available surplus amounted to whatever was claimed: A.I.R. 1957 Cal. 500.

Where Hindu sons bring a suit to declare that certain alienations effected by their father of family properties, and certain decrees obtained by creditors against him are not binding on themselves or on the joint family properties, alleging that there was enormous income from the properties held by their father and that there was no necessity for incurring loans for the family, they ought to produce the account books to prove the income and expenditure. But when they deliberately suppress the account books whose existence is proved by their own witnesses, the Court is justified in concluding that those account books, if produced in Court, would not support the case of the plaintiffs. Though the onus of proving the binding nature of the alienations and of the decrees is on the alienees and the creditor, the onus shifts on to the plaintiffs on account of the presumption arising against them on account of omission to produce the accounts in their possession. No party should be allowed to take advantage of an abstract doctrine, *viz.*, burden of proof, and conceal from the Court the evidence which is shown to be in his possession and which would assist the Court in arriving at a correct decision: I.L.R. (1946) Nag. 844: 1947 Nag.L.J. 86: A.I.R. 1947 Nag. 129.

Where in a suit for damages for infringement of copyright, even after a notice, the defendant fails to produce his account books, there is a fair presumption that the account books have been deliberately suppressed by the defendants in order to conceal the actual profits realised by the sale of the books and the Court is entitled to assume that the entire stock of copies of books published had been sold by the defendants and the sale proceeds appropriated by them: I.L.R. 55 All. 564: 1933 All.L.J. 791: A.I.R. 1933 All. 474.

60. Non-production of other evidence.— When the plaintiffs have failed to produce evidence they may not be permitted to rely on a presumption under S. 114 in place of the evidence that they could produce: I.L.R. (1957) 9 Assam 1: A.I.R. 1959 Assam 98; (1981) 2 M.P.W.N. 5; (1981) 2 M.P.W.N. 157.

Drawing an adverse presumption for non-production of available evidence, *held*, is not obligatory; it is always optional, depending upon the entirety of the facts and circumstances in each case: A.I.R. 1975 S.C. 2299.

Non-production of a record by the parties or for affective adjudication and the averments since not traversed, the Court can draw an adverse inference against the party who had duty to produce: (1991) 1 Cal.L.T. (H.C.) 354; (1978) 2 M.P.W.N. 324 [Non-filing of khasra entries]; 1979 Jab.L.J (Note) 41 [Villager not filing prescription of his treatment taken during his illness.]

Non-production of evidence—*Held*, that in the absence of any reliable proof that a notice was actually issued to the District Magistrate no adverse inference could be drawn

against him on the ground of non-production of such notice: 25 Cut.L.T. 169.

Where the defendant did not deliberately withheld the plans submitted by it to the Municipality from the Court, *held*, no adverse inference could be drawn against the defendant: A.I.R. 1976 Cal. 182 (D.B.).

If a party in whose possession best evidence is available fails, despite the Court's direction or demand from the opposite party to produce the same, the Court may conclude that had such evidence been produced it would have gone against the person who had suppressed it and an adverse inference can be drawn against that person. But where there was only a casual statement by the landlord that he had made entries in diary in respect of rent and the diary was not the basis of the suit and neither there was any order to produce the diary nor the tenant had demanded the same, *held*, no adverse inference could be drawn against the landlord for non-production of said diary: A.I.R. 1991 All. 226: 1991 All.L.J. 549: (1991) 17 All.L.R. 463: 1991 All.W.C. 436.

Where a question arose regarding the rate of rent and the landlady failed to produce a rent-note which was in her possession tho-ugh there was sufficient evidence on record about rate of rent, *held*, presumption under S. 114, *Illus*. (*g*) could not be attracted: A.I.R. 1985 All. 178: (1985) 11 All.L.R. 213.

Where tenant alleged the existence of an oral agreement between him and the landlady and brother of landlady stated that he instructed the tenant to remit the amount by money order and the tenant did not state in the money order coupon that the amount sent therein related to the negotiations and the receipt was not produced, *held*, non-production of money order coupon could not lead to drawing of an adverse inference about existence of oral lease between the parties: A.I.R. 1991 Andh. Pra. 47: (1990) 2 An.W.R. 300.

Where the tenant's liability to be evicted under S. 3(1)(*c*) of the U.P (Temporary) Control of Rent and Eviction Act, 1947 depended upon whether the ice candy plant was installed in the demised premises before or after a particular date and the tenant admittedly in possession of the receipts for purchase of the plant did not produce those receipts, *held*, an adverse inference could be drawn against the tenant that the receipts, if produced, would have gone in favour of the landlord. [A.I.R. 1964 S.C. 136, Foll.]: A.I.R. 1973 All. 582.

Where in a suit for eviction, the plaintiff landlord contended that the defendants had caused permanent damage to the pillars in the premises in occupation of the defendants as they had reduced thickness of the pillars and that an adverse inference could be drawn against the defendants for their failure to get a carpenter and have the show cases removed to make it possible for the Commissioner to find out the extent of the damage which had resulted from the chopping off of two inches of thickness of the wooden pillars in the walls, *held*, the plaintiff had no personal knowledge about the cutting of the pillars. There was no other evidence of any person whatsoever to show that the pillars had been cut. In the absence of any evidence of the pillars having been cut, the alleged refusal on the part of the defendants could not have been made the basis for drawing any adverse inference against the defendants: (1984) 1 Bom.C.R. 546: 1984 Mah.L.J. 228.

Where an "unauthorised occupant" sought to be evicted from public land for a public purpose was served a show cause notice under S. 3(1) of the U.P. Land (Eviction and Recovery of Rent and Damages) Act but in the consequent eviction proceedings he contended that the grounds mentioned therein did not comply with the requirements set out in S. 3(2)(*a*) of that Act but without producing the notice, *held*, it could properly be presumed that the grounds specified in the notice were in accord with the requirement of law: A.I.R. 1979 S.C. 1303: 1979 All.L.J. 714.

It is being well established that the findings of a criminal Court are of no assistance in civil Courts; thus, where the insurer, in a motor accident compensation case, contended that the driver had no licence to drive the vehicle and relied upon a finding in the criminal Court judgment in respect of the same accident, *held*, the burden of proof was not discharged; it was for the insurer to take appropriate steps to compel the driver to produce his driving licence; and, upon his failure to comply, the Court could draw an adverse inference against the opposite parties: A.I.R. 1994 Andh. Pra. 320.

Where workman of a bank claimed to have worked for more than 240 days in a period of 12 months but the bank failed to

produce record, *held*, inference had to be drawn that workman's case was true: 1985 Lab.I.C. 1733 (S.C.).

Omission to produce evidence—Adverse inference not decided by trial Court—Appellate Court's power to decide: A.I.R. 1960 Cal. 92.

Where purchaser rejected goods of the supplier on the ground that on inspection the impugned goods were found defective by the Textile Committee but he did not produce the official record of Textile Committee, *held*, an adverse inference could be drawn against the purchaser for his alleged failure to produce the record: A.I.R. 1981 N.O.C. 151 (Del.).

When best evidence is available to prove the case of a party in a suit, if such a party fails to produce such evidence without sufficient reasons then an adverse inference has to be drawn against them. Thus, where the party failed to place a copy of the marriage register maintained by the temple to support its plea of valid marriage, *held*, non-production of the copy without sufficient explanation enabled the Court to draw an adverse inference against them: (1989-2) 104 Mad.L.W. 197 (D.B.).

Where a husband sued for divorce on the ground of his wife's cruelty had testified that the milk bottles were several times found broken including once in 1976 and was asked in cross-examination as to why did he remember the incident of 1976 which was disallowed on his Advocate's objection, *held*, it must be taken as the husband's own refusal or failure to give the reply: it tantamount to failure to produce evidence meriting an adverse inference against the husband under S.114 (*g*); since remanding the case to the trial Court for recording the husband's reply would be of no use—he might meanwhile cook up a harmless reply, the drawing of the adverse inference is the only alternative left: (1989) 1 Bom. C.R. 156.

Where a question arose as to whether the plaintiffs were the owners of that portion of land upon which the defendants had constructed the hotel building, and witness for plaintiff admitted that the plaintiff had got record of the property of the private estate and all the properties of the private estate were mentioned in that record but the plaintiff failed to produce such record, *held*, an adverse inference could be drawn against the plaintiff that had such record been produced it would not have supported the plaintiff's case: A.I.R. 1994 Sikkim 6 (D.B.).

A presumption as to coparcenary property can be raised only if the land is found standing jointly in the name of the two brothers in the first settlement because no previous record is available. No such presumption can be raised from the entries in the subsequent settlement or the *jamabandi*. Where the respondent contended that the suit property was coparcenary property and in support of said claim the entries in *jamabandi* were relied upon although more than fifty years record prior thereto was in existence which could positively show whether the disputed land had devolved on the two brothers from their father or not, *held*, non-production of the earlier record itself gave rise to the strong presumption against the ancestral nature of the property: 1983 Rev.L.R. 482 (P.&H.).

Where the sale of a house built on the allotted land of the vendor was impugned by his surviving family members on the ground that the land was allotted not merely to the allottee but also to his family members who had also contributed funds for the construction, *held*, it was for the vendee who did not cross-examine the vendor's witnesses on these points to prove the *patta* and the allotment order to show the conditions of allotment which the vendee, claiming to be a purchaser from the late vendor for valuable consideration, as he must have received all such documents: A.I.R. 1994 Gau. 99.

Where in a suit by a member of a joint Hindu family challenging an alienation made by the manager for the discharge of certain alleged debts, proof about the non-existence and the non-payment of those debts is in possession of the joint family of which the plaintiff is a member, he cannot be allowed to take advantage of the abstract doctrine as to the onus of proof and conceal from the Court the evidence which should have been in his possession and which would assist the Court in arriving at a correct decision: A.I.R. 1950 East Punj. 272.

Where to support the minority of the appellant on material date scholar's register, opinion of civil surgeon and statement on oath supported by evidence of his elder brother were produced but horoscope or kutumb register were not shown, *held*, an adverse inference under S. 114, *Illus.* (*g*) could

be drawn only if it was established that the appellant was in possession of those documents and he deliberately failed to produce them. [A.I.R. 1961 S.C. 1277, Rel. on]: A.I.R 1977 All. 319: (1977) 3 All.L.R. 272: 1977 All.W.C. 217.

Non-production of a file by the authority having custody thereof raises an inference that if produced it would have spoken against the Government: 1975 Lab.I.C. 774 (J.&K.).

The confidential reports submitted by the Life Insurance Corporation's medical examiners in respect of the health of the insured are accepted as true; the ordinary presumption is that they had examined the proposers carefully and thoroughly in accordance with the questionnaire unless the Corporation establishes that the medical examiner had prepared a false record or the insured had fraudulently suppressed the material facts about his health of which he was aware: A.I.R. 1971 Andh. Pra. 41 (D.B.).

A statutory notice under S. 34(1)(*a*) of the Income-tax Act, 1922 presupposes that the Income-tax Officer had reason to believe, which could only be based on sufficient material before him, and not a mere vague feeling, and that reason could be presumed to exist; but where despite the assessee's demand during assessment as well as the writ proceedings, the Income-tax Officer's report to the Central Board of Revenue was not produced and in the writ proceedings the Department stated on affidavit that the report was missing from the Board's file and no explanation was offered for non-production of its copy in the Income-tax Officer's file, *held*, an adverse inference could be drawn against the Department. [(1969) 2 I.T.J. 238 (Del.), Affirmed; A.I.R. 1971 S.C. 730; A.I.R. 1971 S.C. 2451, Rel. on]: A.I.R. 1974 S.C. 478: (1974) 3 S.C.C. 581: (1974) 3 S.C.R. 102.

Claim for damages for non-delivery of goods—Starting point of limitation—Onus—Non-production of evidence—Presumption under S. 114(*g*), Evidence Act: A.I.R. 1964 Cal. 362.

Goods carried at owner's risk—Damages to goods in transit—Suit for damages—Evidence to show how goods are dealt with in course of transit—Burden of proof: A.I.R. 1964 Punj. 147.

Breach of contract—Date when damages became due—Suit for damages for non-delivery of cotton seed produced in one season in defendant's mill—Date of performance of contract postponed till date of breach by defendant's own conduct—Plaintiff held entitled to damages on the basis of price on date of each—Total production of cotton seed in that season—Court held entitled to accept plaintiff's estimate and draw adverse presumption against defendant for his failure to produce best evidence—Clause in agreement inserted after its execution—No proof of acceptance by party put in disadvantage—Effect: 1964 M.P.L.J. 848: 1962 Jab.L.J. 646: A.I.R. 1963 Madh. Pra. 197.

R's claim that he was adopted son of *S*—Question if tying turban ceremony was done on *R*—Claim of opponents that "Thikana", record should have been produced—Practice of noting down in "Thikana", name of person on whose head turban is tied, not shown—Adverse inference is not justified: I.L.R. (1965) 15 Raj. 529: 1965 Raj.L.W. 168.

61. Refusal to submit to medical examination.—Where a party refuses to submit to a medical examination in a case where the whole case depends on the state of his mind and body, it is open to the Court to draw an adverse inference or presumption against the recalcitrant party. Thus, where in a divorce petition on the ground of unsoundness of mind of the husband, he failed to go to the Mental Hospital for his examination, *held*, an adverse inference could be drawn against him for such refusal. [A I R 1963 Guj. 250, Rel. on]: A.I.R 1972 P.&H. 270.

Where the wife in a petition for divorce on the ground of insanity under S. 13(1)(*iii*) of the Hindu Marriage Act, 1955 did not have money for her medical examination to ascertain the extent and magnitude of her mental disorder and the husband did not carry out his obligation to bear the expenses therefor, *held*, no adverse inference could be drawn against her for her failure or inability to adduce medical evidence: A.I.R. 1994 N.O.C. 330 (Madh. Pra.).

Where in a divorce petition under S. 13 (1) (*iii*) of the Hindu Marriage Act, 1955 on the ground that the wife was suffering from schizophrenia, though she had already been medically examined twice but the husband contended that as the wife was reluctant for

another medical examination an adverse inference could be drawn against her, *held*, the Hindu Marriage Act does not compel the wife to subject herself to repeated medical examination, so there was no question of drawing any adverse inference. [A.I.R. 1971 Cal. 1 (S.B.), Disting.]: A.I.R. 1982 Cal. 138 (D.B).

Where defendant-husband contended that the marriage between him and the plaintiff was really consummated and, therefore, the latter could not claim dissolution of marriage under the Dissolution of Muslim Marriages Act, 1939 and the defendant filed a petition for the examination of the plaintiff by a doctor to ascertain whether she was *virgo intacta* but she refused to submit herself to such an examination, *held*, merely because the plaintiff did not agree to a medical examination by a doctor adverse inference could not be drawn as the result of such an examination would not be sufficient to unerringly establish that she was not a *virgo intacta*.[A.I.R. 1950 Lah. 45, Rel. on]: (1988) 2 Hindu L.R. 775 (Ker.).

Where in a divorce case under S.19 (1) of the Divorce Act, 1869 on the ground of the wife's impotency, the husband testified that the wife had persistently exhibited an invincible repugnance to consumate the marriage and the wife refused to be examined by a Court-appointed medical expert, *held*, an unfavourable inference against the wife could be properly drawn; the husband's positive evidence of her impotency could be taken as true. [A.I.R. 1921 Cal. 459, Rel. on]: A.I.R. 1971 Cal. 1: (1970-71) 75 Cal.W.N. 168 (S.B.).

Impotency of wife—Ground of complaint in a suit—Prior examination by a medical practitioner—Refusal to be re-examined pending suit—Adverse inference—Permissible. *See* A.I.R. 1952 Sau. 44.

Where the party against whom charges of impotency were made refused to submit to a requisite medical examination, *held*, an adverse inference against that party could be drawn. [A.I.R. 1977 P.&H. 97; A.I.R. 1966 All. 150, Rel. on]: 1994 Mah.L.J. 1513 (D.B.); (1991) 2 Hindu L.R. 233 (P.&H.).

Where in a petition for nullity of marriage by husband on the ground of impotency of wife, the wife refused to submit herself to cross-examination when asked to at the end of cross-examination and the husband failed to make any application and obtaining an order to get the wife medically examined, *held*, no adverse inference could be drawn against the wife for her alleged refusal to submit herself to medical examination: A.I.R. 1982 N.O.C. 252 (Ker.). *See* also note 92, *infra*.

62. Income.—(*See* also S. 106, Note 15). Where in a suit for maintenance, inspite of the order of the Court, the defendant-husband failed to produce documents regarding his income and further he also failed to file an affidavit that he was not in possession of any such documents, *held*, an adverse inference could be drawn against him to the effect that if the said documents were produced, they would go against him: A.I.R. 1985 Guj. 187: (1985-1) 26 Guj.L.R. 374: (1985) 2 Hindu L.R. 29; A.I.R. 1987 Raj. 159: (1987) 1 Raj.L.R. 481: 1987 Raj.L.W. 363: (1987) 2 Hindu L.R. 267.

63. Election record.—Corrupt practice—Publication or distribution of certain leaflets—Non-production of leaflets—No adverse inference can be drawn against production: I.L.R. 38 Pat. 1007: A.I.R. 1961 Pat. 41.

Where in an election petition respondent denied that he or his party had printed a certain pamphlet containing false allegations against the petitioner and distributed them at meeting and his witnesses admitted in their evidence that the party and its officers maintained proceedings of work done such as printing and publishing of leaflets, holding of meetings, etc., *held*, the respondent in view of the evidence of his witnesses should have proved his denial by producing the proceeding in evidence. When the respondent failed to produce them the Election Tribunal was justified in drawing an adverse inference against him: A.I.R. 1958 Ori. 228.

Where in an election petition a witness testified that he had printed the offending leaflet against another candidate as per the returned candidate's letter received through the returned candidate's election agent and though there was a ring of truth in that testimony, the returned candidate chose not to contradict it by the evidence of his election agent, *held*, it could be presumed that the election agent, if examined, would not have supported the returned candidate: A.I.R. 1976 S.C. 2169.

Where a handbill purportedly got printed at a press mentioned therein by one Aziz was denied immediately by the press as having been printed by it and no steps were taken during the trial of an election petition to summon the original matter from the printer or the printer itself, *held*, the repudiation by the press did not explain the want of proper steps at the right time and negligence or wilful default at the trial by the election petitioner; the adverse inference must be drawn against the petitioner for non-production of evidence: A.I.R. 1984 S.C. 960: (1984) 3 S.C.C. 346.

Where the appellant-election petitioner could not contest the election as his nomination papers were rejected by the returning officer on the ground of late presentation of nomination papers whereas the appellant contended that his nomination papers were presented within time but he failed to produce, serial number of the nomination paper, the name of the candidate, the name of the constituency, the date and time of presentation of the nomination paper and the date and time fixed for its scrutiny *held*, non-production of that receipt by the appellant could be taken as a circumstance against him and it could be concluded that the nomination papers were filed after the expiry of the time prescribed for them: A.I.R. 1980 S.C. 701: (1980) 1 S.C.C. 713: (1980) 2 S.C.R. 501.

Where the election petition alleged that voters were threatened with divine displeasure at a meeting but neither the material witness nor the notes of the meeting were produced in the trial Court, *held*, adverse inference was rightly drawn against the petitioner: A.I.R. 1974 S.C. 1957: (1972) 1 S.C.C. 826: (1972) 3 S.C.R. 955.

Where in an election petition, the petitioner placed reliance on record-of-rights for proof of his caste and religion but did not produce the same, though it was with him, *held*, the record-of-rights undoubtedly was an important document to prove his caste and religion, but the same had been withheld from the Court for which adverse inference had to be drawn against him: A.I.R. 1986 Ori. 255.

Where in an election petition against the successful Sarpanch of a *gram panchayat*, a party summoned "used ballot papers" from the Block Development Officer who only remitted the counterfoils and not the used ballot papers, *held*, no adverse inference against the party summoning the used ballot papers could be drawn for their non-production; it was for the Court to enforce their production if it found them to be necessary: (1983) 1 An.W. R. 147.

64. Non-production of evidence by Railways.—The initial burden lies on the Railway Administration to show that it took the requisite care as a bailee of the goods under S. 151 of the Indian Contract Act. Where, therefore, in a case relating to compensation arising out of loss of two consignment of cotton due to fire in the wagon, the Railway Administration produced witnesses to show that every effort was made to quell fire but did not produce primary evidence in the form of records maintained by the Railway Administration which would have thrown sufficient light on the question involved, *held*, primary evidence having thus been withheld, it is open to the Court to draw a presumption adversely against the Railways under S. 114 (*g*): A.I.R. 1971 All. 531: 1971 All.L.J. 116 (D.B.)

Where Railways did not produce tranship-ment register despite demand and the manner of handling consignment during transit was also not furnished, *held*, adverse inference may be dawn against Railways: (1981) 2 M.P. W.N. 55.

When goods are carried at the Railway risk, the special facts and circumstances under which the consignment was handled are only known to the Railway Administration, and, therefore, it is for them to place that material before the Court for forming its opinion on the question whether it had taken as much care of the goods as is required of them. Non-production of record by Railway Administration justifies the raising of an adverse inference against them: A.I.R. 1971 Madh. Pra. 131. *See* A.I.R. 1957 Nag. 59.

Where in a suit against a Railway for compensation for non-delivery, the unloading register maintained by the Railways and which would throw light on the question whether the goods were not received by the Railways, is not produced by the Railways an adverse inference has to be drawn against the Railways: I.L.R. (1955) Mys. 444: A.I.R. 1955 Mys. 123.

Consignments delivered to a Railway, may have to travel on Railways of two or three different Administrations. There are numerous cases in which goods are lost or damaged. There are cases also in which goods go astray. They may deviate from the course and may not be traced for years. In these circumstances, it is not safe to presume that a particular consignment was received intact, first by the E.I. Railway, then it was handed over intact by the E.I. Railway to the East Bengal Railway, and then brought by the East Bengal Railway to the Assam Railway: I.L.R. (1957) 9 Assam 1: A.I.R. 1959 Assam 98.

Goods accepted for carriage—Nature of duty of the Railways—Proof of care taken by it—Mere fact that rain water entered the wagon and caused damage—*Held* would not fix liability on Railways. [A.I.R. 1957 Nag. 59; A.I.R. 1957 Madh. Pra. 157; A.I.R. 1917 P.C. 173, Foll.]: A.I.R. 1970 Madh. Pra. 55.

Loss of goods consigned to Railways—Presumption. *See* I.L.R. (1957) 9 Assam 1: A.I.R. 1959 Assam 98.

Where S.W. pipes consigned at Railways risk rates delivered at the destination were found to be partly damaged but the Railways denied their liability to pay damages in view of S. 77-C of the Railways Act, 1890, *held*, that defence was not available to the Railways as it had not adduced the documentary evidence as to how the goods under their control were dealt with; an adverse inference has to be drawn against the Railways for suppression of material evidence: A.I.R. 1980 Andh. Pra. 78.

Damage or deterioration of goods in transit—Goods sent at owner's risk rate—Still in order to prove negligence or misconduct of Railways the plaintiff may call upon Railway Administration to produce evidence and if it does not produce it Court may infer that if evidence was produced it would have gone against the defendant: A.I.R. 1967 Cal. 133.

Suit for compensation for non-delivery of part of goods consigned and delivery of the rest in damaged condition—Railways, in spite of Courts direction not producing relevant papers and correspondence which would be of assistance in deciding the question whether the Railway Administration had knowledge of the claim for damages within the period of limitation—*Held*, that the presumption was against the Railways and that it was to be assumed that the claim came to their knowledge within the period of limitation: A.I.R. 1955 Assam 221.

Consignment booked at owner's risk rate—Damages to goods in transit—Responsibility of Railways—Negligence on the part of Railway Administration or its servant must be proved—Disclosure as to how consignment was dealt with in course of transit—Railways not bound to disclose where Cls. (*a*) and (*b*) of S. 74-D are not applicable—No disclosure sought for by plaintiff—Adverse inference cannot be drawn against Railways: A.I.R. 1970 Pat. 182: 1969 Pat.L.J.R. 399: 1969 B.L.J.R. 871.

Consignment sent under risk note Z—Non-delivery—Suit for damages—Duty of Railway to disclose how consignment was dealt with in transit—Extent of—Failure to make full disclosure—Effect of—Plaintiff when required to prove misconduct: A.I.R. 1965 S.C. 1755.

Suit for damages for loss of goods against delivery by Railway—Burden is on plaintiff to prove loss on its lines—Request for production of documents relating to the goods in possession of defendant-Railways—Non-production—Presumption under S. 114 (*g*), Evidence Act arise—For ends of justice case remanded for such production: 1963 Ker.L.T. 444.

Suit for damages for non-delivery of part of consignment—Consignor alleging negligence on part of Railways and calling for handbooks of Watch and Ward Department at certain stations—Handbooks not produced in spite of Court's notice—*Held*, that though the non-production of the handbooks, was susceptible in law to an adverse inference against the Railway Administration on the facts of the case there was no scope for drawing that inference: A.I.R. 1957 Pat. 147.

Goods booked under Railway risk—Liability of Railway Administration—Loss of goods—Onus of proof. *See* A.I.R. 1957 Cal. 190. Risk note *B*—Non-disclosure of information contemplated by risk note prior to filing of suit—Presumption—If can be raised: *See* 1956 An.W.R. 994.

Where silver bars consigned through the Railways after declaration of the contents and their value were not delivered at the

destination and the risk note exempted the Railways from liability for loss, destruction or deterioration of the consignment, *held*, the Railways was bound under the law to disclose how the consignment was dealt with at different stages, being within its special knowledge: on its failure to make such disclosure, an adverse inference could be drawn against the Railways as the Railways had pleaded that the consignment had been delivered through the misconduct of its servants to a third party without production of the railway receipt; Railways is liable for the loss: A.I.R. 1975 Cal. 203 (D.B.)

Where cotton unloaded on the platform was not removed to the shed and was damaged by fire within the transit period and the Railways denied negligence by ascribing it to sheer accident and pleaded having taken fire-extinguishing measures when fire had almost spread to all the bales, *held*, the three essential ingredients of the maxim *res ipsa loquitur* were satisfied, and read with S.114 (*g*), the Railways were liable for the loss: for the liability rested on them to prove that they were not negligent: the facts being within their special knowledge, the burden of proof lay upon them: (1977) 90 Mad. L.W. 438.

Where the newly cleared goods of the consignee was stacked on the platform outside the shed with his consent due to non-availability of the space inside the shed as the consignee's other goods were already lying there and the consignee had posted his own watchman to guard his goods and the consignee had been asked more than once to take delivery of the goods, *held*, for any damage caused to such goods by fire, the railway could not be made liable: A.I.R. 1981 Mad. 162: (1981) 94 Mad.L.W. 7.

Where goods in the course of transshipment from the narrow to the broadguage by the Railways caught fire and were destroyed and the Railways did neither produce the departmental enquiry held by it to ascertain the cause of fire nor any witness to depose that it had exercised all reasonable care and caution in dealing with the goods, the onus whereof lay on it, *held*, not having discharged the onus, the Railways was liable to compensate for the loss of goods: A.I.R. 1971 Mad. 53: (1970) 83 Mad. L.W. 251: (1970) 2 M.L.J. 212 (D.B.)

Where the consignment of fresh plantains took four days to arrive at the destination as against the normal time of three days, *held*, it is for the Railways to prove, that being within its special knowledge, as to how and in what circumstances the consignment took one extra day; upon the Railways' failure to do so, the Court could properly raise an adverse inference against the Railways.[A.I.R. 1964 Punj. 147, Rel. on]: A.I.R. 1976 Del. 236: I.L.R. (1976) 1 Del. 436:1976 Rajdhani L.R. 278.

Where a consignment of mangoes took 13 days instead of the usual 5/6 days to arrive at the destination and the mangoes were thereby damaged, and the Railways attributed the delay to the guards strike but the evidence showed that the strike was no cause of delay and the Railways had no explanation for delay, *held*, the damage was occasioned by the Railway's negligence. [A.I.R. 1959 Cal. 337; A.I.R. 1957 Cal. 190, Foll.; A.I.R. 1951 Assam 173, Dissent. from]: A.I.R. 1971 Cal. 347.

65. *Illustration* (*g*)—Illustrative cases.—Discretionary and mandatory part of statute—Obligation to summon witness under mandatory part—Court if can rely on presumption under S. 114, *Illus.* (*g*), Evidence Act: A.I.R. 1958 All. 439: 1958 Cr.L.J. 716.

As it is a well established rule of evidence that a party should put to each of its opponent's witness so much of his case as concerns that particular witness, *held*, if no such questions are put, the Courts presume that the witness account has been accepted: A.I.R. 1992 P.&H. 252.

Adverse inference—Parties filing affidavits but not obtaining orders for discovery of documents against each other—Adverse inference against both parties would destroy inference against each—No adverse inference drawn: (1968-69) 73 Cal.W.N. 279.

Affidavit filed in support of application—Duty of other party to challenge correctness of allegations in affidavit—Other party merely stating that allegations were untrue—Not sufficient—Allegations not contested—Presumption: 1962 All.L.J. 495: A.I.R. 1962 All. 407.

The presumption of adverse inference cannot displace the contrary inference supported by adequate evidence: (1962) 1 M.L.J. 193: A.I.R. 1962 Mad. 219.

Adverse inference—Duty of Court or *quasi* judicial body to produce record called for—Failure to comply entitles Court to

draw adverse inference: 1970 Lab.I.C. 506 (J.&K.).

Where the High Court had drawn adverse inference against the appellants for non-examination of material witness and for non-production of some documents (which might and ought to have been produced by them) and for the absence of any attempt on their part in that behalf and this was done by it notwithstanding the fact that the Tribunal chose not to do so, being of the opinion that it was unnecessary, *held*, that what the High Court had done was amply justified in the circumstances of the case: A.I.R. 1960 Cal. 92: 20 E.L.R. 325.

Machines alleged identical or deceptively similar—Alleger not allowing inspection of machines—Adverse inference can be correctly drawn: (1964-65) 69 Cal.W.N. 947: A.I.R. 1965 Cal. 417.

Official maps generally unobtainable—Government producing most of the maps relied upon—Maps directed to be kept on record for inspection of parties—No suppression of evidence and no adverse inference can be drawn: A.I.R. 1965 Cal. 282.

Determination of paternity between parties—Party refusing to give blood—Adverse inference cannot be drawn: A.I.R. 1968 Bom. 388.

Allegations of insolvency denied by company—Company failing to disclose assets and liabilities—Presumption of commercial insolvency if can be raised: (1967) 1 Comp.L.J. 172 (Cal.).

Where a Vigilance Inspector employed in the Railways sued for recovery of rent deducted from his pay being illegal on the ground that as per Railway Board letter quarters allotted to the anti-corruption staff were rent free but neither the letter nor proof of its contents nor any other material on record showed that the plaintiff's post was equivalent to the posts covered under the Board letter, *held*, no presumption could be raised in respect of any of these points: 1974 Lab.I.C. 604.

Export of moist iron ore—Unilateral assessment after delay of two years—Levy of duty—Analysis report of Government though obtained by Custom Authorities, no copies thereof submitted to the exporter—Non-supply of copy amounts to violation of principles of natural justice—Refusal of Custom Authorities to produce report in Court—Adverse inference is to be drawn against Authority that, if produced, it would be against Authorities: 1983 Tax. L.R. 2164 (Goa).

Where a party failed to prove that he had the necessary funds to purchase the property *benami*, the burden of proof necessarily lay upon him, he cannot ask the Court to draw an adverse inference against the *benamidar* on the latter's failure to appear in the witness box to prove the source of the consideration paid for the property; in a litigation it is only when there is a necessary prevarication or statutory obligation to give evidence that a party is expected to do so: A.I.R. 1975 Mad.95: (1975) 1 M.L.J. 47 (D.B.).

Where mortgagee who continued in possession of the impugned property contended that he had purchased the property at an auction sale conducted by the Collector and thereby he became the owner but the best evidence, namely, the notification to conduct sale for arrears, the sale proceedings and the certificate of sale were not placed on record, *held*, an adverse inference could be drawn that the mortgagee was not the owner of the property in question: A.I.R. 1992 S.C. 2009.

Where the respondent-wife failed to file reply to the application made by the appellant-husband for recission of the decree or judicial separation granted in her favour, but the parties led their evidence and, therefore, had full opportunity, *held*, no adverse inference could be drawn against the wife for her alleged failure to file reply to the petition made by her husband: (1989) 1 Hindu L.R. 160 (Madh. Pra.).

Where a complaint against an Ex-Chief Minister alleging corruption was quashed by the High Court in writ petition filed by the accused on the ground that no written statement was filed by the State Government in reply to the writ petition, *held*, no adverse inference could be drawn on the mere non-filing of a written statement by the State when the matter related to serious disputed facts, yet to be investigated. [(1990) 8 Punj.L.R. & S. 62, Reversed]: A.I.R 1992 S.C. 604: 1992 Cr. L.J. 527.

Where S. 102 (2) of the Punjab Gram Panchayat Act, 1953 admittedly provided for only one enquiry into embezzlement charges against the Sarpanch but a second enquiry

was instituted after the first enquiry officer had exonerated him on the basis of evidence, and the Sarpanch further contended that he was not furnished copy of the exonerating order, despite application, and the Government also choose to keep back that order from the writ Court, *held*, a presumption could properly be raised that the order, if produced, would have gone against the Government; second enquiry struck down as incompetent. [1971 Punj.L.J. 456; 1972 Punj.L.J. 353, Foll.]: A.I.R. 1991 P.&H. 23.

Where the accused charged with bribery alleged that complainant thrust the currency notes into his pocket against his will but against which he had not protested or preferred any complaint about such assault and further without offering any explanation of facts and circumstances appearing against him merely remained content with false denials, such a conduct of the accused could not be taken to indicate his innocence. More so, when the accused was not an ignorant or helpless man, but a Government servant possessing considerable self-confidence and intelligence.

False denials of an accused person can be considered in arriving at an adverse inference against him, although by themselves and individually, like mere silence of an accused person, they cannot have a very damaging effect. However, it is not correct to say that silence of the accused cannot at all be taken as a corroborative circumstance. The decree of weight to be attached to the silence of the accused depends on the nature of each case: 1968 Cr.L.J. 391 (All.).

Where the trial Court and the High Court in appeal concurrently found that the cheque book, out of which a cheque for Rs. 50,000 had been encashed, was neither entrusted to, nor stolen by, the accused which left the only possible alternative of the cheque having been drawn and signed and given by the complainant himself to the accused, *held*, the High Court could not have set aside his acquittal and convict him under S. 471 of the Indian Penal Code even if the explanation offered by the accused was not convincing; no adverse inference against the accused could be drawn; conviction set aside: A.I.R. 1979 S.C. 1506.

Board of Directors empowered to make loans by means of resolution—Whether there was such resolution—Burden is on company and not on lender—Non-production of book of resolution—Inference is against company: A.I.R. 1967 Cal. 75.

Land acquisition proceedings—Affidavits—Proposed acquisition impugned as in colourable exercise of power—Respondent is required to disclose relevant material: (1966-67) 71 Cal.W.N. 499.

Income or capital—Burden of proof and shifting of onus—It is for the Revenue in the first instance to establish that particular receipt is income liable to tax—Burden shifts on to assessee when sufficient evidence either direct or circumstantial is disclosed by Revenue—Assessee failing to put before Department material in his exclusive possession—Adverse inference can be drawn against assessee: (1966) 1 M.L.J. (S.C.) 134: A.I.R. 1966 S.C. 1325.

***Illustration* (*h*)**

66. Refusal to answer.—Presumption from refusal to take oath. *See* 2 C.L.R. 476; I.L.R. 22 Bom. 680. Persons accused of an offence may not have a very satisfactory explanation to offer for the circumstance in which they were found and they may prefer to say nothing. One cannot in all cases draw an adverse inference from the fact that the persons accused refused to give their account of what happened: A.I.R. 1937 Rang. 516.

***Illustration* (*i*)**

67. Document in obligor's possession.—Where the mortgagor has produced the mortgage-deed with the stamps punched in the ordinary way, such production would raise a presumption that it had been paid up, but it would not help to prove that it had been paid before a particular date: 144 I.C. 175: A.I.R. 1933 Rang. 61 (2). [I.L.R. 29 Cal. 344 (P.C.), Rel. on]. Presumption of discharge of mortgage arising from the mortgagor's possession of the mortgage bond when rebutted: A.I.R. 1927 P.C. 561: 53 M.L.J. 205 (P.C.); 103 I.C. 481; 121 I.C. 730. Strength of presumption: 29 Nag.L.R. 298: A.I.R. 1933 Nag. 379.

Where the mortgagee sued for possession of the mortgaged property in a mortgage with conditional sale proving for redemption within 1 year and where despite averment to the contrary in the deed, the possession remained with the mortgagor who had also the original deed with him, *held*, the

mortgagee's remedy was not a suit for possession but for redemption; presumption under S. 114 (*i*) is available to the mortgagor; the suit for possession would lie only after the suit for redemption has been decreed: A.I.R. 1988 Guj. 110. *See* also 1978 Jab.L.J. (Note) 63.

Though the Court may presume that when a document creating an obligation in the hands of the obligor is produced by him into the Court, the obligation has been discharged; but the Court at the same time can have regard to the other facts to find out whether the said maxim applies or not; the Court is not bound to draw the presumption straightway; if it finds that the document has come into the possession of the obligor, in suspicious circumstances or he might have stolen it, the Court may refuse to draw the presumption. The initial burden of proof of discharge is on the defendant; it can be discharged by proof of payment. Where the evidence of both the sides is not satisfactory, the Court may resort to the presumption, but where the evidence of the plaintiff is more convincing than that of the defendants, the Court must decide on its appraisal, and not on the presumption: (1973) 2 An.W.R. 21.

Where the mortgagee of a registered mortgage deed endorsed on its back that he had received the principal but given up the interest accrued and delivered the deed to the mortgagor, *held*, the endorsement on the back of the deed, unregistered, was inadmissible both for want of registration as well as under S. 92, proviso (4). S. 114 is also of no help; the deed being in possession of the mortgagor merely raises a presumption which may be rebutted; it does not prove that the deed had been fully satisfied. [A.I.R. 1952 S.C. 153, Rel. on; A.I.R. 1929 Mad. 794; A.I.R. 1931 Mad. 636; A.I.R. 1926 Cal. 170; A.I.R. 1930 All. 721 (F.B.) held not good law in view of A.I.R. 1952 S.C. 153]: A.I.R. 1977 Mad. 298: (1977) 90 Mad.L.W. 248: (1977) 1 M.L.J. 528.

Presumption in other cases

68. Accident.—(*See* also Note 56, *supra* and Note 93, *infra*). Rash and negligent driving in accident—Presumption of negligence: A.I.R. 1968 Madh. Pra. 47.

Maximum—*Res ipsa loquitur*—Principle underlying the maxim: I.L.R. (1962) Bom. 797: A.I.R. 1963 Bom. 144.

Direct nexus between death of person and rash and negligent act of accused is essential—Evidence on record showing that accused had been seen driving for about six months to a year and that he had driven jeep to various places a day previous to occurrence accused having only a learner's licence—*Held*, on the basis of facts found accused could not have been held guilty under S. 304-A—There was no presumption in law that a person who possessed only a learner's licence or possessed no licence at all did not know driving: 1968 Cr.L.J. 1013: A.I.R. 1968 S.C. 829; 1971 Ker.L.T. 761.

The general rule under the Act is that the burden of proving negligence in a case of accident lies on the party who alleges it but that party is certainly entitled to take advantage of presumptions to lighten that burden. Such presumptions as laid down in S. 4 are of three types: (*i*) permissive presumptions or presumptions of fact; (*ii*) compelling presumptions or presumptions of law (rebuttable); and (*iii*) irrebuttable presumptions of law or "conclusive proof" "Presumptions of facts" are inferences of certain fact patterns drawn from common experience and observation, constitution of human mind, springs of human action, usages and habits of society and ordinary course of human affairs. S. 114, a general section, deals with presumptions of this kind. The Court is not bound to draw a presumption of facts; it has to exercise its discretion in each case. Thus, even in an action in torts, if the defendant adduces no rebutting evidence but offers reasonable explanation, equally consistent with the presence as well as absence of negligence, the presumptions or inferences based on *res ipsa loquitur* will cease to exist; the burden of proving the affirmative, will still lie with the plaintiff; and it will be for the Court to determine at the time of judgment whether the proven or undisputed facts, as a whole, disclosed negligence: A.I.R. 1979 S.C. 1848: (1979) 2 Karn. L.J.(S.N.) 73.

When a Motor Vehicle Accident Claim Tribunal is confronted with the vexed controversy of apportioning blame, amongst the two vehicles involved in the accident, it is clearly the duty of both parties to place before it the best evidence available. A party may refrain from doing so, but only on peril of an adverse inference being drawn against it. [A.I.R. 1976 Ori. 224, Foll.]: A.I.R. 1985 P.&H. 347.

Neither the high speed nor the non-blowing of horn on a road where it is prohibited by traffic rules nor the knocking down or causing the death by accident by themselves, *held*, justify raising presumption of rashness and negligence on the part of the vehicle driver; there must be acceptable evidence of rash and negligent driving but also that it was the proximate and direct cause of death in a prosecution under S. 304-A of the Indian Penal Code. [A.I.R. 1968 S.C. 829, Rel. on]: A.I.R. 1971 Bom. 164: (1970) 72 Bom. L.R. 492: 1970 Mah. L.J. 763.

Where a motor accident was not occasioned by the collision of two vehicles but involved only a single vehicle and the plea of sudden failure of lights in the foggy weather was not established, *held*, the maxim *res ipsa loquitur* was attracted; the negligence of the driver can be presumed; the judgment may be based thereupon: A.I.R. 1994 N.O.C. 308 (Him. Pra.) (D.B.).

When an accident was caused because of a fit of epilepsy suffered by the driver of a Himachal Road Transport Corporation bus and the defence "*res ipsa loquitur*" and "inevitable accident" was set up by the Corporation and it was found that the driver was employed hardly about 19 or 20 days earlier on production of medical fitness certificate issued by the Chief Medical Officer and, thus, the Corporation could not be attributed the knowledge of the driver's ailment prior to his employment though he was subsequently terminated for that illness, *held*, the Corporation's defence was not established; it neither placed on record the driver's driving license nor his medical fitness certificate; the burden upon the Corporation being heavy it was under an obligation to bring on record of its having taken all due care, as a prudent employer, to ensure that it was entrusting the bus carrying passengers to a person who was capable in all respects to drive it, especially when the driver had attributed the accident to his being over-worked and disclaimed being an epileptic: A.I.R. 1991 Him. Pra. 73.

Where a claim petition under S. 110-A of the Motor Vehicles Act did not disclose the full facts and circumstances resulting in the accident and the injuries, *held*, such intentional non-disclosure would enable the Court to draw an adverse inference against the petitioner: A.I.R. 1982 Him. Pra. 50: 1982 Sim.L.C. 24.

Where the vehicle involved in the accident was driven by the driver in employment of the vehicle owners and there was no evidence to show that he had taken the vehicle in an unauthorised manner, *held*, the driver would be presumed to be driving the vehicle in the course of his employment: A.I.R. 1982 Him. Pra. 89: 1982 Sim.L.C. 185.

Where an insurer in a motor accident claim case insists that its liability is limited to the statutory limits set out in S. 95 (2)(*b*) of the Motor Vehicles Act, 1939, *held*, it is for the insurer to produce the policy and show that its liability is not unlimited. [(1988) 1 S.C.C. 626, Rel. on]: (1989-1) 37 B.L.J.R. 230; A.I.R. 1987 Ori. 18: (1986) 1 Ori.L.R. 554 [Non-production of the policy has always been held to be a circumstance to draw adverse inference against the insurer.]

Where in a claim case arising out of a motor accident neither the owner of the vehicle nor his Counsel was asked in writing to produce the permit, *held*, no adverse inference against the owner could be drawn for non-production of such permit: A.I.R. 1995 Andh. Pra. 268.

69. Accounts.—(*See* also Note 17, Ss. 101-104, *supra*). The words of S. 114 are general and there is no reason why a Court should not invoke the aid of that section in proper cases and raise a presumption as to the genuineness of old accounts even when they are unsigned if they come from proper custody and appear to have been kept regularly regard being had to the common course of private business: (1943) 45 Punj.L.R. 441: A.I.R. 1944 Lah. 58.

Where the entry in account books supports rather than rebuts the contention of the party producing the books that the payment of the amount was made on the date of the entry and not on the previous night, there is no reason why in the absence of any evidence to the contrary, the Court should assume the payment to have been made on a previous night and entered next morning under that date. The payment must be held to have been made on the date on which it was entered: I.L.R. (1958) Andh. Pra. 844: A.I.R. 1959 Andh. Pra. 103: (1958) 2 An.W.R. 556.

Entries made in the regularly maintained account books of a nationalised company which have also been proved by its accountant, *held*, are perfectly reliable evidence: A.I.R. 1985 Ker. 262 (D.B.).

Regularity of accounts—Money-lender's accounts—No presumption that they are fabricated: (1958) 1 M.L.J. 93.

Question of fact—Relevancy and sufficiency of evidence—Account book, entries in—Absence of evidence regarding account books being kept in course of business and the entries being made at the time of transaction—Rejection of evidence in first appeal—Finding cannot be interfered with in second appeal: I.L.R. (1963) 13 Raj. 1137: A.I.R. 1964 Raj. 88.

Where the claim of being in exclusive possession of a property was based on entries in the revenue records but none of the witnesses had accepted the responsibility of testifying to the correctness of the account books of the joint family and no other important documents were produced in support of the account books, *held*, the account books were liable to be rejected: A.I.R. 1989 S.C. 1269: (1989) 2 S.C.C. 630: (1989-2) 30 Guj. L.R. 1051.

Where in a suit for recovery on an agreement of sale, the Court found several discrepancies in the evidence and account books and several erasures and over-writings in the purchase register produced by the defendant but not connected with suit transaction, *held*, the suit could not be decreed on such suspicious circumstances; the plaintiff must discharge the primary burden of proving his case: A.I.R. 1978 N.O.C. 280 (Cal.).

70. Adoption.—(*See* also Note 19, Ss. 101-104, *supra*). Proof of adoption—Onus—Lapse of long period—Presumption arises as to its regularity: 1960 M.P.L.J. 424.

A registered adoption deed raises a presumption of valid adoption. This presumption is rebuttable, no doubt, but not by mere conjectures or discrepancies in evidence of little or no consequence; it is the totality of the circumstances and the evidence on record that must be taken into account and weighed in deciding whether such presumption stands rebutted: A.I.R. 1990 P.&H. 220: (1989) 2 Rev.L.R. 270: (1989) 2 Hindu L.R. 199.

The presumption of the validity of the adoption of a Hindu made long back where the family had recognised him as the adopted son may be raised but where the adoption is not old and its validity is challenged on the ground of the adopting father and the natural mother being within prohibited degree, no such presumption is permissible; on facts, the adoption of the brother's daughter's son is not invalid; the bar of the rule extends only to the adoption of (*i*) the daughter's son (*ii*) the sister's son and (*iii*) the mother's sister's son. [A.I.R. 1962 S.C. 351; A.I.R. 1962 S.C. 356; A.I.R. 1958 Andh. Pra. 693; I.L.R. 32 Bom. 619, Rel. on; A.I.R. 1958 Pat. 233; A.I.R. 1963 All. 509, no longer good law]: A.I.R. 1985 Raj. 55.

After a long lapse of years, it is likely that eye witness evidence of adoption may not be available and become difficult to find, thus, if the party alleging adoption adduces some evidence of the factum of adoption it may be regarded as sufficient to shift the burden on the opposite party; in cases of old adoption, a presumption of validity of the adoption is naturally drawn from the status of the adopted son in the adopting family and its recognition by the family members over the years: A.I.R. 1976 Raj. 40: 1976 Raj. L.W. 14: 1975 W.L.N. 931.

S. 6 of the Hindu Adoption and Maintenance Act, 1956 enacts a special provision that the Court shall presume, whenever a registered document purportedly recording an adoption and signed by the persons giving and taking the child in adoption, is produced before it that the adoption has been made in compliance with the Act unless and until it is disproved. On the proof of the three basic conditions, the mandatory presumption must be raised; and it would relate to the factum and validity of the adoption: 1982 Hindu L.R. 36 (Madh. Pra.) (D.B.).

Adoption—Recognition of adopted person by members of family for over fifty years—Strong presumption arises in favour of its validity: A.I.R. 1969 S.C. 1359.

Adoption ceremonies—Persons enjoying status of adopted son for nearly 50 years—Presumption: I.L.R. (1938) Lah. 173: A.I.R. 1937 Lah. 626.

Adoption—Recitals in unregistered document 30 years old executed by *S* containing statement that he went in adoption—Document coming from proper custody—Must be presumed to have been executed by *S*: A.I.R. 1968 Andh. Pra. 276.

If a custom of adopting a married male having children in the community of "khateeka" is proved to prevail for a period of 20 to 30 years, it follows that it was ancient, certain and reasonable and it is for the other side who challenges its existence to

lead evidence to the contrary. Thus, the evidence of instances of the duration of 18 to 35 years of adoptions of married males having children in the community of "khateeka" in a certain place is sufficient to prove that this custom was ancient and was also in existence when the adoption in question took place. [A.I.R. 1966 S.C. 605, Foll.]: 1981 Raj. L.W. 61.

Where it was not established that the plaintiff was given and taken in adoption and the deed of adoption was also not signed by the plaintiff's father, *held*, no presumption in respect of registered documents relating to adoption under S. 16 of the Hindu Adoptions and Maintenance Act, 1956 could be raised: A.I.R. 1984 All. 44: 1983 All. W.C. 995; 1979 All. W.C. 564.

71. Adultery.—(*See* also Note 20, Ss. 101-104, *supra*). Where the charge of adultery was founded upon abortion undergone by the wife when the spouses were living together but the husband pleaded no sexual intercourse between them at the relevant time, *held*, there being access and ample opportunity for intercourse, a strong inference of cohabitation between them would arise which a mere denial by the husband could not dispel: A.I.R. 1984 P.&H. 99: 1983 Hindu L.R. 513.

Appreciation of evidence—A man and a married woman, both villagers, found talking in field—Inference of illicit connection when can be drawn: 1967 All.W.R. (H.C.) 352.

Adultery—Proof of: (1958) 2 W.L.R. 110.

Accusation of adultery—Establishment of—Evidence by spouse—Corroboration necessary—Statements of adulteress recorded in Government Maternity Home and Rescue Home registers can be used for corroboration: (1964) 2 Cr.L.J. 685: A.I.R. 1964 Mys. 280.

Where in divorce proceedings, the husband alleged adultery against his wife and stated that the wife was caught while having sexual intercourse with respondent on April 4, 1985 in his parents' house and that parents of the wife were called and apprised of the alleged misdeeds of the wife and they assured that if given a chance, she would mend her ways and the parties lived happily till the middle of May, 1985 when the wife left for her parents' house, *held*, the fact that the parties lived together gave rise to a strong presumption of condonation by the husband A.I.R. 1993 P.&H. 33.

Where a suit is filed under S. 125 of the Code of Criminal Procedure by the wife, generally the opposite party puts in a show cause stating his ground for his refusal to maintain the wife. Even if it is assumed that the opposite party does not take a particular ground *viz.*, that of adultery in his show cause, he should at least in his cross-examination elicit or give out what his defence is so that the other side is not taken by surprise when adducing witnesses to prove that the wife is living in adultery. Thus, where in the cross-examination of the witnesses, there was not even a suggestion that the wife was living in adultery but the defence witnesses were examined to prove that the wife used to live in adultery *held*, as this came as a surprise to the wife, no reliance could be placed on such vague and cryptic allegation of adultery: 1984 Hindu L.R. 790 (Cal.).

72. Adverse possession.—(*See* also Note 22, Ss. 101-104, *supra*). Law is firmly established that a person basing his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to the denial of his title; the *animus* of the pro-pounder of the adverse possession is the most crucial factor: A.I.R. 1986 Mad. 106: (1985) 98 Mad. L.W. 606 (D.B.)

The classical requirements of adverse possession must be *nec vi clam nec precario;* that is, such possession must be adequate in continuity, in publicity and in extent; it must be overt and without any attempt at concealment so that the real owner with due diligence may know as to what was happening: A.I.R. 1986 Mad. 106: (1985) 98 Mad.L.W. 606 (D.B.).

Adverse possession, though commenced in the wrong and aimed against the right, is not shameful; the plea is permitted with the laudable intention of giving quietus to long possession; that is the reason that the Code of Civil Procedure requires a party suing for eviction or possession to *prima facie* show the suit to be in time: A.I.R. 1986 Mad. 106: (1985) 98 Mad.L.W. 606 (D.B.).

Permissive possession does not become hostile till its assertion is brought to the knowledge of the owner; the permissive possession need not be proved by direct evidence but can be inferred from attendant

circumstances; where possession is permissive in its inception it cannot become hostile to its grantor: A.I.R. 1986 Mad. 106: (1985)98 Mad. L.W. 606 (D.B.).

There is an essential distinction between adverse possession *qua* a stranger and a co-owner; in the case of a stranger, adverse possession is open, visible and notorious and an owner failing to notice it does so at his own peril; on the other hand the possession of a co-owner is presumed to be on behalf of all co-owners due to the unity of their title and possession, the proof of the co-owner's adverse possession should be more than his mere exclusive possession and receipt of income; besides exclusive possession he must also establish the other co-owner's ouster besides a hostile and open denial and repudiation of the latter's right to his knowledge; however, in both the cases it is not necessary to show that such adverse possession was actually brought to the knowledge of the ousted owner or co-owner: (1972) 85 Mad. L.W. 596: A.I.R. 1972 Mad. 467 (D.B.).

Where there was uninterrupted possession and enjoyment of the suit premises by the defendant and there was absence of any protest or demand by the plaintiff for a long time extending over a period of more than fifty years, *held*, there arose a presumption of title in favour of the occupiers: A.I.R. 1981 J.&K. 57.

A plea of *benami* and adverse possession in the alternative is not permissible; plea of adverse possession would lack the *animus possidendi*: A.I.R. 1992 Karn. 270: (1991) 3 Karn. L.J. 258.

Possession—Adverse possession—Elements—Possession for over statutory period—Evidence and proof—Presumptions and probabilities cannot be substituted: (1962) 1 An.L.T. 494: A.I.R. 1962 Andh. Pra. 518.

Where evidence of adverse possession over a *bund* was a stray instance of the sale of two neem trees about 25 years ago but no evidence worth the name as to who constructed the *bund*, *held*, it could not be deemed a reasonably proximate period backwards to justify the presumption of adverse possession. [A.I.R. 1966 S.C. 605, Rel. on]: A.I.R. 1971 Mys. 339.

73. Age.—(*See* also Note 39, *supra*). Matriculation Certificate—No presumption about correctness of age, there is no presumption in law about the correctness of the age mentioned in the Matriculation Certificate in preference to other relevant records: 1969 All.Cr.R. 41: 1969 All.W.R. (H.C.) 41.

74. Assessment.—Every Court or judicial Tribunal may presume the existence of facts having regard to normal course of human conduct and public and private business. S. 114 of the Evidence Act recognises this principle. Although the Evidence Act does not apply to proceedings in Income-tax Act, the rule enunciated is of universal application, and the Tribunal can raise such presumptions as are normal in the circumstances.

Where the explanation of the assessee has been found not only to be not proved but to be an after thought, unsatisfactory and unreasonable, *held*, it is open to draw the conclusion that the receipt is from undisclosed source: (1972) 2 I.T.J. 212 (All.) (D.B.).

Though rule of estoppel is not applicable to the assessment proceedings, but the fact that the assessee included the income of certain premises in his returns for several years, *held*, is a circumstance, in the absence of any satisfactory explanation, which the taxing authorities are entitled to take into consideration: A.I.R. 1971 S.C. 2439: 1971 U.J. (S.C.) 872.

Question whether particular payment is revenue expenditure or not is mixed question of law and fact—No question of law is raised by refusal to draw inference: (1966) 1 I.T.J. 195 (All.).

Proof as to income—Inference from expenditure of tenant: A.I.R. 1968 J.&K. 59.

Claim for depreciation—Dispute as to—Burden of proof—Company must prove by legal evidence amount claimed—Presumption of accuracy attaching to balance-sheet and profit and loss account not applicable to auditor's certificate—Mere production of auditor's certificate not conclusive—Employee should be given adequate opportunity to verify figures in certificate by cross-examination of employer and his witness: 1969 Lab. I.C. 995: A.I.R. 1969 S.C. 612.

Absence of evidence to show that reserves were non-existent or they were being utilised for purposes other than business of company—Presumption is that they were being

utilized as working capital of company: A.I.R. 1957 S.C. 1222.

Where the assessee filed voluntary returns for the assessment before the end of four years from the end of the relevant assessment year and the I.T.O. levied interest up to the date of the filing of the returns, *held*, it must be presumed that the Income-tax Officer had extended the time for filing the returns after satisfying himself that it was a case for extension of time. The presumption was founded on the principle that an Officer entrusted with a judicial or *quasi* judicial duty must be presumed to have discharged his duties in a proper and *bona fide* manner; thus, no penalty under S. 271(1)(*a*) of the Income-tax Act, 1961 could be levied: A.I.R. 1985 S.C. 114: (1985) 1 S.C.C. 283: (1985) 2 S.C.R. 215.

Imposition of tax by statutory authority—Presumption that it has followed prescribed procedure can be raised—Presumption not weakened by long acquiescence in imposition—Imposition of tax not in accordance with law—Effect of: 1964 All.L.J. 479: A.I.R. 1964 S.C. 370.

Presumption of sale under S. 28-B of U.P. Sales Tax Act (1948) is irrebuttable: 1983 Tax. L.R. 2888: 52 S.T.C. 440 (All.).

75. *Benami*.—The presumption which ordinarily attaches to the production of the original document by one who claims that it is farzi and a *benami* document would vanish, if there is evidence to show that the document was originally in the custody of the intended beneficiary: 1954 B.L.J.R. 82: A.I.R. 1954 Pat. 280.

Where there is a clear picture as to source or passing of consideration in a transaction, long and continued possession of the parties trying to set up *benami*, though an important element for consideration, does not raise any presumption in favour of benami. Where the plaintiffs sold the disputed property for consideration but they continued to possess the property forcibly for a number of years, *held*, the impugned document of conveyance could not be held as a *benami* document. [A.I.R. 1916 Cal. 367, Foll.]: A.I.R. 1973 Cal. 345.

Where ostensible purchaser did not have sufficient money and capacity to purchase the suit property and the real transferee continued to remain in possession of the suit properly even after the execution of the sale deed, *held*, transaction embodied in the sale deed was a *benami* transaction: A.I.R. 1981 Bom. 406.

Where in a *benami* transaction the father of the minor children had paid the consideration, *held*, it should be presumed unless the contrary intention is proved, that the father had acquired the properties for his own benefit and not for his minor sons: A.I.R. 1988 Cal. 375 (D.B.).

It is now well settled that the English rule as to presumption of advancement has not been adopted in the Indian law of trust; thus where it was found that the husband had provided consideration for the property purchased in the name of the wife, in the absence of the presumption of advancement, she will have to prove that the consideration was provided by the husband for her benefit; that is to be proved by positive evidence; the issue cannot be framed so as to put the onus on the husband to prove that he did not, by paying the consideration, intend to benefit the wife. [A.I.R. 1938 Mad. 8, Rel. on]: A.I.R. 1975 Mad.141: (1974) 2 M.L.J. 442: (1974) 87 Mad.L.W. 119 (S.N.) (D.B.).

Benami—Benami between husband and wife—Presumption as to possession: A.I.R. 1966 All. 278.

Where a person makes a purchase in the name of his wife or unmarried daughter, a statutory presumption arises under S. 3(2) of the Benami Transactions (Prohibition) Act, 1988 that such a transaction has been entered into for their benefit. However, the presumption is only a rebuttable one: (1990-1) 38 B.L.J.R. 601.

76. Citizenship/domicile.—Though passport may not be conclusive on the point of citizenship, but it raises a presumption, though rebuttable, for it is legitimate to assume that before the passport was issued to him some enquiry must have been made by the Police or other competent authority on the subject of his Indian citizenship: A.I.R. 1972 Gau. 56.

Person holding certificate of citizenship—Service of notice under S. 3, Foreigners Act—Validity—Writ petition to quash notice—State claiming that certificate was obtained by misrepresentation and fraud or was not granted by proper authority—If valid defence: A.I.R. 1963 Assam 55.

Acquisition of citizenship—Person entering India on passport of Pakistan—Presumption: A.I.R. 1961 Guj. 109.

Domicile—Presumption—Husband and wife—Law of husband's domicile at time of marriage—Rebuttal of presumption: (1956) 2 All E.R. 817.

77. Co-owners.—Co-owners—Co-heirs—Possession of one when adverse to other co-heirs—Presumption. *See* A.I.R. 1957 S.C. 314: (1957) 1 M.L.J. (S.C.) 46.

Where there were deposits in the joint names of *A* and *B*, both salaried persons and there was no evidence to show that money deposited belonged to *A*, the only reasonable conclusion that can be drawn from the joint nature of the deposits is that it belonged equally to both of them: 1959 M.P.L.J. 841: A.I.R. 1959 Madh. Pra. 359.

Notice signed by one joint owner on behalf of all—Presumption: 1965 All.W.R. (H.C.) 753.

Transfer of entire property by co-owner in possession—Acts of adverse possession by transfer to the knowledge of other co-owner—Husband of co-sharer having knowledge of acts of adverse possession—Co-sharer is presumed to have knowledge: A.I.R. 1964 All. 425.

Co-owner's adverse possession—Ouster—Inference of ouster or exclusion: A.I.R. 1969 Ker. 222.

Claim for apportionment of compensation—Dispute regarding eight annas share acquired by purchase of equity of redemption in property at Court auction—No indication or evidence as to extent of share of each of claimants—Presumption would be that they share equally—Hence, compensation should be distributed equally: (1964) 77 Mad.L.W. 644.

Where bank locker stood jointly in names of wife and husband, *held*, it could be presumed that the valuables kept in the locker belonged to both and not to one alone: A.I.R. 1992 Pat. 173: (1991-2)39 B.L.J.R. 990.

78. Corruption cases.—Presumption under Prevention of Corruption Act, 1947, S. 4—Nature and quantum of proof required to raise and rebut presumption—Presumption under S. 114, Evidence Act is different: 1968 Cr.L.J. 391 (All.).

Prevention of Corruption Act, 1947—Effect—Presumption under Act and under Evidence Act—Distinction: A.I.R. 1957 Punj. 110: 1957 Cr.L.J. 659; A.I.R. 1965 S.C. 575; 1977 Cr.L.J. (N.O.C.) 71 (Goa).

Presumption under Prevention of Corruption Act, 1947, S. 4—Nature of—Rebuttal—Presumption arises as soon as it is shown that accused had received the stated amount and such amount was not the legal remuneration—Word "gratification"—Meaning—It is not necessary that before presumption arises prosecution must prove that money was paid as a bribe: 1968 Cr.L.J. 1484: 1968 Lab.I.C. 1412: A.I.R. 1968 S.C. 1292.

Accused shown to have accepted money which was not legal remuneration—Presumption can be raised—Rebuttal must be by explanation which must be true and not merely plausible—Presumption under S. 4(1) and Evidence Act, S. 114, distinction between—Whether presumption is rebutted is question of fact—Supreme Court will not interfere: 1964 M.L.J. (Cr.) 65: A.I.R. 1964 S.C. 575.

Where there was no evidence regarding payment of bribe to the accused and the accused gave a satisfactory explanation for the money which was recovered from him, *held*, a presumption could not be drawn against the accused for accepting bribe: 1994 Cr.L.J. 1258 (Mad.).

Fact that Investigating Officer had offered his personal search before effecting search of accused not mentioned in his detailed report—Inference that legal formality of search was not observed before recovery of incriminating notes from person of accused—If justified: 1981 Cr.L.J. 1691 (Punj.).

It is not necessary that the passing of money should be proved by direct evidence. It may also be proved by circumstantial evidence. Thus, where the accused, who had put the money in his right side pocket, threw it across the partition wall in the adjoining room, on seeing the raiding party, and the notes so thrown were found to be the same notes which had been treated with phenolphthalein powder and the handkerchief which was taken from the accused's right side pocket and his rightside pocket itself were subjected to a test which showed that they too had come into contact with phenolphthalein powder, *held*, it could be presumed that the accused had obtained the money as bribe: A.I.R. 1980 S.C. 873: (1980)2 S.C.C. 390: 1980 Cr. L.J. 564.

Merely because the prosecution witnesses and the complainant, in a bribery case, came from the same village, *held*, it cannot be said that they were mutually related and their evidence be discarded on that ground: A.I.R. 1987 S.C. 1441: 1987 Cr. L.J. 1180: (1987) 2 S.C.C. 486.

79. Criminal cases.—In prosecution of a criminal offence, the onus is upon the prosecution to prove the different ingredients of the offence and unless it discharges that onus, the prosecution cannot succeed. The Court may, of course presume, as mentioned in S. 114, the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, their relation to the facts of a particular case. The illustrations to that section are merely examples of circumstances in which certain presumptions may be made. Other presumptions of a similar kind in similar circumstances can be made under the provisions of section itself whether or not a presumption can be drawn under the section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid down. Human behaviour is so complex that room must be left for play in the joints. It is not possible to formulate a series of exact propositions and confine human behaviour within straight jacket. The raw material here is far too complex to be susceptible of precise and exact propositions for exactness here is a fake: A.I.R. 1973 S.C. 2773: (1973) 2 S.C.C. 808: 1974 Cr.L.J. 1.

S. 114 enables the Courts to presume only that which accords with the ordinary course of events and human nature and not what would be an aberration from such a course. The degree which proof must reach before a Court trying a criminal case will convict is no doubt that which a prudent man will employ in reading a conclusion beyond reasonable doubt whereas an accused need not prove his case to the same extent in order to succeed. But the standards employed in judging each version are those of a reasonable and prudent man. Such a man can only adopt what is natural to expect and what accords with commonsense and ordinary experience but not what is extraordinary and unexpected as a reliable test of credibility of witnesses: A.I.R. 1973 S.C. 460: 1972 Cr.L.J. 1286: (1972) 3 S.C.C. 418.

Our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents: A.I.R. 1973 S.C. 2622: (1973) 2 S.C.C. 793: 1973 Cr.L.J. 1783.

The Court shall presume the absence of circumstances which would bring the case of the accused within the general exceptions provided in Chapter IV of the Penal Code or elsewhere in the said Code or any other law and which would demonstrate his innocence; or when S. 114 authorises the Court to presume the accused to be a thief or receiver of stolen property solely on the ground of his possession of the stolen goods, unless the accused satisfactorily accounts for such possession. The relevant provisions of various legislations relating to statutory or economic offences and also the recent amendments introduced in the Evidence Act in the last decade, *e.g.*, S. 114-A, etc., are so inconsistent or incompatible with the so-called presumption as to render the same almost to a ritualistic chanting: (1990-91) 95 Cal.W.N 688: (1991) 2 Cal.H.N. 48: 1991 Cr.L.J. 2912.

If the incriminating facts or circumstances are established by the prosecution and if the accused fails to offer an explanation or gives a false statement, the Court would be entitled to draw an adverse inference against him. [A.I.R. 1957 S.C. 211, Rel. on]: 1971 Cr.L.J. 1804 (Madh. Pra.) (D.B.).

A callous and inordinately prolonged delay (which does not arise from the default of the accused or is otherwise not occasioned by any extraordinary or exceptional reason) in the investigation and original trials of pending cases for capital offences punishable with death would plainly violate the constitutional guarantee of a speedy public trial under Art. 21. But the essence of the rule is one of presumptive prejudice arising from the passage of the prescribed period of time as an outer limit but plainly rebuttable for justifiable causes or by the defaults of the accused himself: A.I.R. 1987 Pat. 219: 1987 Pat.L.J.R. (H.C.) 394: 1987 B.L.J.R. 555 (F.B.).

Criminal conviction can be based solely on legal presumption unrebutted. It is because conviction on circumstantial evidence is legal and valid. And circumstantial

evidence is in effect presumptions and suppositions and inferences from circumstances.

Facts which lead to a conclusion necessary to prove or disprove a fact in issue may be established directly or by inference and "evidence of facts which inferentially lead to such a conclusion is described as presumptive or circumstantial." But a conviction for bigamy cannot be sustained or on such presumption alone and must fail unless the observance of the requisite form and performance of the necessary ceremonies are affirmatively proved. For bigamy (unless any of the marriages is under the Special Marriage Act) would entirely depend on the positive proof of observance and performance of forms and ceremonies required to constitute a valid marriage: 1992 Cr.L.J. 1502: (1991) 2 Cal.L.J. 71: (1991) 1 Cal.H.N 110: (1990-91) 95 Cal.W.N. 472.

Evidence in criminal trial—Onus of proving case on prosecution—No question of presumption arises in respect of facts which the prosecution has to prove—Existence of facts cannot be presumed unless case comes under S. 114, Evidence Act: 1965 Kash.L.J. 125: (1965) 2 Cr.L.J. 640: A.I.R. 1965 J.&K. 105.

The true rule is that the circumstances alleged must be established by satisfactory evidence as in the case of other evidence. While it is true that there should be no missing links, it is not the law that every one of the link must appear on the surface of the evidence. Some of them may be inferred from facts: 1962 M.L.J. (Cr.) 41: (1962) 2 Cr.L.J. 81: A.I.R. 1962 Mys. 138; A.I.R. 1985 S.C. 1224: (1985) 2 Crimes 465.

Proof of guilt of accused — Burden is on prosecution — Prosecution cannot take advantage of weakness in defence version: 1967 Cr.L.J. 191: A.I.R. 1967 Goa 18.

From the mere fact that the deceased had hundred per cent. burn injuries of second and third degree, *held*, it could not be presumed that the deceased was not physically and mentally fit to give dying declaration. [1987 Cr.L.J. 775 (S.C.), Foll.]: 1995 Cr.L.J. 1904 (Raj.) (D.B.).

Criminal intention—Proof of—Whether there was criminal intention is a question of fact—Presumption under S. 114, Evidence Act—When can arise: 1966 All.Cr.R. 260.

Intention is not capable of direct proof as fact — Intention is to be gathered from surrounding circumstance and conduct of accused: 1967 Cr.L.J. 184: A.I.R. 1967 Goa 11(F.B.).

Intention—Proof of—No presumption—Burden to prove intention—Extent of. [A.I.R. 1962 S.C. 605; A.I.R. 1964 S.C. 1563, Rel. on; A.I.R. 1966 S.C. 1; 1961 A.C. 290, Expl.]: A.I.R. 1970 Raj. 60.

Intention to intimidate—Presumption: (1966) 32 Cut.L.T. 266.

Thumb-impression of accused taken forcibly—Determination of guilt of accused—Such thumb-impression should not be taken into consideration: 1968 All. Cr. R. 375: 1968 All.W.R. (H.C.) 590.

There is no presumption of absolute truthfulness of prosecution witnesses: A.I.R. 1969 Cal. 321.

Human conduct—Discovery on information—When a man points out unknown matters to others, one may presume under S. 114 that he is connected with the crime unless he can give some satisfactory explanation as to how he comes by that knowledge: I.L.R. 47 Bom. 74: A.I.R. 1923 Bom. 183.

(Per *Agarwala, J.*).—Holding out of a threat of doing injury to another furnishes ground to presume that he who threatened the act was the perpetrator or instigator: A.I.R. 1955 All. 443: 1955 All.L.J. 468.

Proof as to place where offence committed—Onus: (1962) 3 Guj.L.R. 409: (1963) 2 Cr.L.J. 273: A.I.R. 1963 Guj. 234.

Immunity from prosecution not assured: 1968 Cr.L.J. 493: A.I.R. 1968 Mad. 117.

Appreciation of evidence—Eye-witnesses normally do not see causing of every injury that is caused to a victim and hence causing of injuries is inferred from circumstantial evidence against accused—Where witnesses had seen only causing of injuries and assailant is only one, inference is that other injuries were caused by same assailant: (1966) 2 An.W.R. 338.

Innocence of accused—Presumption as to: 1969 Cr. L.J. 504: A.I.R. 1969 Ori. 75.

(Per *Desai, J.*).—The accused did not say that he was not bound to open his lips or to help the prosecution in proving his guilt; he did not refuse to offer an explanation. On the other hand, he denied the circumstantial evidence altogether, suggesting that there was nothing which he had to explain. *Held*, that in such a case it was not open to the Court to assume that he had refused to offer an explanation on the ground that he had a right to keep silent: 1955 All.L.J. 468: A.I.R. 1955 All. 443.

The fact that the accused did not give a detailed statement at the spot when he was accused of a crime could hardly be a circumstance from which a presumption of guilt can

be drawn. He might want to give a considered statement and if he did not give a detailed statement immediately after the accusation was levelled against him, it is not possible to draw any inference adverse to him, from his silence: 1957 Cr.L.J. 117 (All.).

Extra-judicial confession—Admissibility of—Statements of suspects recorded by person in authority—Circumstances corroborating statements, present—Statements held were admissible—Acquittal of one accused would not exonerate the other: 1964 M.P.L.J. 750.

Accused not to be compelled to produce incriminating evidence—Evidence of compulsion—No presumption. *See* A.I.R. 1955 All. 367: 56 Cr.L.J. 898.

No presumption as to guilt can be raised from the fact that the accused has absconded: 21 I.C. 473: 14 Cr.L.J. 601. *See* also I.L.R. 49 All. 57: A.I.R. 1927 All. 737.

Murder—Absconding of accused—Effect of: 1963 All.L.J. 977; I.L.R. (1974) 1 Del. 277.

Absence of motive for committing murder—Inference: 1963 All.L.J. 977.

Where the accused falsely denied the relevant facts which had been conclusively established by the prosecution, *held*, an adverse inference was to be drawn: 1978 M.P.L.J. (Note) 60.

Where in a murder charge, the accused falsely denied several relevant facts which had been conclusively established, the Court would be justified in drawing an adverse inference from this against the accused: 1957 Cr.L.J. 328: A.I.R. 1957 S.C. 211.

The mere knowledge of the place of concealment does not necessarily lead to the conclusion that the person having such knowledge participated in the act of concealment, if the place is not his own: (1941) 43 Punj.L.R. 600: A.I.R. 1941 Lah. 471. But *see infra*. In considering what inference can properly be drawn from the possession by the accused of an incriminating article, when no explanation is forthcoming from him as to how he came by it, the Court is not bound by any rule of law, but is merely considering a matter of reasonable inference and common sense. Where the accused charged with the possession of counterfeit currency notes under S. 489-C, I. P. Code, leads the Police Officer and takes him to a place not his own or in his exclusive possession but to which he could have access without difficulty, digs the earth and takes out a bundle of currency notes from the pit and hands over the same to the Police Officer, the notes being counterfeit, it would be perfectly reasonable, in the absence of any explanation by him as to how he came to be in the know of the place where from they have been recovered, to raise a presumption against the accused, that he was in possession of the notes and had secreted them, intending to use them as genuine or that they may be used as genuine within the meaning of S. 489-C, I.P.Code: A.I.R. 1951 Mys. 34: I.L.R. (1951) Mys. 210.

Possession of accused incriminatory—False explanation—Effect. *See* A.I.R. 1954 Manipur 13.

Though from the accused's knowledge of concealing of certain evidence pertaining to the offence alleged, the offence may be presumed, it is not the mere possession of such facts and objects, but the totality of facts and circumstances and the conduct of the accused in relation to the incriminating evidence, of which he is shown to have knowledge, that would raise the presumption of the guilt of the accused, under S. 114 of the Evidence Act. [1970 All.W.R. 885; A.I.R. 1945 Lah. 27, Foll.; A.I.R. 1954 S.C. 39, Disting.]: 1971 All.L.J. 529: 1971 All.W.R. 327.

Where certain silver pieces of the size of a rupee were found along with counterfeit rupees all bearing the same year and it was shown that all the coins were concealed under bhusa in a locked room of which the accused had the key, *held*, that S. 114, created a presumption of guilt against the accused and that he was liable to be convicted under S. 243, I.P. Code: 9 O.W.N. 1198: A.I.R. 1933 Oudh 85. *See* also 32 I.C. 160: 17 Cr.L.J. 32; 18 I.C. 684: 11 All.L.J. 94; 46 I.C. 158: (1917-18) 22 Cal.W.N. 597; 21 I.C. 156: (1912-13) 17 Cal.W.N. 1077; 53 I.C. 819; 19 Cr.L.J. 189: 43 I.C. 605; 13 I.C. 828: 1912 M.W.N. 97; 12 I.C. 652: 21 M.L.J. 1071; 53 I.C. 481: 20 Cr.L.J. 753 (N).

Where key of the almirah from which an unlicensed arm was recovered was produced by the accused, *held*, inference of accused's possession could be drawn: 1973 B.B.C.J. 478.

Where a Pipe gun alongwith three live cartridge and some clothes were recovered from a tin box from one of the rooms of the house of petitioners but no evidence was

produced that the petitioner had occupied that room or was living in that room and the key of the box was supplied by petitioner's mother and it was also not established that the clothes belonged to the petitioner, *held*, no presumption could arise that the room was under the petitioner's control or that the petitioner had knowledge that the arms were kept in that tin box. [A.I.R. 1947 Pat. 236, Rel. on]: (1990-1) 38 B.L.J.R. 690.

Where the only evidence of record was that the accused had the custody of a forged withdrawal slip by which he withdrew Rs. 6,000 from the bank and misappropriated the same, *held*, it could be presumed that it was the accused who committed the offence under S. 467 read with S.109 of the Indian Penal Code; acquittal set aside: A.I.R. 1987 S.C. 821: 1987 Cr.L.J. 722: (1987) 1 S.C.C. 577: (1987)1 U.J. (S.C.) 344.

Accused delivering certain cheques for paying balance amount for goods supplied by dealers—Cheques dishonoured—No attempt made by accused to pay amount for encashment of cheques—Accused would be presumed to have committed offence under S. 420, I.P.Code: 1982 Cr.L.J. 1482: (1982) 22 Del.L.T. 32: (1982) 84 Punj.L.R. 125 (Del.).

The essential ingredient of an offence under S. 408, I. P. Code, is dishonest misappropriation. The onus of the general issue, *i.e.*, dishonest misappropriation lies on the prosecution, and, in the absence of any evidence of dishonesty, the accused is entitled to acquittal. Where the accused has come forward with a plea which relates to settlement of accounts and where the prosecution has not produced any evidence of any dishonest misappropriation, the accused cannot be convicted merely on the basis of any presumption: 1957 M.L.J. (Cr.) 535: (1957) 2 An.W.R. 333.

The Evidence Act is expressed in terms which allow full effect to be given to circumstances or conditions of probability or improbability so that where forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonable doubt required in a criminal case may not be applicable: 1968 B.L.J.R. 409.

Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. The difficulty arises when prohibited articles are recovered from places under joint family possession. It is now, however, well settled that in such a case the head of the family is presumed to be in possession of any illicit article found in the house. The presumption is rebuttable. It can be easily rebutted by showing that the room or receptacle in question was in the particular and exclusive possession of one member of the joint family. Similarly, where two or more persons are charged with joint illegal possession, it is incumbent on the State to prove (*a*) that each of the accused had either physical or constructive possession of the property, or (*b*) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of the latter. In all criminal charges the onus of proving the guilt of the accused rests on the prosecution and it never shifts on the accused by reason of S. 106: (1961) 1 Cr.L.J. 533: A.I.R. 1961 Mad. 162.

Possession of instrument of offence—Recovery from house of joint family—Presumption: 1957 M.L.J. (Cr.) 421: A.I.R. 1957 Andh. Pra. 758.

In a house kept by the father and an adult son, there is no presumption that the contraband articles found in the house should necessarily be in the possession of the father. They may as well be in the possession of the son or they may be in the possession of both. *Held*, that in the instant case the evidence did not establish beyond doubt that the father was in exclusive possession of the contraband articles: 1957 M.L.J. (Cr.) 66: (1957) 1 M.L.J. 152.

Merely because a bag of *jira* is found stored in a room adjoining a shop, it cannot be presumed that it is for sale.

A presumption can of course be drawn if the entire evidence on record justifies the same. Before drawing such a presumption and utilising the same against the accused, the Court should carefully examine the evidence on record to see if there is anything therein on which the said presumption is rebutted: (1971) 37 Cut.L.T. 1210.

If a man approached somebody at about 6 p.m. in the evening for getting payment of his outstanding dues, and he suddenly found that he was dragged inside the house and kept tied there, it would naturally be

expected of him to shout for help and to resist such wrongful confinement in all possible manner attracting the attention of the people in the neighbourhood. That would be the most natural reaction of a person placed in the above circumstances and such inference drawn on the above set of facts cannot be said to be either illegal or unwarranted: 1969 Cr.L.J. 578 (Ori.).

Presumption in criminal cases—Incident taking place in month of Sawan, busiest for cultivation—Eye-witnesses to occurrence claiming to have been in their house on day of incident—Neighbours, however, found gone to fields—No question put to witnesses in cross-examination as to why they remained in their houses—It will not be fair to draw an inference against prosecution in this respect and to hold presence of those witnesses at their houses that day as unnatural: 1968 Raj.L.W. 601: I.L.R. (1969) 19 Raj. 641.

Where in a dacoity case the prosecution contended that there was evidence that at the time of commission of the dacoity the female inmates were preparing meal and were arranging for dinner for the male members of the house and from this it could safely be presumed that there was light in the house as nobody would prepare dinner in the darkness but there was no evidence to hold that there was any light in the room where valuables were kept, *held*, in the absence of any evidence it could not be presumed that there was enough light in the house in which inmates of the house could identify the appellants: 1988 Cr.L.J. 1408 (Pat.) (D.B.).

Where in a rape case it was argued that as vagina admitted even one finger with difficulty there could not be any penetration though there was profuse bleeding and hymen was absent with the edges torn, *held*, it could not be inferred that there was no penetration as the muscles must have contracted by then: A.I.R. 1989 S.C. 702: 1989 Cr.L.J. 841: (1989)1 S.C.C. 432: (1989)1 Crimes 384.

Merely because a person died in Police custody, *held*, an immediate inference of murder cannot be drawn against the Police personal: 1992 Cr.L.J. 1872 (Mad.) (D.B.).

The fact that clothes with blood stains are discovered in the house of the accused in a murder trial does not entitle the Court to make any presumption against the accused as to his guilt or as to the stains being of human blood, though the clothes admittedly belonged to the deceased. If the prosecution proves that any stain of human blood is found on the clothes, the accused might be called on to explain the fact, but when the prosecution failed and there was no evidence to prove that the stains were of human blood, the Court is wrong in making a presumption: 11 O.W.N. 969: A.I.R. 1934 Oudh 373; 11 O.W.N. 950: A.I.R. 1934 Oudh 388.

Where an accused had murdered his brother and the prosecution had established by cogent and convincing proof his motive, his guilty conduct immediately before and after the occurrence, his refusal to participate in the identification parade and his refusal to give specimen of his footprints, *held*, it raised a clear presumption of the accused having committed the murder: A.I.R. 1974 S.C. 1723: 1974 Cr.L.J. 1171.

Where the only surviving person of an assault at some odd hours deposed that he had seen all the four accused at the spot of the incident and out of them accused No. 1 and 2 assaulted him and thereafter he became unconscious and no overt act was attributed to the accused No. 4 and the accused No. 4 did not offer any plausible explanation for his presence at the spot, *held*, his presence at the spot led to an irresistible inference that though he was not assailant as per the testimony of the surviving victim, he was one of the participants in the mission with accused Nos. 1 to 3: 1993 Cr.L.J. 1608 (Bom.) (D.B.).

Where in a murder case, the witnesses had stated that there was a lantern burning in the house in the light of which they saw the accused but at the time when the lantern was seized from the house of the deceased and was produced in the Court, the wick and chimney were missing, however, all the witnesses spoke about the recovery of the lantern together with its chimney and wick and that when it was sent to the Court the same were intact, *held*, the only inference that was possible was that the chimney should have got broken and the wick lost when the lantern was kept in the property room of the Court: A.I.R. 1989 S.C. 1543: 1989 Cr.L.J. 1785: (1989) 2 S.C.C. 425.

Appreciation of evidence—Father murdered by his wife and son by strangulation—Shrieks uttered by father deposed to by witnesses—Deposition of one of witnesses not referring to names of accused wife and son—That witness in his first information report

also not mentioning names of accused—That witness resident of house opposite to that of deceased—Exact stage at which that witness got aroused and came down on street indeterminable—That witness stated to have been on street at time of incident—Depositions of other witnesses however specifically referring to names of accused—All witnesses respectable and natural witnesses with no animus against accused—In such context, no inference against prosecution case can be raised merely from the fact that what particular witness heard did not specifically name any of accused—It only shows spontaneous nature of first information report—Mere absence of names of accused in the shrieks deposed to by that witness is by itself not a circumstance going to root of case: (1969) 71 Punj.L.R. 280.

There is no irrebuttable presumption that a doctor is always a witness of truth; his evidence is to be appreciated like that of any other witness: A.I.R. 1983 S.C. 66: (1982) 2 S.C.C. 396: 1982 Cr.L.J. 1972.

Recovery of allopathic medicines from the dispensary of a homeopathic doctor did not necessarily show that he was a man of shaky character when recovery of allopathic medicines had no connection or relation to the commission of the offence for which he had been charged: A.I.R. 1991 S.C. 1842: 1991 Cr.L.J. 2666: (1991) 3 S.C.C. 609.

Where a doctor administered an injection of Menstrogen Forte to bring about the termination of pregnancy occasioned by illicit relations, despite specific warnings embodied in the literature attached indicated that it should not be used during pregnancy or for its diagnosis and she died, *held*, it could be presumed that the doctor injected the medicine with the knowledge of its adverse effects revealed from the literature; he was guilty of the offence of voluntary causing miscarriage under S. 312 of the Indian Penal Code: 1992 Cr.L.J. 2029 (Madh. Pra.).

Presumption in criminal cases—Offence of cow slaughter—Accused completely denying prosecution case—Accused, however, not explaining how they came with dead body and were dealing with carcass, when raid was made—*Held*, on facts, assuming that there was no actual evidence of killing of cow, there was sufficient evidence to warrant presumption under S. 114 that accused had slaughtered cow: 1969 All.W.R. (H.C.) 847: 1969 All.Cr.R. 541.

Accused caught while cutting the flesh of slaughtered cow—Blood still dripping—Presumption that it was slaughtered by accused: 1959 All.L.J. 598: A.I.R. 1958 All. 198: 1958 Cr.L.J. 316; 1975 All.W.C. 157.

Eight accused found cutting meat of a cow slaughtered about an hour before—It is not known which of them took part in cow slaughter—It is not proper to infer that all the eight accused participated in cow slaughter: 1970 All.Cr.R. 20: 1969 All.W.R. (H.C.) 915.

Prostitution—Nature of evidence required to prove the offence. 1967 Cr.L.J. 1140: A.I.R. 1967 Guj. 211.

Charge against accused under S. 66(1)(*b*), Bombay Prohibition Act (XXV of 1949)—Prosecution cannot resort to S. 114, Evidence Act: A.I.R. 1970 Guj. 131: 1970 Cr.L.J. 956: (1970) 11 Guj.L.R. 208.

Trial for offence under Madras Prohibition Act—Accused challenging nature of contents of bottles—Magistrate opening bottles in open Court—Presumption drawn from smell of contents and visual examination of bottles—Validity—Contents ordered to be destroyed immediately—Magistrate held acted in contravention of R. 375 of Criminal Rules of Practice: 1962 M.L.J. (Cr.) 415: (1962) 2 M.L.J. 95.

The possession of full bottles of wine in a person's house when the number of bottles is less than that allowed by law does not raise the presumption that the bottles were for sale: 14 I.C. 968: 13 Cr.L.J. 424.

Finding regarding expediency—Presumption under S. 114, Evidence Act—Omission to record is mere irregularity and does not vitiate complaint: I.L.R. (1962) 1 All. 292: (1962) 1 Cr.L.J. 555: A.I.R. 1962 All. 251.

The mere fact that the accused was found in possession of a number of poisonous substances would not by itself raise a presumption against him in every case to the effect that his possession of the same was for sale. Whether a presumption of that nature should arise under S. 114 of the Indian Evidence Act or not should depend upon the circumstances of each case. Where it is established that the poisonous substances belonged to accused's brother who was a licence holder and that he died leaving the said substances, and that the same were not acquired by the accused by adopting any illicit or improper means, no inference of

guilt can be drawn at all against the accused: A.I.R. 1957 All. 705: 1957 Cr.L.J. 1191.

Presumption under Public Gambling Act, 1857, S. 6—Special rule of evidence: 1956 All.L.J. 935.

In a trial for the offences under Ss. 292 and 293 of the Indian Penal Code a certificate granted under S. 6 of the Cinematograph Act by the Board of Censors does not provide an irrebuttable defence to accused who have been granted such a certificate, but it is certainly a relevant fact of some weight to be taken into consideration by the criminal Court in deciding whether the offence charged is established: A.I.R. 1980 S.C. 258: 1980 Cr. L.J. 202: (1980) 1 S.C.C. 43: 1980 Rajdhani L.R. 222: (1980) 1 S.C.R. 1081.

Illegitimate child found dead—No automatic presumption arises that it was killed by its mother—Such presumption, if permitted, will destroy the presumption of innocence to which every accused is entitled: 1964 Ker.L.J. 76: 1964 Ker.L.T. 127: A.I.R. 1964 Ker. 241.

80. Customary right.—Where a village with a population of only 500 had two public cremation grounds and a large tract of land on the bank of the village tank was also claimed by them as a public cremation ground when it had been brought under plough by the land owners, *held*, the custom pleaded in support of the claim was not reasonable and could not be sustained; the custom must be reasonable not only at its inception but also in the changed circumstances: A.I.R. 1984 N.O.C. 246: (1984) 1 Cal.L.J. 408: (1983-84) 88 Cal.W.N. 864.

A customary right is available to a fluctuating body of persons such as a body of villagers, but a customary right which is in the nature of a public right and arises out of the custom of the locality, is a part of the law of the locality and is not a private right dependent upon grant, dedication or prescription. It has to be proved by showing that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent been submitted to as established governing rule of a particular locality. The customary right claimed should also be reasonable.

Therefore, in a case where a customary right of pasturage was claimed on the basis of an entry in mutation papers describing the disputed land as Bagayat and there being no evidence except the bare statement of witnesses that they have been seeing the grazing by cattle for the past several years and there being no evidence to prove that the custom has become part of the law of the locality, it was *held* that these could not justify a presumption that the land was Gochar or even communal in character. Further, it was *held* that since the exercise of right of pasturage would completely deprive the right of the owner to grow fruit bearing trees on the land it must also be held unreasonable: (1967) 33 Cut.L.T. 1077.

Where there was no evidence that cremation of strangers to the family's private cremation ground was as of right or with the belief that the Hindu inhabitants were entitled to do so, *held*, such occasional user by strangers could not be as of right but with the family's leave and license; it could not be taken as the other villagers customary right: A.I.R. 1984 N.O.C. 246: (1984) 1 Cal.L.J. 408: (1983-84) 88 Cal.W.N. 864.

81. Customs Act.—Presumption under S. 178-A, cannot be raised when article seized is not covered by S. 178-A(2) of the Sea Customs Act: (1961) 1 M.L.J. 374: A.I.R. 1961 Mad. 368: 1961 M.L.J. (Cr.) 274.

Smuggled goods in packets—Knowledge about their being smuggled goods—Prosecution unable to lead any direct evidence for importing the knowledge of accused about the goods being smuggled—Presumption will depend on circumstances of each particular case: 1979 All.W.C. 237: 1979 All.Cr.R. 98.

Foreign markings on goods can be taken as a circumstance to infer that they were of foreign origin: (1988) 34 E.L.T. 571(Ker.) (D.B.).

Chief Customs Authority—Appeal to—Powers to pass orders in—Confiscation of goods—Commutation of penalty—Condition to be fulfilled for commutation—Presumption as to—Record or proof offered must show that condition was fulfilled: (1962) 1 S.C.R. 896: A.I.R. 1961 S.C. 1549.

82. Death.—Even independently of S.108, presumption of death of a person can be drawn by the Court under S.114, if circumstances and evidence justify such inference: A.I.R. 1988 N.O.C. 76: (1988) 1 Ker.L.T. 45.

Where a wife alleging that her husband is dead, fails to produce such evidence as she ought to know, a presumption arises against her: 117 I.C. 209: A.I.R. 1929 Nag. 127.

There is no presumption that when two persons die in the same accident or incident, the elder predeceases the younger; such a presumption has been created under S. 21 of the Hindu Succession Act. Where a father and son are killed in a Railway accident the presumption is that the father died prior to the son; the mother in such a case would be entitled to compensation as a widowed mother under S. 2(*d*)(*i*) and not under S. 2(*d*)(*iii*) which applies only to a mother other than a widowed mother: 1981 All.C.J. 523: (1981) 43 Fac.L.R. 359: 1982 All.L.J. 6 (D.B.).

Where one set of people went under the water and their bodies could not then be recovered and another set of people had been struggling and keeping themselves above water and had been netted and brought ashore and of whom one actually recovered, it is permissible to draw the presumption that deaths, occurred in the order of seniority and the younger was the survivor and that he died later than others: A.I.R. 1957 Mad. 269.

Where a mother and daughter met their death in the Quetta earthquake and there is no reliable evidence to show which of the two died first, there can be no presumption in law that the elder died before the younger: I.L.R. (1939) Kar. 509: A.I.R. 1939 Sind 234.

83. Dedication to public.—User as of right by the public justifies the inference of an intention to dedicate the land as a passage but it is always a question of fact whether such intention can be inferred or not. Such dedication may be made by an express grant or it may be presumed from a long and continued user on the part of the public. Where a dedication is by the express terms of a grant or by implication from long and continued user by the public, such user being only a piece of evidence warranting a rebuttable presumption and no more. In order to raise a presumption of dedication, the weight of evidence of public user depends upon several factors. Where though the ownership of the suit passage was with the plaintiff but the entire public was using it from a long time, *held*, a presumption as to its dedication in favour of public could be drawn: A.I.R. 1978 N.O.C. 181: 1978 M.P.L.J. 194.

Public user—Dedication when can be presumed—Nature of evidence: A.I.R. 1954 Hyd. 82: I.L.R. (1954) Hyd. 46.

84. Delegation of powers.—There is no presumption by which delegation of powers could be presumed: 1958 Cr.L.J. 1394: A.I.R. 1958 Cal. 661.

Powers of Karnavan—He can renounce his office but cannot transfer or delegate it—He can, however, delegate his power of management subject to power of resumption—Karnavan's duties in connection with management of Tarwad can also be delegated: A.I.R. 1963 S.C. 128.

85. Drugs.—Mere possession of medicines even of large quantity is not sufficient to presume, in absence of affirmative evidence, that it was for sale: 1984 Cr.L.J. 931 (Cal.).

Where the accused was arrested with four packets of narcotic drug which were not proved to be for personal consumption, *held*, it was reasonable to presume that the same were for sale: (1989)1 Bom.C.R. 574 (D.B.).

Drug shop—Date-expired penicillin ointment kept—Presumption of stocking for sale: A.I.R. 1956 All. 703: 1956 Cr.L.J. 1380.

Where the accused were charged with knowingly receiving, concealing and transporting heroin and cocaine which he knew had been illegally imported and knowingly purchasing, dispensing and distributing heroin and cocaine, because all or nearly all heroin consumed in the United States is illegally imported, in the absence of explanation as to possession, the Jury can properly infer that the heroin in the possession of the accused had been illegally imported and that he had knowledge of illegal importation. Evidence of the possession by the accused of a great quantity of heroin is sufficient to support conviction for distributing such heroin. Drawing of such an inference does not violate the accused's right to be convicted only on a finding of guilt beyond reasonable doubt. Drawing of inference "unless the defendant explains the possession satisfactorily" does not place impermissible pressure on the accused to testify in his own defence.

As regards charge of possession of cocaine, however, no presumption of illegal importation can be drawn, since it is lawfully produced in greater quantities in the United States than is illegally imported: (1969) 24 Law Ed. 2nd 610: A.I.R. 1970 U.S.S.C. 82.

Merely because certain amount is also recovered from the place from where heroin was recovered in a raid, *held*, in absence of any evidence to *prima facie* link said amount with the sale proceeds of heroin, no presumption could be raised that the said amount was sale proceeds of any drug: 1993 Cr. L.J. 21 (Del.).

Opium Act, 1878, Ss. 9 and 10—Presumption—Representative sample tested by Chemical Examiner and report submitted—Accused cannot claim re-examination of the remaining opium on the ground that he has to rebut the presumption raised: (1966) 68 Punj.L.R. 657.

Where the house from which the opium was recovered was a dilapidated and deserted one and was open and accessible to all and sundry and the recovery of opium at the instance of the accused from the house was inconsistent with the explanation of the witness having only seen somebody putting the opium there. *Held*, that such a recovery was not sufficient to establish the possession of the accused over the property recovered: I.L.R. (1964) 14 Raj. 715: 1964 Raj.L.W. 171.

Possession of opium—Opium to the extent of 23 Kg. recovered from premises owned by accused, head of his family—*Held*, that a presumption as to possession of opium could arise: 1982 Cr.L.J. 696 (Raj.).

86. Easement.—Where a certain piece of open land is surrounded on all sides by houses and the open piece of land is used for common purposes, *e.g.*, on the occasion of marriages, deaths and other festivities and also used for passage, presumption may reasonably be drawn that the open piece of land is either the joint property of the owners of the houses surrounding it in the same way as they own the sites of their houses, or if they be not the owners of the sites that land has been left for their own use by the owners thereof and that the owners of the houses have rights over the land in the nature of easements. The presumption is no doubt rebuttable: 1953 All.L.J. 696: A.I.R. 1954 All. 215.

Right of way—User must be as of right—Presumption: A.I.R. 1958 Ori. 248.

Where a plaintiff claimed an easement of the right of way over the defendants' property, *inter alia* by prescription as well as by necessity and the defendants categorically pleaded that they had not consented to the plaintiff's user of the way over their property, *held*, the user not having originated from consent, it must be taken as of right and perfected by prescription if its user for more than 20 years is established by evidence: A.I.R. 1986 Ker. 75: I.L.R. (1986) 1 Ker. 526: 1986 Ker.L.T. 203.

Customary easements—User of—Presumption and burden of proof: (1964) 2 An.W.R. 39.

Easements Act, 1882, Ss. 13, 15—Lost grant—User from immemorial time—Pleadings—New plea after remand—C.P. Code, 1908, O. 6, R. 2 and O. 41, R. 23. Lost grant—Presumption: 1968 B.L.J.R. 515: I.L.R. 46 Pat. 977.

87. Election—General.—(*See* also Note 38, *supra*). Improper rejection of nomination paper—Presumption. *See* A.I.R. 1957 S.C. 242; A.I.R. 1966 J.&K. 12.

Just because the successful candidate in an election was unable to explain the circumstances under which a certain person came to be suspended and transferred to another place after a register had been obtained from the said person by the Commissioner appointed by the Court and after it came to be known that that person might be examined as a witness in the election petition, *held*, there is no justification whatsoever to draw any adverse inference against the elected candidate. [A.I.R. 1985 P.&H. 6, Reversed]: A.I.R. 1985 S.C. 887: (1985) 2 S.C.C. 425.

Election—Candidate, an Advocate President of Bar Association and influential member of several organisations—His formal acquaintance with Returning Officer—No presumption of latter's partiality towards the candidate: 1965 Punj.L.R. (Supp.) 674: A.I.R. 1966 Punj. 66.

Where the returned candidate was found to be present on the spot and his agents or supporters indulged in assaulting voters and hurling bombs on them without the candidate stopping them, *held*, a conclusive inference could be drawn that such acts were committed with his or his agent's knowledge and consent: A.I.R. 1985 S.C. 24: (1984) 4 S.C.C. 649: (1985) 1 S.C.R. 1089.

As every election petition is required under S. 81(3) of the Representation of the People Act, 1951 to be presented along with

as many copies, attested as true under the petitioner's signatures, as the number of respondents and no defect was found therein, *held*, presumption being in favour of the regular performance of the official acts, the burden to prove that such copies were not presented with the petition lies on the respondent seeking rejection of the petition on that ground; his failure to examine the Registrar, the Stamp Reporter and the peon justifies drawing of an adverse inference against him. [A.I.R. 1964 Madh. Pra. 137, Rel. on]: A.I.R. 1976 Ori. 85.

Office-bearers of Municipal Council candidates for election—Office-bearers providing necessary civil amenities to public just before election—No presumption that all benevolent and public utility acts on the eve of election are done with corrupt motive: A.I.R 1966 Madh. Pra. 255.

88. Execution of documents.—(*See* also Ss. 101-104, Note 47, *supra*). Normally, when execution of a document is either admitted or proved and when no disabling factor or vitiating circumstance is alleged or proved, admission or proof of signature with the necessary formalities will be proof of execution with knowledge of the contents, atleast *prima facie*, for the purpose of shifting the burden of proof: (1990) 2 Ker.L.T. (S.N.) 35 .

There is initial presumption that a document is executed on the day mentioned in the document as the date of execution and it is for the party who contends that the document was executed on a different date to show that it was so. [(1968) 2 W.L.R. 55, Rel. on]: A.I.R. 1974 Ker. 121: 1973 Ker.L.J. 595 (D.B.).

In case of documents executed by an illiterate person, the normal presumption as to due execution cannot be raised. [A.I.R. 1939 Nag. 78; A.I.R. 1937 P.C. 274; (1869) 3 C.P. 704, Rel. on]: (1974) 1 Cut.W.R. 630.

Execution of document—Person admitting signature on document pleading that he signed it in blank—Presumption and onus of proof—Both parties leading evidence—Question of onus immaterial: I.L.R. (1961) 11 Raj. 103: A.I.R. 1962 Raj. 231.

Ordinarily, when a man *sui juris* and of understanding signs a document, such as a promissory note, after it is written up, and the same is produced from proper custody, it is reasonable to apply the presumption under S. 114, in favour of the person relying upon it and to call upon the person who impugns it to prove the special circumstances which invalidate it. When there is no plea of fraud or undue influence in the matter of the signature to the document, and his only plea of denial of execution is found against it, it must be held that the instrument is not only duly signed but also duly executed by him: 53 Mys.H.C.R. 1.

If the defendant pleads that he has left a blank signed stamp paper with the plaintiff, he has a duty to explain satisfactorily before the Court what prompted him to do such an act which is not a normal human conduct: (1990) 1 Ker.L.T. 456: (1990) 1 Ker.L.J. 332.

When a signature on a document has been proved, it is for the person signing to prove that it was affixed by him otherwise than voluntarily: I.L.R. 50 All. 145: 25 All.L.J. 883: A.I.R. 1928 All. 16.

Deed—Execution—Letters containin signature—Presumption of execution. *See* 1956 An.W.R. 1004: A.I.R. 1957 Andh. Pra. 584.

Admission of execution of deed before Registrar—Presumption that the deed is valid: A.I.R. 1930 All. 605. When it is held that the document was executed with full knowledge of its nature and contents, the presumption is that it has come into effect: I.L.R. (1956) Trav.-Co. 606: A.I.R. 1956 Trav.-Co. 196.

Where there was no endorsement of the Sub-Registrar who registered a gift deed to the effect that he read it out to the executant, and the Sub-Registrar was not examined as a witness, *held*, it could not be presumed that he read it out to her. [A.I.R. 1962 S.C. 567, Foll.]: A.I.R. 1973 Mys. 338 (D.B.).

Where a widow sold a property and the deed was signed by the reversioners as attesting witnesses, *held*, that by itself was no proof that the reversioners had consented to the alienation; no presumption of legal necessity could be raised against them: A.I.R. 1985 N.O.C. 138 (Cal.).

The normal presumption with regard to an alteration in a deed is that the alteration was made prior to the execution of the deed: I.L.R. (1955) Nag. 224: A.I.R. 1955 Nag. 116.

89. Gift.—Gift by paternal uncle—Benefit to tarwad of donee—Presumption under Malabar Law—If applies: (S.) A.I.R. 1957 Trav.-Co. 77.

Persons setting up conditional gift failing to prove same—*Held*, gift must be presumed to be absolute: I.L.R. 36 Cal. 237 (P.C.).

Under the *Aliyasanthana* system of Law, where a gift or disposition is made in favour of all the members of a Kavaru, the law presumes that it is a gift or disposition in favour of that Kavaru and that the named persons will inherit the properties with the incidents of *Aliyasanthana* law or *Marumakkathayam* law: A.I.R. 1992 Karn. 290.

90. Husband and wife.—There is no presumption that a husband as such has his wife's authority to sell her property; he cannot even enter into contract on her behalf. The conditions which entitle a husband to act as an implied agent of his wife are that he could not communicate with his wife before executing the agreement and the course he took was necessary in the sense that it was in the circumstances the only reasonable and prudent course to take and he acts *bona fide* in the wife's interest; the implied authority does not however, extend, to acts which are outside the ordinary course of business and are neither necessary nor incidental to the authority. The wife living with her husband is presumed to have her husband's authority to pledge his credit for necessaries suitable to their style of living which is founded on the husband's implied duty to maintain the wife. This presumed authority is confined to buying of drinks, food, clothes, etc., belonging to the household department usually entrusted to the wife's management; the authority extends to household provisions and all other things incidental thereto. The presumption, however, does not extend to articles of luxury nor to extravagancy: A.I.R. 1971 All. 494.

Marriage by itself raises no presumption that the husband has a beneficial interest in the property standing in the wife's name; there must be some evidence that such property belonged to the husband and not to the wife: 140 I.C. 678: A.I.R. 1932 Cal. 829.

There is no presumption that the property owned or held by a woman necessarily belongs to her husband or that the funds for its acquisition were supplied to her by her husband or somebody else: A.I.R. 1957 All. 215: 1957 All.W.R. (H.C.) 179.

The possession of property by the husband or the wife, *held*, is to be presumed to be that of the spouse having the legal title thereto: A.I.R. 1977 N.O.C. 291 (Ker.) (D.B.).

91. Idiocy/insanity, etc.—(*See* also Note 57, *supra*). There is ample authority that mere proof of idiocy at a point of time does not establish congenital idiocy; it is a fact required to be proved like any other fact and cannot be presumed; rather it is the sanity which is to be presumed unless congenital idiocy is established; thus, a person born in 1941 cannot be presumed to be a congenital idiot on proof that he was an idiot 23 years thereafter or from some years after his birth. [A.I.R. 1965 S.C. 364 and A.I.R. 1974 Mys. 61, Disting.]: A.I.R. 1982 Andh. Pra. 163 (D.B.).

Evidence—Appreciation of—Insanity—Proof: I.L.R. (1963) 1 Ker. 76.

Petition for dissolution of marriage on ground that respondent is incurable of unsound mind—It is for petitioner to establish such unsoundness of mind—There is no provision in law compelling respondent to undergo medical examination—Adverse inference can, however, be drawn against respondent for refusing to submit to medical examination: (1963) 4 Guj.L.R. 890: A.I.R. 1963 Guj. 250.

Presumption as to sound mind: 1959 Cr.L.J. 844: A.I.R. 1959 Madh. Pra. 259.

92. Impotency.—(*See* also Note 61, *supra*). Persistent refusal to consummate marriage by husband—Incapacity to consummate may be assumed: A.I.R. 1968 Ker. 129.

Petition under Divorce Act, 1869, S. 18 by husband on the ground of wife's impotency—Wife deliberately refusing to give reason for not consummating marriage—Also refusing to submit to medical examination—Subsequent offer by her to consummate marriage found not genuine—Inference of impotency, *held*, could be drawn: A.I.R. 1970 Mad. 103: (1969) 82 Mad.L.W. 122: (1969) 2 M.L.J. 194 (S.B.).

93. Insurance.—(*See* also Notes 56 and 68, *supra*). For transfer of ownership of a motor vehicle the procedure under S. 31 of the Motor Vehicles Act has to be followed and till any such transfer is entered in the certificate of registration it has to be presumed that the person in whose favour such certificate of registration stands, is the owner: A.I.R. 1976 Raj. 75: 1975 Raj.L.W. 366: 1975 W.L.N. 607.

The person in whose name a vehicle is registered under the Motor Vehicles Act is

prima facie entitled to its possession where in a suit for delivery of the vehicle the petitioner contended that vehicle was registered in his favour by the State Transport Department and, thus, he was entitled for delivery of vehicle but the accused contended that the petitioner sold vehicle to him vide a sale deed but it was yet to be proved that said document was executed in favour of accused by petitioner, *held*, the registration of the tractor stood in the name of petitioner at all the relevant times. As such, *prima facie* petitioner was entitled to get the delivery of the tractor: 1984 Raj.L.W. 370.

It is well settled that the contract of insurance of motor vehicles is a personal contract of indemnity; it comes to an end and the policy lapses as soon as the ownership of the vehicle is transferred; transfer of ownership can raise no presumption that the insurance policy stood transferred in the name of the purchaser. [A.I.R. 1956 Cal. 555, Dissent.; A.I.R. 1951 Punj. 114; A.I.R. 1961 Mad. 208; A.I.R. 1963 Madh. Pra. 164; A.I.R. 1966 Mad. 244; A.I.R. 1968 J.&K. 2; A.I.R. 1971 Mad. 347; A.I.R. 1973 Ori. 166; A.I.R. 1973 Del. 115; A.I.R. 1977 Raj. 121, Foll.]: A.I.R. 1983 Raj. 83: 1983 Raj.L.W. 56.

On failure to produce the original policy or its office copy and other documentary evidence, a presumption against the insurance company would be raised. The insurer in order to successfully disclaim its liability beyond the statutory limit has to establish that (*i*) it was only an "only act" policy; (*ii*) no extra premium was charged; and (*iii*) there was no special contract which facts are within its special knowledge; if it fails to do so by producing relevant documents and cogent evidence, the benefit of the statutory liability will not be available to it; the only irresistible inference would be that the insurance policy, if produced, would have shown a special contract covering an unlimited third party risk: A.I.R. 1994 Del. 10.

Where in a motor accident case the vehicle owner did not plead that the insurer's liability under the policy was unlimited and the policy produced in the Court was incomplete in respect of certain endorsements which had no bearing on the extent of the insurer's liability, *held*, the insurer was not bound to produce the policy; it would, thus, be not proper to draw an adverse inference against the insurer and fasten it with the liability to pay the entire compensation granted to the claimants: A.I.R. 1994 Ori. 236 (D.B.).

Where an insurance company in a motor accident claim case pleaded immunity from liability on the ground of breach of a special condition of policy, namely, that vehicle was being driven rashly by an unauthorised person at the time of accident, *held*, the condition in the policy bond did not permit the vehicle to be driven by a named driver. Any driver who was licensed under the law was entitled to drive the vehicle and when such a driver drove the vehicle, it must be assumed that he had the authority of the owner to drive the vehicle. There could be no breach of the condition of the policy on that ground: A.I.R. 1982 Ori. 51(D.B.).

Insurer denying liability on the ground that the driver did not have licence to drive, *held*, it was for the insurer to take appropriate steps to compel the driver to produce his driving licence; on its failure, the Court could draw an adverse inference: A.I.R. 1994 Andh. Pra. 320.

Acceptance—Signing of proposal form of policy by *P* on behalf of *X* as owner of vehicle—Insurer communicating acceptance to *X* by post—*X* keeping silent and not disowning ownership of vehicle—*Held*, *X* was owner of the vehicle and vehicle was properly insured: (1967) 69 Punj.L.R. 578.

94. Joint family.—(*See* also Note 60, Ss. 101-104, *supra*). Joint family property—Existence of—Nucleus: A.I.R. 1957 Him. Pra. 39.

Joint Hindu family—Property held by—Presumption as to: A.I.R. 1967 Assam 99.

Under Hindu law there is no presumption that a property standing in the name of a co-sharer is a joint family property: A.I.R. 1991 Pat. 145.

A Hindu family is presumed to be joint unless the contrary is proved: A.I.R. 1971 S.C. 996.

There may be presumption that there is a Hindu joint family but there can be no presumption that the joint family possesses joint family properties: A.I.R. 1984 S.C. 1171: (1984) 3 S.C.C. 447: 1984 U.J. (S.C.) 679.

Though there is a presumption of a Hindu family being joint, there is no presumption that any property held by a member of a family is joint family property; the burden lies on

the party pleading a particular property to be joint family property to prove it; either by proving sufficient joint family nucleus out of which it could be acquired or if the member proves it to be self-acquired, then, that he had blended it with the joint-family property. In either case, it would belong to the joint family. [A.I.R. 1960 S.C. 335; A.I.R. 1969 S.C. 1076, Rel. on]: A.I.R. 1982 Del. 520 (D.B.).

The existence of a property in the hands of a member of the joint family property, *held*, cannot be taken to be derived from the Joint family asset; there is no presumption that it belonged to the joint family: 1981 Hindu L.R. 686 (Mad.) (D.B.).

It is well established that if the property stands in the name of the co-parcener of a joint family, mere proof of the existence of the joint family owning some joint family property, does not give rise to any presumption and that it must be established that there was sufficient nucleus of the joint family for purchasing the property which stands in the name of the coparcener. Where in a suit for partition the plaintiff claimed that the disputed property was purchased from nucleus of the joint family and the defendant, who contradicted it, was in possession of the account books of the joint family but he failed to produce them, an adverse inference could be drawn that if such accounts were produced, they would go to show that the property was purchased from the nucleus of the joint family. [I.L.R. (1937) Bom. 708, Rel. on]: (1972) 85 Mad.L.W. 857 (D.B.).

If a joint family possessed property which was admittedly joint, the presumption would be that the property continues to be joint and the burden would lie upon the member who claims it as his separate property to prove that there was a partition and that he got it on such partition. This presumption is strong in the case of brothers. But there is no presumption that a family because it is joint possesses joint property or any property. Where a joint family did not have any nucleus out of which the impugned property could have been acquired by the joint family in the name of any individual member of the family, *held*, no presumption in law could arise that the property acquired by an individual member still belonged to the joint family and could in no case be the self acquisition of that individual member: [A.I.R. 1933 P.C. 85; A.I.R. 1960 S.C. 335, Rel. on]: A.I.R. 1981 Pat. 43: 1981 B.L.J.R. (H.C.) 146: 1981 B.B.C.J. (H.C.) 141 1981 B.L.J. 25: 1980 Pat.L.J.R. 423.

When a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions, then a presumption arises that the acquisition standing in the names of the persons who were in the management of the family properties are family acquisitions: A.I.R. 1972 S.C. 2531.

Joint family property—New acquisition by manager in own name—Manager having no independent source of income—Presumption: A.I.R. 1959 S.C. 906.

Acquisition in name of junior member—Nature of property—No presumption of self-acquisition—Principles applicable to self-acquired property in Hindu law not applicable: (1966) 1 M.L.J. (S.C.) 85: A.I.R. 1966 S.C. 411.

A member of a joint Hindu family may acquire property in his own name; but he has to establish that consideration therefor did not come from the joint family but from his own moneys; in the absence of any material to show that the purchase by the *karta* was out of his own funds, *held*, the presumption that the property was acquired by the joint family prevailed: A.I.R. 1974 Mad. 51: (1973) 1 M.L.J. 388: (1975) 88 Mad. L.W. 509.

Where a joint family was not in affluent circumstances possessing sufficient and adequate nucleus, yielding a surplus so as to enable the purchase of the disputed property for the joint family but the respondent showed that he was provided with funds by his brother-in-law for the purchase of said property, *held*, there was no presumption raised in favour of the joint family property. [A.I.R. 1969 S.C. 1076, Rel. on]: A.I.R. 1981 Mad. 62: (1980) 1 M.L.J. 492: (1980) 93 Mad.L.W. 734 (D.B.).

Hindu Law—Joint family—Existence of family nucleus proved—Subsequent acquisition—Presumption—Proof—Self-acquired property of member impressed with character of joint-family property cannot be disposed of by Will: (1967) 2 I.T.J. 315 (Andh. Pra).

Hindu joint family—Death of father—Mutation of property in name of widow of predeceased son along with two other sons—Possession of widow for more than

twelve years—Presumption of maintenance grant—If justified: A.I.R. 1956 J.&K. 36.

Hindu law—Joint family—Acquisition of separate property by member—Presumption is that it is joint family property. [A.I.R. 1954 S.C. 379, Rel. on]: A.I.R. 1970 Pat. 13 (D.B.).

Hindu law—Joint family—*Dayabhaga*—Acquisitions by member—Presumption as to character of: A.I.R. 1958 Cal. 105.

Where sons are recorded as jointly owning lands, the presumption that their father owned it cannot be raised: I.L.R. 8 Lah. 30: A.I.R. 1926 Lah. 659.

Hindu law—Joint family consisting of father and sons—Father executing deed of a gift transferring some of the joint family properties to his unmarried daughter—All the sons attesting gift deed—Ordinary rule that attestor does not know the contents of document which he signs will not apply—Sons must be deemed to have consented to the gift: A.I.R. 1964 All. 64.

Where a theatre was mortgaged by members of a joint Hindu family during the life time of their father who would normally be the *karta* but he did not join in the transaction as he would have if it indeed belonged to the joint family and there was nothing in the deed that any of its executants was acting as *karta*, *held*, it could not be said that the theatre was a joint family property: 1981 Hindu L.R. 686 (Mad.) (D.B.).

A coparcener's right to sever from, and cause disruption in the joint family is not defeated by the general presumption of jointness; thus, where the deceased donor, separated from the joint family of his father, executed a gift deed, and another coparcener assailed the gift claiming to be of joint property, *held*, the coparcener had to prove his case; he could not rely merely on the general presumption of jointness: A.I.R. 1992 Madh. Pra. 297.

Where some of the properties, not included in the partition deed, were purchased exclusively in the names of some members of joint family, *held*, there was no presumption that they were joint family properties: A.I.R. 1975 Ori. 97: (1974) 40 Cut.L.T. 597.

When a property stands in the name of a joint tenant, whether he is a managing member or only a junior member, presumption is that it belongs to him, whether membership is of a joint family or *marumakkathayam tharwad*: A.I.R. 1991 Ker. 123.

Self-acquisition—Presumption of: A.I.R. 1958 Andh. Pra. 147.

Presumption under Hindu law—Character of land—No evidence to indicate that land was self-acquired—Presumption of ancestral property: A.I.R. 1956 Him. Pra. 68; A.I.R. 1958 All. 42.

In case there was sufficient surplus from the joint family property to acquire other properties in the name of individual members, *held*, the presumption is that they belonged to the joint family; the burden would lie on the member claiming that a particular property was his separate and self-acquired property. The presumption of the property being joint, however, would arise if the property was acquired in the name of a coparcener, that is a male member of the family; if the acquisition is in the name of a female who can never be a coparcener, no such presumption can arise: A.I.R. 1985 N.O.C. 243: (1985)1 Ori.L.R. 186 (D.B.).

Where grandsons claimed right by birth in the joint family in the house built by their grandfather on a leasehold plot acquired by him and it was shown that he had been selling ancestral properties to acquire properties in lieu thereof and it was in evidence that before acquisition and construction of the suit house, the grandfather had received as provident fund and insurance amounts far in excess of the amount spent in acquisition, had an independent income of his own as a Government servant and drawing a monthly pension of Rs. 450, *held*, the house was the grandfather's self-acquired property; it did not belong to the joint family: A.I.R. 1986 Del. 121.

Presumption as to jointness of family—Grows weaker in case of cousins according to degrees of relationship to founder—Slight evidence displaces it: A.I.R. 1961 Him. Pra. 10.

Presumption of coparcenary property (land)—Can be raised only if found standing jointly in the names of two brothers—No presumption can be raised from entries in subsequent jamabandis: 1983 Rev.L.R. 482: (1984) 86 Punj.L.R. 32.

Hindu law — Partition — Presumption does not arise by mutation proceedings unless the mind of parties was directed to it: 1970 Punj.L.J. 198.

Partition admitted or proved—Presumption: A.I.R. 1966 Pat. 179.

Under Hindu law there can be an oral partition and once a partition is alleged then the law will presume, unless something is proved to the contrary, that there was a complete partition between the members of the family: A.I.R. 1980 Pat. 254 (D.B.).

Where the coparcener comes forward with a case of partial partition, *held*, the presumption will be that the partition was complete and burden will be upon the coparcener to show that it was not so: A.I.R. 1985 All. 133: 1984 All.C.J. 647.

Where in pursuance of an amicable arrangement for the sake of conveniently enjoying joint family lands, the three brothers looked after the lands in different villages but subsequently defendant contended that there was partition amongst the three brothers about 40 years ago, *held*, in the absence of proof of division, by metes and bounds, the presumption was that the family continued to be joint and the presumption was stronger as they happened to be brothers: A.I.R. 1991 Ori. 66 (D.B.).

It is elementary that the normal state of every Hindu family is joint; the presumption is that unless proved to the contrary, such a family continues to be joint; even the burden to prove an old partition still lies on the party which asserts partition; but where the partition asserted is ancient (more than century old as in the instant case), such burden may not be discharged by evidence, obliterated or lost by lapse of time; but the partition may be gathered from subsequent acts and conduct of the family members like record-of-rights showing the family lands to be joint in successive settlements and their joint purchases of lands about three decades earlier; the family continued to be joint: A.I.R. 1985 N.O.C. 60 (Ori.) (D.B.).

Presumption as to old transactions—Deed of family arrangement executed in 1895—Direct evidence with regard to fact of division of properties mentioned in the deed difficult—Presumption existing with regard to recitals in ancient documents must prevail: (1963) 1 An.L.T. 389: A.I.R. 1964 Andh. Pra. 326.

There is a presumption of jointness in a Hindu family; but on partition being proved, jointness comes to an end; the presumption then arises that partition was by metes and bounds unless it is rebutted in evidence by the other party. If the plaintiff pleads partition of shares but without division by metes and bounds and proves it to its satisfaction, the Court can certainly reopen the partition. Suit dismissed for want of such plea and proof when division by metes and bound and separate possession was established by the defendants: A.I.R. 1983 Pat. 129: 1983 B.L.J. 295: 1983 B.L.J.R. 400: 1983 Pat. L.J.R. 634 (D.B.).

Where a plaintiff suing through his next friend sued for a declaration that certain joint family property alienations made by the *karta* were null and void and sought partition and separation of his share claiming to be a person of defective understanding, an imbecile and incapable of protecting his own interest, *held*, such an averment cannot lead to the presumption that the plaintiff was a congenital lunatic and had no right or interest whatsoever in the family property under S. 2 of the Hindu Inheritance (Removal of Disabilities) Act, 1928; the burden lies on the alienee to establish that though she did enter into a mortgage agreement with the plaintiff under his signatures, he was a congenital lunatic having no right in the property and was incapable to maintain the suit. [A.I.R. 1962 Mys. 18, Foll.; A.I.R. 1960 S.C. 601, Disting.]: A.I.R. 1973 Mad. 36: (1972) 85 Mad.L.W. 611: (1972) 2 M.L.J. 34 (D.B.).

Where a business was carried on by members of joint family, *held*, a presumption arose that business belonged to the joint family unless contrary was proved: A.I.R. 1978 N.O.C. 46 (Gau.) (D.B.).

Succession to non-taluqdari property—Presumption is that it is also governed by rule of devolution on single heir and not by rule of Hindu law: A.I.R. 1970 S.C. 42: (1970) 1 S.C.R. 428.

Progeny of a deceased parent, if they are Christians, take their parental estate as tenants-in-common; they do not constitute a joint family as the Hindus do. There can, therefore, be no presumption that any acquisition of property by one progeny is for the benefit of other progeny or the family. [A.I.R. 1921 Cal. 653; A.I.R. 1947 Mad. 287, Rel. on]: A.I.R. 1985 Karn. 231: (1985) 2 Karn.L.J. 61: I.L.R. (1985) Karn. 1645 (D.B.).

95. Knowledge of law.—There is no presumption that a citizen, what to talk of a villager, knows the law. It would be, thus,

preposterous to presume that villagers, and more so of a backward State like Bihar would know the provisions of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 and the rules and the law of presumption as contained in Chapter VIII of the Indian Evidence Act. [A.I.R. 1979 S.C. 621; A.I.R. 1985 S.C. 1, Rel. on]: (1991-1) 39 B.L.J.R. 570.

It might be presumed that persons who are presumed to know the law observed it and that, when two acts are done on the same day, the one necessary to be done first to give the other validity, was, in fact, done first: 12 Nag.L.J. 86: A.I.R. 1929 Nag. 257.

Every person is presumed to know the law, and the natural consequence of his act; and as per S. 105 of the Evidence Act, the Court shall presume the absence of exception. In such a case, the prosecution is not bound to show that the accused at the relevant time was not insane. However, thereby the onus of prosecution to prove the prosecution case beyond the shadow of reasonable doubt would not be effected: 1994 Cr.L.J. 450 (Ker.) (D.B.).

96. Landlord and tenant.—(*See* also Notes 45, 56 and 58, *supra*). If a thing or state of things is shown to exist, an inference of its continuity within a reasonable proximate time both forwards and backwards, may sometimes be drawn. Once it was proved that tenancy existed in favour of the defendant in 1957, it could be terminated only in accordance with the provisions of law. The burden of proof lies on the alleging party to establish that this contract of tenancy came to an end: (1972) 2 Sim.L.J. 13.

Residence at a certain place is a state of things; to prove its existence, presumption by itself signifies very little. A tribunal of fact requires a degree of probability commensurate with the occasion. The question of residence or non-residence is a question of fact, not of inference but of positive proof. The landlord cannot prove the negative only by his statement; the tenant is required to prove the positive; the burden at once shifts to the tenant to show where he was residing during the relevant period: A.I.R. 1980 Del. 110: 1980 Rajdhani L.R. 423.

Rent receipts are very valuable as evidence of the relationship of landlord and tenant, but the absence of receipts cannot, by itself, lead to the conclusion that there is no such relationship, more so when the dispute relates to a period before the Orissa Land Reforms Act came into force. (1976) 42 Cut.L.T. 981.

Where landlord accepted rent from tenant after filing a suit for eviction, *held*, it would not amount to waiver of his right to evict the tenant: A.I.R. 1978 N.O.C. 221: (1977) 1 M.L.J. 230.

Where a tenant of a large property had purchased half of that property, *held*, the presumption is that he intended to keep his tenancy rights in the unpurchased property as alive and distinct from his ownership of the purchased property; a person is presumed to intend that which is to his benefit; the burden to prove that the tenant intended to merge the two rights would, therefore, lie on the party which asserts it: A.I.R. 1973 P.&H. 204: 1972 Punj.L.J. 703.

Where the landlord had let out the premises after obtaining permission under S.21 of the Delhi Rent Control Act for a limited period and thereafter on expiry of that period applied for permission for letting out the premises again for another limited period, *held*, no inference could be drawn that from the very beginning the premises were available for letting out indefinitely: A.I.R. 1986 S.C. 1184: (1986) 3 S.C.C. 1: (1986) 30 Del.L.T. 179: 1986 Rajdhani L.R. 478.

Where a limited tenancy under S. 21 of the Delhi Rent Control Act, 1958 was created for 2 years and upon the expiry thereof the tenant refused to quit despite his statement before the Controller at the time of the grant, *held*, in the absence of evidence to the effect that the tenant did not understand or accept what was stated by the landlord before the Controller or that the tenant and the landlord were in collusion or that the tenant was a victim of fraud or the weaker side in the bargain, it could not be presumed that the sanction of the Controller to create the tenancy was a nullity; having obtained the benefit of the sanction, the tenant was estopped from impugning the sanction. [1985 Rajdhani L.R. 492, Reversed]: A.I.R. 1987 S.C. 1986: (1987) 32 Del.L.T. 354: (1987) 4 S.C.C. 1.

Permanent tenancy — Presumption — Question of fact: A.I.R. 1957 All. 346.

Presumption as to duration of tenancy: A.I.R. 1970 Raj. 17.

Where a plaintiff proves that he got into possession of a land by settlement from the landlord and got a receipt from him, his possession would be presumed to continue till he is dispossessed: 1956 B.L.J.R. 108: A.I.R. 1957 Pat. 92.

Permanent tenancy—Land let for building purposes—No period fixed—Presumption arises in favour of permanent tenancy—Right even to lessee to surrender lease at any time—It does not affect nature of tenancy—Lessee's right to surrender—*Held*, on construction of lease-deed that it created permanent tenancy: A.I.R. 1962 S.C. 413.

In a case of zamindari property yielding rent only its collection by a claimant ordinarily is a very stable piece of evidence to support his case of possession: A.I.R. 1956 Pat. 233.

Payment of rent—Relationship of landlord and tenant—Presumption. *See* A.I.R. 1955 Punj. 34: I.L.R. (1955) Punj. 94.

Rent—Payment of—Payment in certain form for number of years—Presumption: A.I.R. 1967 Mys. 65.

Consent of the landlord cannot be presumed or inferred from his failure to take the earliest steps for eviction of a sub-tenant who occupied under an illegal subtenancy: A.I.R. 1977 All. 155: 1977 All.W.C. 23: 1977 All.L.J. 236.

Where it was found on evidence that the exclusive possession of a part of the demised premises was with the sub-tenant and there was no satisfactory or acceptable explanation therefor by the tenant in an eviction proceeding based on sub-letting and parting with possession, *held*, it was not impermissible for the Court to draw an inference having regard to the ordinary course of human conduct that the transaction between the tenant and the sub-tenant was entered into for monetary consideration: A.I.R. 1988 S.C. 1845.

Where in a suit for eviction the landlord established that the petitioner-tenant allowed another firm to use his premises and the occupiers were not having any relationship with the petitioner-tenant, *held*, it could be presumed that the occupiers were paying money for the use of disputed premises. [1965 Cur.L.J. 341 (Punj.); 1975 Ren.C.J. 651 (Punj.); A.I.R. 1974 S.C. 280; 1976 Ren.C.J. 87 (Punj.), Dist.]: A.I.R. 1978 P.&H. 186: (1978) 80 Punj.L.R. 275.

Where a suit for eviction on the ground of sub-letting was filed relying on admission of tenant's brother before the Income-tax Authorities that he had exclusive possession of demised premises but the tenant was not a party to the affidavit signed by his brother, *held*, the fact that tenant had other business could not lead to the conclusion that he was not in exclusive possession of the demised premises as tenant or that he sub-let the premises to his brother: A.I.R. 1992 S.C. 123: (1992) 19 All.L.R. 242: (1992) 42 Del.L.T. 46: (1992)1 S.C.C. 143.

Where on the tenant's going on deputation to another place his brother-in-law lived in the suit premises but on return he himself started living in the premises, *held*, subsequent event of the return of the tenant to the suit premises clearly showed that he retained control over the suit premises and that his brother-in-law never had any exclusive right of enjoyment of the suit property or any portion thereof; no presumption of sub-tenancy could be drawn: A.I.R. 1987 Cal. 115.

Where in a suit for eviction on the ground of unauthorised sub-letting, though the landlord contended that the lease-deed entered into between the parties contained a clause interdicting any sub-lease without the landlord's written consent, but the lease-deed was not filed in the Court, *held*, it could be presumed that a valid lease-deed had been executed and it contained a contract to the contrary in so far as the tenant's right to sub-lease is concerned. [(1984)1 Ren.C.R. 299 (P.&H.), Affirm.]: A.I.R. 1987 S.C. 770: (1987) 1 S.C.C. 712: (1987) 100 Mad.L.W. 642: (1987) 1 U.J. (S.C.) 610.

The landlord was refused leave by the prescribed authority under S. 3 of the U.P. (Temporary) Control of Rent and Eviction Act, 1947 seeking eviction of the tenant for his own use because his brother, with whom he was residing, had asked him to shift. Subsequently, on the commencement of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 he again sought the same permission of the building as a whole or a part thereof as he had shifted to a single room accommodation which was refused by the prescribed authority but granted by the appellate authority. *Held*, the refusal by the prescribed authority that it was barred under R. 18(1) framed under the new Act for having been preferred within six months of the

earlier refusal was misconceived; R. 18(1) is only a rule of presumption to serve as a guideline for the authorities if the circumstances were still unchanged; it is intended to avoid multiplicity of proceedings; it could not be construed as an inexorable legal prescription for rejecting the second application in the changed circumstances: A.I.R. 1989 S.C. 255: (1989) 1 S.C.C. 1.

Suit for eviction on ground of *bona fide* necessity—Landlord not deposing about his *bona fide* need of accommodation—Court—If may draw adverse presumption. *See* (1978) 1 Ren.C.J. 365 (Del.).

Where the landlord sought eviction of tenants on the ground of *bona fide* of personal necessity as his family was fast multiplying but the tenants contended that the landlord's family members, being highly qualified, would not venture to live together under the same roof, *held*, the presumption that highly qualified members would not live together was too ludicrous and irrelevant; it would be unnatural to presume that the landlord's claim was ill-motivated and unreasonable. The notion of reasonableness and *bona fides* has to be appreciated in the context of the peculiar facts of each case; mere hypothetical generalisation of a legal principle would be hazardous: A.I.R. 1990 Karn. 121: I.L.R. (1989) Karn. 2095: (1989) 2 Karn.L.J. 131.

Under S. 23-D(3) of the M.P. Accommodation Control Act, 1961, the *bona fide* nature of the landlord's requirement for the demised premises can be presumed only if the landlord establishes the factual basis of his requirement; it is only then that the tenant is required to establish the landlord's *mala fides* which he can do either by direct evidence or cross-examination of the landlord and his witnesses; it is only thereafter that the burden shifts to the landlord to prove *bona fides* of his requirement: A.I.R. 1990 N.O.C. 154 (Madh. Pra.).

The presumption under S. 23-D(3) of the M.P. Accommodation Control Act, 1961 is only partial and is confined to the *bona fide* nature of requirement and does not extend to the other ingredients involved in the ground for grant of relief of eviction. The law does not by the said presumption seek to relieve the landlords of the special category of the burden of proving by adducing evidence the ingredients except that of *bona fide* nature of the requirement. There is no question of shifting of onus in respect thereof merely on the pleadings as distinct from proof: A.I.R. 1990 Madh. Pra. 106.

Where a case of eviction on the ground of the *bona fide* need was decreed by the High Court on the basis that as the suit premises comprised only of one room, the proviso to Cl. (*c*) of sub-S. (1) of S. 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 which provided for a decree of partial eviction to satisfy the landlord's need, was not attracted, *held*, that assumption was fallacious since it pre-supposed indivisibility of the premises comprised of one room, irrespective of its dimensions and even when the room was big enough to permit division to satisfy the needs of the landlord as well as the tenant; the matter was remitted back to the trial Court to enquire as to whether the premises could be divided and eviction of the tenant from a part of the premises could substantially satisfy the landlord's need: A.I.R. 1994 S.C. 489.

Where in a suit for ejectment on the ground of arrears of rent, the tenant stated that he had deposited property tax to Nagar Mahapalika which was sufficient to discharge the liability of rent and receipts were also produced in evidence, *held*, it could be presumed that the procedure for recovery of tax was followed and notice was served on the tenant for payment. [The tenant was presumed to have paid the taxes on being called upon to pay the same by Nagar Mahapalika]: A.I.R. 1977 All. 435: 1977 All.W.C. 715.

A and *B* taking joint tenancy under the landlord—The presumption of English law that a transfer to more persons than one creates a joint tenancy with right of survivorship in absence of words of severance is not available to *A*—The presumption here is that of a tenancy in common—After death of *B* his heirs will share the tenancy in common with *A* and *A* will not become the sole tenant under the landlord· (1963-64) 68 Cal.W.N. 786: 1963 Cal.L.J. 75.

Suit for ejectment and khas possession—Defendant 2 alleged to be in occupation under an illegal and lawful transfer of suit tenancy by defendant, the tenant, without plaintiff landlord's consent—Onus to prove alleged transfer by way of sub-letting is on the plaintiff—Suit must fail where he fails to discharge the onus—No presumption of sub-tenancy or sub-letting arises under the

enactment in every case in which the tenant leaves the station permanently, as under the English Act: (1960-61) 65 Cal.W.N. 1175.

Question whether occupier is licensee or tenant—Test to determine indicated—Fact that the appartment is a room in a hotel may lead to the inference that occupier is a lodger or inmate—Inference, however, is not a necessary inference of law: A.I.R. 1968 S.C. 933.

Zamindar and ryot—Suit for eviction by Zamindar—Burden of proof—Zamindar's right to evict—Presumption arising in such suit—It applies to suit between persons claiming under ryot: A.I.R. 1962 S.C. 342: (1962) 1 M.L.J. (S.C.) 149.

97. Lost grant.—When a person was found in possession and enjoyment of land for a considerable period of time under an assertion of title without challenge, Courts were inclined to ascribe a legal origin to such possession, and when on the facts a title by prescription could not be sustained, it was held that a presumption could be made that the possession was referable to a grant by the owner entitled to the land, but that such grant had been lost. It was presumption made for securing ancient and continued possession, which could not otherwise be reasonably accounted for. But it was not a *"presumptio juris et de jure"*, and the Courts were not bound to raise it, if the facts in evidence went against it. So also the presumption was not made if there was any legal impediment to the making of it. There will likewise be no scope for this presumption, if there is no person capable of making a grant, or if the grant would have been illegal and beyond the powers of the grantor. It is well settled that it is beyond the powers of a manager of a religious institution to grant perpetual lease binding the institution for all times to a fixed rent, unless there is a compelling necessity or benefit therefor. Where what is pleaded is not even so much as a permanent lease, because there is neither premium paid nor rent reserved but a Lakheraj grant unsupported by any consideration, that would clearly be beyond the powers of a Mahant, and no presumption of a lost grant could be made in respect thereto: (1955) 1 S.C.R. 1168: A.I.R. 1955 S.C. 228.

The fiction of lost grant rested and still rests upon the basis of long user, and though in theory the user is merely presumptive evidence, in practice and effect it is decisive. At the present, day it is the last expedient of a claimant who finds himself unable to rely upon prescription at common law or upon the provision of the Limitation Act. The same kind of user must be shown as in the case of prescription at common law, so that if it is *vi, clam,* or *precario,* the doctrine will not be invoked by the Court. Again in accordance with general principles, it must be clear that there was some person or body of persons to whom the grant might have been made; that there was a fee simple owner capable of executing the grant; and that the right claimed was one which might have been the subject-matter of a grant. The presumption of a lost modern grant cannot be rebutted by evidence that no such grant was in fact made. The doctrine is plainly a fiction; it is a means to an end, and the end is that some technical ground may be found for upholding a right which has been openly enjoyed: 1968 Ker. L.T. 940: I.L.R. (1968) 1 Ker. 323.

In order to succeed on the strength of the presumption of lost grant, it must be established (*1*) that the right has been enjoyed continuously for a long number of years; (2) that the exercise of this right was as of right openly and peaceably; and (3) that it was reasonable and there was nothing inherently wrong in it. The onus to establish the ingredients which raise a presumption of lost grant lies on the person who claims it. Where it is not shown that the right claimed had been exercised from time immemorial and the evidence adduced does not take one beyond the period when survey of rights were prepared, it cannot be said that the right had been enjoyed for such a long number of years as to raise a presumption that it had a legal origin: A.I.R. 1958 Pat. 571.

It is a pre-requisite of the assertion of a right based on lost grant that there should be a clear proof of long possession as well as its enjoyment under a definite claim of right: A.I.R. 1984 N.O.C. 246: (1984)1 Cal.L.J. 408: (1983-84) 88 Cal.W.N. 864.

Presumption of lost grant—When arises: A.I.R. 1966 J.&K. 45.

There can be no presumption of lost grant in favour of a fluctuating and unascertained body like inhabitants of a village: A.I.R 1984 N.O.C. 246: (1984) 1 Cal. L.J. 408: (1983-84) 88 Cal.W.N. 864.

Where the finding of the High Court in the earlier title suit and the decree of the

Supreme Court established conclusively that the properties in question belong to a Math, namely, the Bodh Gaya Math, and not to any deity or deities and, thus, the true origin of the endowments and the proof of title was not only forthcoming but was actually and designedly produced on the record to convincingly prove the nature of the grant, *held*, that being so, the plea that the origin of the endowment was lost in antiquity had no legs to stand upon. Consequently, the principles governing the case of a lost grant were not even remotely attracted: A.I.R. 1985 Pat. 129: 1985 Pat.L.J.R. 235: 1985 B.B.C.J. (H.C.) 238: 1985 B.L.J.R. 254 (F.B.).

Where the evidence on record was that the Rajus (a denomination of Hindus) had been managing a temple for the past several decades and the origins of the temple are not known, *held*, the presumption of lost grant cannot be raised: (1992-2)110 Mad.L.W. 190.

Ancient grants—Presumption—Original grant not available—Grant whether burdened with service—No competent witness—No inference can be drawn that the grant was burdened with service of rendering puja, from the fact that grantees rendered puja and sheba. *See* A.I.R. 1955 Assam 23: I.L.R. (1954) Assam 242.

Where a compromise decree merely recognised the defendants' permanent rights of occupancy in the suit lands in their and their predecessors-in-interest's possession and enjoyment from times immemorial, *held*, in the absence of the grant or proof of its terms and conditions, there can be no presumption as to the terms of the grant. [A.I.R. 1918 P.C. 169; A.I.R. 1924 P.C. 65; A.I.R. 1934 P.C. 84, Foll.]: A.I.R. 1982 Andh. Pra. 24: (1981) 2 An.W.R. 290 (D.B.).

98. Maintenance.—In a suit for maintenance, the husband is given an opportunity to bring to the notice of the Court the facts and circumstances from which the quantum is to be fixed, Court does not pass a decree which cannot be executed. Accordingly, in the absence of any other material on the facts and circumstances brought to notice of the Court, an inference may be drawn that at the time of judgment husband had means to pay the amount decreed. Further, it can be presumed that such means to pay continued: A.I.R. 1992 Ori. 199: (1993) 1 Hindu L.R. 100. *See* also Note 62, *supra*.

Able-bodied husband presumed to be capable of maintaining wife and children—Rebuttal: 1968 Cr.L.J. 1153: A.I.R. 1968 Del. 174.

Where the plaintiff-wife, prior to filing the suit for maintenance, had issued a notice to and served upon the husband who denied his relationship with the plaintiff as husband and wife but did not choose to reply, *held*, having regard to normal course of human conduct and reactions in such a situation, this was a case in which a reply could be expected from a person in the position of the defendant in view of the defendant's allegation that the plaintiff was mischievously trying to foist herself on defendant as a wife. Having regard to the facts of the case, his silence, did amount to a piece of conduct susceptible of an adverse inference against the defendant: A.I.R. 1984 Karn. 112 (D.B.).

Averment by wife that she is unable to maintain herself—Not necessary—Burden of proof to prove contrary lies on the husband: 1983 Cr.L.J. (N.O.C.) 75: 1981 Raj.L.W. 477.

Where in a maintenance suit, the husband pleaded that the wife was in receipt of the rental income of certain premises but failed to give any evidence in that regard, *held*, in the absence of material produced by the husband, the wife's version that she was residing in the premises and it was not let out to anyone was acceptable. [(1978) 80 Punj.L.R. 300, Rel. on]: A.I.R. 1983 Ker. 139: 1982 Ker.L.T. 417: (1983) 1 D.M.C. 432.

Where a widow was in possession of ancestral property and was residing there, *held*, even though there was no direct evidence that the disputed property was given to her in lieu of maintenance it would be reasonable to presume that she had acquired the property in lieu of maintenance. [A.I.R. 1974 Raj. 147, Rel. on]: A.I.R. 1982 Raj. 267: 1982 Raj.L.W. 301.

Claim for maintenance by Muslim divorcee on her behalf and on behalf of her daughter—Plea of relinquishment of claim raised by husband—Evidence and proof—Adverse inference against wife—Tenability. *See* 1981 All.L.J. 785.

Maintenance of unmarried daughter—No presumption from age and health of daughter about capacity to earn and to maintain: A.I.R. 1969 Punj. 285.

Claim to maintenance by a daughter under S. 20(3) of Hindu Adoption and Maintenance Act, 1956—Ability to maintain herself —No such presumption can be made against a College going girl: A.I.R. 1968 Mys. 288.

99. ***Mala fide***.—*Mala fide* action or malice in law are not to be easily presumed. A party alleging these has to satisfy the Court that there are such facts and circumstances on which malice or *mala fides* could legitimately be found. The mere non-adherence by a departmental inquiry committee to the strict procedure followed by a judicial tribunal does not amount to either acting *mala fide* or acting contrary to natural justice: A.I.R. 1957 All. 671.

If there was material that called for action by the concerned Congress Minister or other authority in public interests in declaring a person as disqualified proprietor under S. 10(*f*)(*iv*), Orissa Court of Wards Act, the fact that it may have synchronised with the general elections would not be enough to establish positive *mala fides*: I.L.R. (1952) Cut. 529: A.I.R. 1953 Ori. 121.

100. ***Malicious prosecution***.—Suit for *malicious prosecution*—Absence of reasonable and probable cause—If lends to presumption of malice. *See* (1978) 4 All.L.R. 652. Onus and presumption: A.I.R. 1970 Ori. 91: (1969) 35 Cut.L.T. 835: 1970 Cr.L.J. 819 (D.B.). Absence of reasonable or probable cause and action with malice are necessary ingredients—Both must be proved—Finding as to absence of reasonable cause is one of fact—Malice cannot be presumed—Finding based on presumption of malice is vitiated: 1965 All.L.J. 317.

101. Marriage.—Continuous cohabitation for a number of years between a man and woman raises the presumption of marriage. But it is a rebuttable presumption and, if circumstances destroy that presumption the Court cannot ignore them: 1961 Jab.L.J. 547: 1961 M.P.L.J. 244: A.I.R. 1961 Madh. Pra. 93.

When a man and a woman live together as husband and wife and were treated as husband and wife for sufficiently long time by friends, relatives and neighbours, there is always a presumption in favour of their marriage. If children are born to such a couple, there is a further presumption in favour of their legitimacy. The presumption in favour of marriage does not get mitigated or weakened merely because there may not be positive evidence of any marriage having taken place. Though marriage ceremony said to have taken place may not be valid, the marriage can be held to be valid by force of habit and repute and the onus of rebutting such a marriage would be on the person who denies the marriage and the presumption of law in favour of marriage and legitimacy is not to be repelled lightly by mere balance of probability. The evidence for that should be strong, satisfactory and conclusive: A.I.R. 1987 Bom. 27: 1986 Mah.L.J. 186: (1986) 2 Hindu L.R. 29: 1986 Mah.L.R. 864: (1986) 2 Bom.C.R. 146: I.L.R. (1986) Bom. 1281; A.I.R. 1989 Ori. 10: (1989) 1 Hindu L.R. 482; (1992) 2 Hindu L.R. 171 (P.&H.); A.I.R. 1994 Mad. 123 (D.B.).

Presumption as to valid marriage—Man and woman having cohabitation and living together for number of years—Presumption of valid marriage.

If a man and woman who could marry and enter into a valid marriage, cohabited and lived together for a long number of years, a presumption of valid marriage between them can be drawn. Even if the connection started originally as an adulterous one, it would not stand in the way of a presumption as to the matrimonial relationship between the parties being drawn, if subsequently they became entitled under law to marry each other. Even if the evidence as to the actual marriage ceremony between such man and woman is weak and not completely reliable, the presumption of marriage between them can be drawn from their long cohabitation. If the parties are at liberty to inter-marry, their relationship can be presumed to be matrimonial and can be evidenced by habit and repute: (1969) 1 An.W.R. 480.

Legitimacy—Connection between man and woman permanent—Presumption: 62 I.C. 769: 13 Mad.L.W. 511. A presumption of marriage may be drawn from long cohabitation, but if it is known that the connection started in mere concubinage, this presumption cannot arise: 98 I.C. 887: A.I.R. 1927 Lah. 48; A.I.R. 1929 Rang. 64; I.L.R. (1942) 2 Cal. 299: A.I.R. 1943 Cal. 76.

Presumption in favour of marriage and against concubinage—Applicability to Hindus: A.I.R. 1960 Raj. 251.

The law presumes in favour of marriage and against concubinage when a man and a

woman have cohabited continually for a number of years: 56 I.A. 201: I.L.R. 10 Lah. 725: A.I.R. 1929 P.C. 135: 57 M.L.J. 366 (P.C.); (1994-2) 114 Mad.L.W. 125 (D.B.).

Legitimacy — Law presumes in favour of marriage and against concubinage—Acknowledgment and reputation of legitimacy both being conduct are admissible in evidence: A.I.R. 1966 Pat. 316.

The presumption of a valid marriage is rebuttable and in considering the question whether there is presumption of valid marriage, the circumstances such as whether the parties had married earlier and whether the said marriage is subsisting and whether the man has treated the woman as lawfully wedded wife in company of friends, relatives and other members of the society and whether their friends and relatives have treated them as wife and husband have to be considered: (1990) 1 An.L.T. 41 (N.R.C.).

When a man and woman are cohabiting continuously for a number of years, law presumes in favour of marriage and against concubinage: 1982 M.P.W.N. 60; 1979 All.W.C. 447: 1979 All.L.J. 858; 1983 M.P.W.N. 262; A.I.R. 1984 Del. 347: 1984 Hindu L.R. 761: (1984) 26 Del.L.T. 199; (1991) 1 Ker.L.T. (S.N.) 35 (Case No. 47); (1992) 1 Ker.L.T. (S.N.) 27 (Case No. 35). However, the presumption, is a rebuttal one. Those who question the fact of marriage can rebut the presumption by showing that the woman was not married to the man at all. The initial onus lies on those who deny the marriage to prove that the woman was not a legal wife but only a concubine: 1965 Kash.L.J. 337: A.I.R. 1966 J.&K. 75; (1995-1) 115 Mad.L.W. 487 (D.B.).

Where a man and woman were living together for a long time freely and openly to the knowledge of all the relatives and even had a child which of course died to the knowledge of all the relatives, *held*, it would be highly improbable that they were not married: (1988-2) 102 Mad.L.W. 354: (1989) 1 Hindu L.R. 95.

When a woman lives for a number of years in close association with a man and bear children, who are acknowledged by the man as born to him and relations and persons of the village treat them as such, there is a presumption of legitimacy, as vice and immorality are not usually attributed to such associations between a man and a woman: A.I.R. 1956 Mys. 17: I.L.R. (1955) Mys. 578.

Continuous cohabitation of a man and a woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage. But the presumption which may be drawn from long cohabitation is rebuttable. When such presumption has arisen from evidence, mere total denial of the husband that he ever lived with her cannot rebut the presumption. [A.I.R. 1952 S.C. 231, Rel. on]: (1970) 2 Mys.L.J. 15: 1970 M.L.J. (Cr.) 552: A.I.R. 1970 Mys. 305.

Whenever a man and woman lived as husband and wife for a fairly long time and were so reputed, law presumes that they are living as husband and wife and not in a state of concubinage. Presumption is both with regard to factum of marriage and legality of it. It is strong presumption as it goes to the root of the structure of society and the persons who challenge it will have to rebut it by clear, cogent and satisfactory evidence. This burden is heavy on them. [A.I.R. 1978 S.C. 1557; (1968) 2 M.L.J. 411; I.L.R. (1975) Kam. 1973, Foll.]: A.I.R. 1981 Karn. 40; A.I.R. 1994 Karn. 247 (D.B.).

There is a presumption in favour of marriage and against concubinage when a man and a woman have cohabited continuously for a number of years. After the marriage laws of Nairs have been defined and settled by the enactment of the Cochin Nair Act of 1095, when a man and woman governed by that Act are found to have been continuously cohabiting for a long number of years as husband and wife, this well-recognised presumption will arise in their case also and can be applied to them. But this is only a presumption upon a matter of fact, and is, therefore, rebuttable. If there are circumstances which weaken or destroy that presumption the Court cannot ignore them. What circumstances or evidence would weaken or destroy the presumption must necessarily depend upon the facts of each case and no hard and fast rule can be laid down in regard to that matter: A.I.R. 1957 Trav.-Co. 85: 1956 Ker.L.T. 830 (F.B.).

The marriage status being the chief foundation on which the superstructure of society rests, presumption of the marriage arising from cohabitation of spouses is a very strong presumption. Where a man and a woman had lived together as man and wife, the law will presume, until the contrary is

proved, that they were living together by virtue of a legal marriage and not in concubinage. This presumption of law is the strongest of legal presumptions and is not lightly to be repelled by the mere balance of probabilities and the evidence repelling that presumption must be strong, distinct and satisfactory. Every intendment is made in favour of a marriage *de facto* and the more distinct, the date of the marriage, the more readily is the presumption drawn, based upon cohabitation and repute. The weight of the presumption gets strengthened when it is proved that the party whose marriage is in question distinctly intended to marry and went through a form of a marriage with that intent and also subsequently lived together as man and wife and were esteemed and reputed as such by those who knew them. The presumption still exists, even when there is no positive evidence of any marriage having taken place. English and Indian case-law discussed: (1968) 2 M.L.J. 411: I.L.R. (1968) 2 Mad. 138: (1968) 81 Mad.L.W. 200.

Marriage is normal, concubinage is exception; where a man and woman cohabited as husband and wife and were so recognised by their relations and the society, there is a strong presumption of their lawful marriage. But if there is positive evidence in rebuttal that the woman to begin with was a concubine or there was any impediment which would render their lawful union improbable, the usual marital ceremonies have to be established by direct evidence; otherwise, they would be deemed to be a lawfully married couple. [A.I.R. 1929 P.C. 135; 1957 M.P.L.J. 481; A.I.R. 1952 S.C. 231, Rel. on]: 1978 M.P.L.J. 505: 1978 Jab.L.J. 483.

In spite of the presumption of marriage arising from long cohabitation, the burden of proof of marriage actually lies with the person who desires to prove it: 1945 Nag.L.J. 489. Also the relationship of concubinage once found to exist is presumed under the law to continue until the contrary is proved: 98 I.C. 887.

Where the parties were living as man and wife for more than 15 years, the man also admitted the position, *held*, a presumption of marriage could be raised. [(1968) 81 Mad.L.W. 200; (1978) 91 Mad.L.W. 168 (S.N.) (S.C.), Rel. on]: (1986) 99 Mad.L.W. 921 (D.B.); 1983 Hindu L.R. 487: 1983 All.W.C. 272: 1983 All.L.J. 597.

Where the parties were living as husband and wife for about 25 years and were taken as such by the world at large, *held*, there was presumption of validity of marriage between them: A.I.R. 1973 P.&H. 124: 1972 Cur.L.J. 221.

Where there was long cohabitation for over three decades between a man and woman and as many as four children were begotten, *held*, a strong presumption of marriage arose in their favour and no special evidence in that regard was called for: (1993) 2 M.L.J. 385; (1987) 3 Bom.C.R. 199; 1978 M.P.W.N. 44 [Cohabitation as husband and wife for 20 years.]

There is a general presumption of marriage from cohabitation with habit and repute. Where the parties had been cohabiting for more than 30 years and were being treated as lawfully wedded by all their relatives, friends and people in general and their issues were also considered as legitimate issues, *held*, a presumption could be raised that the partners were actually lawfully wedded. [A.I.R. 1978 S.C. 1557, Rel. on]: A.I.R. 1986 Bom. 172: (1986) 2 D.M.C. 165: (1986) 2 Hindu L.R. 229.

A long uninterrupted cohabitation for over 30 years with children born and acknowledged as such throughout and the husband having himself managed the divorce of the wife from her previous husband, *held*, the presumption of the *factum* and validity of the marriage is clearly, therefore, justified; the term marriage inherently implies a valid marriage; a marriage which is not valid is no marriage at all: (1980) 21 Guj.L.R. 887: 1981 Hindu L.R. 211 (D.B.).

Remarriage of widow—Evidence showing that marriage was performed according to custom obtaining in community—Fact of marriage was known to all village people and parties were treated and received as wife and husband—Oral and documentary evidence also corroborating probability of remarriage—*Held*, strict observance of elaborate ceremonies could not reasonably be expected in case of widow remarriage and when it was proved that marriage was performed in fact Court would presume that necessary ceremonies had been performed—Further, evidence was also overwhelming and sufficient to raise very strong presumption in favour of remarriage of widow: 1969 All.W.R. (H.C.) 579.

Where the parties to the alleged marriage belonged to Marar Community where P.A.T. marriage custom prevailed, and the marriage was alleged to have taken place by such custom, the plaintiff failed to prove observance of custom of P.A.T. ceremony in said community and further the parties to the alleged marriage were living as husband and wife for more than eleven years, *held*, the presumption of valid marriage could be raised under S. 114. [A.I.R. 1952 S.C. 231, Rel. on]: (1992) 2 Hindu L.R. 562 (Mad.).

Where a woman came to the house of a person to look after his first wife suffering from T.B. and continued to live there, after the first wife's death, for long 15 years when she gave birth to his children, remained with him as his wife and was so recognised by outside world, in bank notices, election records, ration cards and school records of her children and was described in his Will as having lived with him as a devoted, sincere and faithful wife, *held*, the presumption of her marriage with the deceased could be raised; merely because the origins of the marriage lay in concubinage and on occasions—once in a suit—she was described or admitted, to be a "kept concubine" would not detract from the presumption: (1987) 100 Mad.L.W. 58: (1987) 1 M.L.J. 149 (D.B.).

Where a man and a woman were living together for a period of ten years which was much less than the period during which they admittedly lived apart *held*, due to long period of unexplained separation and absence of evidence of neighbours or local residents, it was not possible to raise the presumption of marriage: (1989-2) 104 Mad.L.W. 15.

Where the marriage of a Roman catholic couple was performed not according to Christian rites but as per Hindu system as they had adopted *Suyamaryadhai*, *held*, a mere living together as husband and wife for five months did not raise the presumption of a valid marriage between the parties: 1984 Hindu L.R. 129 (Mad.).

Where the parties have lived and cohabited together for a long period and were recognised as husband and wife by relations and friends, a presumption of marriage can be raised. But the presumption is always rebuttable.

In the instant case, the cohabitation lasted for less than 2 years. The man was a potter and the girl came from a Brahmin family. No near relations were examined to show that the parties were treated or recognised as husband and wife. The man had lived an immoral life having connection with several other women. *Held*, that the circumstances were sufficient to rebut the presumption and showed that there was a greater probability of the man having lived with the woman as his mistress: (1961) 2 Cr.L.J. 342: A.I.R. 1961 Guj. 141.

Where a man and woman cohabited for a long time and acquired the reputation of man and wife, their marriage, despite want of its positive evidence, may be presumed; but such a presumption is not available where the party could not prove the celebration of marriage; on facts and circumstances two and a half years of cohabitation found too short a period for drawing the presumption; no specific period can be laid down; it is to be determined on the facts of each case: (1981) 94 Mad.L.W. (J.S.) 40 (D.B.); (1981) 2 M.P.W.N. 36 [Where co-habitation was not for long period and the woman claiming to be wife was found to be of loose character, *held*, no presumption of marriage could be raised.]

Cohabitation whether raises presumption of marriage—Cohabitation with public woman—Presumption is unavailable: A.I.R. 1968 Mys. 155.

Where in a case for annulment of marriage on the ground that the husband's previous marriage with his first spouse was still subsisting but the husband contended that since the first wife had for long been cohabiting with another man and had given birth to children who were recognised to be their children and, therefore, his previous marriage may be presumed to have been dissolved, *held*, in the absence of sufficient evidence to prove that the previous wife was cohabiting with any particular man, no presumption of her valid marriage or divorce from the husband could be drawn: A.I.R. 1974 Madh. Pra. 52: 1973 M.P.L.J. 626: 1973 Cr.L.J. 662 (D.B.).

Where a man and a woman lived as husband and wife for about 50 years, *held*, a strong presumption arose in favour of the wedlock: A.I.R. 1978 S.C. 1557: 1978 U.J. (S.C.) 545: (1978) 3 S.C.C. 527: 1978 Hindu L.R. 697.

Continuous living as man and wife raises a presumption of legal marriage and this presumption is greatly strengthened when they are described as man and wife in municipal papers: A.I.R. 1934 All. 884.

A presumption of a marriage arises in a case where it is established that the parties were living together as man and woman and after the death of the man the latter was allowed by his reversioners to retain his property for a period of 41 years: 1937 O.W.N. 1221.

Where the evidence was that a widow after her husband's death lived with his first cousin as man and wife, had several children by him, and two were together cultivating lands and there was nothing to show that they were outcasted or their status as man and wife was repudiated, it would not be justifiable to hold that there has not been a remarriage: 18 R.D. 417. *See* also I.L.R. 12 Luck. 568: A.I.R. 1936 Oudh 298.

Even though the connection between a man and a woman was at its inception adulterous, the presumption of a marriage arises in a case where it is established that the husband of the woman had divorced her and after that they continued to live together, treated each other as husband and wife and were looked upon by others as such: (1933) 35 Punj.L.R. 532: A.I.R. 1934 Lah. 517.

Presumption about marriage, when can be drawn. *See* 1979 Hindu L.R. 96: 1979 Marriage L.J. 236 (P.&H.).

Where a couple lived for considerable time as husband and wife till her death and the husband recognised her as a legally wedded second wife and her son as his own, *held*, a long and weighty catena of authorities raise a strong presumption in favour of marriage and against concubinage: (1987) 2 Hindu L.R. 27: (1987) 1 Cal.L.J. 94: (1986-87) 91 Cal.W.N. 733.

In the absence of any contention that any particular ceremony is necessary in the remarriage of widow with a second husband the fact that a woman lived for a considerably long time with a person as his wife will be sufficient to establish that she was the remarried wife of the latter. There would be a presumption of re-marriage in favour of the lady: A.I.R. 1957 Tripura 27.

Where no custom of prohibition of a second marriage during the subsistence of the first marriage in 1941 was established, some form of second marriage had been performed, the couple cohabited for 15 years, begot a son and they were recognised as such by their family members, relations and society, *held*, a strong presumption in favour of their marriage being valid arises; existence of the first wife not sufficient to rebut the presumption. [A.I.R. 1961 Andh. Pra. 320, Dissent.]: A.I.R. 1971 Mad. 330: (1970) 2 M.L.J. 193 (D.B.).

Where there was no direct evidence regarding the marriage celebration between the parties, but there were declarations made by both of them that they were husband and wife and they were admitted to be living in the same room, there is the strongest presumption that they were husband and wife: I.L.R. (1975) Karn. 1973 (D.B.); 1982 M.P.W.N. 53 [Where besides long co-habitation, there was evidence of Natra marriage and the deceased husband had also described her as his wife in the Will, *held*, a presumption of marriage could be raised.]

The fact that a woman was in continuous exclusive keeping of a man gives rise to the legal presumption that they were married notwithstanding the fact that the witness who testified thereto called it a mere concubinage. Lower appellate Court's finding set aside for no weight having been given to the presumption of marriage. [A.I.R. 1929 P.C. 135; A.I.R. 1952 S.C. 231, Foll.]: A.I.R. 1972 Ori. 143: 38 Cut.L.T. 39.

It is well settled that where a marriage was in fact performed, necessary ceremonies therefor would be presumed to have been duly performed; it is for the party challenging its validity to rebut the presumption by evidence that the form of marriage in some respect or the other is invalid; the witnesses to the marriage are not required to prove all the details which taken together constitute a valid Hindu marriage. [(1911) I.L.R. 38 Cal. 700 (P.C.), Rel. on]: A.I.R. 1974 Ori. 107: (1973) 2 Cut.W.R. 1108.

Once the factum of marriage is proved everything necessary to validate such marriage, including the observation of essential ceremonies, shall be presumed, particularly in a case of restitution of conjugal rights where the legality and the validity of the marriage has not been impugned either in the pleadings or in the evidence on the ground of non-performance of necessary

ceremonies or otherwise. The requirements of a criminal prosecution as to the positive proof of essential ceremonies cannot, therefore, be imported in a civil proceedings for restitution of conjugal rights unless the performance of those ceremonies is specifically disputed: A.I.R. 1987 Cal. 213: (1986) 2 Cal.H.N. 386: (1986-87) 91 Cal.W.N. 456: (1987) 2 D.M.C. 442.

When some sort of a marriage ceremony is undergone, there is always a presumption of a valid marriage unless the same is rebutted by cogent and satisfactory evidence; thus, where the wife stated that the couple went to a priest who recited *mantras*, applied *tilak* to her forehead, made them exchange garlands, declared them husband and wife and the marriage was consummated and there was no evidence that *saptapadi* was a must according to their religious rites, ceremonies and customs, *held*, it could not be said that the marriage was not legal and valid. [A.I.R. 1984 Bom. 229; A.I.R. 1987 Bom. 27; A.I.R. 1978 S.C. 1557, Rel. on; A.I.R. 1971 S.C. 1153; A.I.R. 1979 S.C. 713; A.I.R. 1979 S.C. 848; A.I.R. 1991 S.C. 816, Disting.]: A.I.R. 1994 Bom. 43: 1993 Mah.L.J. 923: (1994) 1 D.M.C. 49: (1993) 2 Hindu L.R. 531.

When celebration of some form of marriage is established, *held*, Court is justified in raising presumption of legal marriage arising out of long cohabitation: 1983 Cr.L.J. 1440 (Cal.).

Presumption—Marriage—Plaintiff and deceased defendant living in concubinage—Plaintiff alleging that marriage took place between them after the death of deceased defendant's first wife—Evidence to show that ceremonies like *saptapadi* and *homam* performed—*Held*, that the presumption as to the validity of marriage had not been rebutted: (1965-66) 70 Cal.W.N. 28.

Where admitted facts clearly prove that the man and woman had deliberately gone to, as pre-planned, Tirupati only to celebrate their marriage and paid necessary fees at the Tirumala-Tirupati Devasthanam which has a separate establishment for solemnisation of Hindu marriages according to the Shastras and the custom of the parties' caste and the marriage was performed by the official *purohit*, *held*, it is difficult to believe that the *purohit* did not perform the essential formalities, of *homa* and *saptapadi*, essential to a Hindu marriage; presumption of validity drawn: (1977) 2 An.W.R. 32 (D.B.).

Marriage—Presumption as to performance of essential ceremony of *saptapadi* from mere proof of presence of priest cannot be raised: 1965 Kash.L.J. 125: (1965) 2 Cr.L.J. 640: A.I.R. 1965 J.&K. 105.

Where an uninvited priest was present at the solemnisation of a marriage in *kudivaippu* form though his presence was not required, *held*, it is impermissible to draw an inference of the invalidity of the marriage merely on that count: A.I.R. 1973 Ker. 250: 1973 Ker.L.J. 332: 1973 Ker.L.T. 963: 1973 Ker.L.R. 228.

Where the solemnisation of a marriage in *kudivaippu* form was testified to by relations of the parties, *held*, it could not be appraised as that of interested witnesses; such marriages are conducted inside the house and are mainly attended to by near relations: A.I.R. 1973 Ker. 250: 1973 Ker.L.J. 332: 1973 Ker.L.T. 963: 1973 Ker.L.R. 228.

The presumption of marriage in the absence of any evidence of marriage ceremony or even unsatisfactory evidence of marriage may justifiably be made when the person concerned lived together for some period of time, and had been treated as husband and wife by family, friends and relatives. Where in a case of claim of maintenance by wife, the marriage as was said to have taken place was not proved and respondent was living with the petitioner even before the so-called marriage took place, *held*, in the absence of any satisfactory reliable evidence it could not be said that the respondent was married to the petitioner and had the required legal status of wife: 1989 Cr.L.J. 1540 (Gau.).

Where there was long cohabitation between a man and woman and the woman was found to be already married to another man and there was no proof regarding dissolution of her earlier marriage or death of her previous husband, *held*, presumption of marriage which arose due to long cohabitation, stood rebutted: A.I.R. 1981 N.O.C. 173: (1981) 51 Cut.L.T. 513.

Charge of second marriage during subsistence of first one—Prior marriage must be proved to have been duly solemnised—There is presumption in favour of validity of marriage: 1969 Cr.L.J. 164: A.I.R. 1969 Cal. 55.

It is not obligatory for the complainant to necessarily prove in a case under S. 494 of the Indian Penal Code that all necessary rites and ceremonies were performed in respect of

the second marriage; a conviction may be entered if there is other reliable evidence to establish the charge. Thus, where the first wife had produced the second marriage certificate indicating that the husband had gone through a ceremony of the second marriage conducted by the priest who had also signed the application for registration of the marriage, the husband's conviction was in order when the evidence of the second marriage was not controverted: 1992 Cr.L.J. 601: (1992) 3 Rec.Cr.R. 57 (Bom.).

A conviction under S. 494, I.P.Code cannot be sustained on the presumption that all the rites and ceremonies for a valid marriage must have been performed unless the observance of the requisite form and performance of the necessary ceremonies are affirmatively proved. A mere letter written by the co-accused woman, the wife to the second marriage, wherein she had stated that she had already disclosed to others that she and the accused-husband were already married and that she had to suffer very much from that marriage, *held*, cannot be relied upon for convicting accused for the offence of bigamy: 1992 Cr.L.J. 1502: (1990-91) 95 Cal.W.N. 472: (1991) 2 Cal.L.J. 71 (D.B.).

Though a Devdasi is, like any other Hindu woman, entitled to contract a legal marriage as also to a rebuttable presumption of marriage from long co-habitation but where she had had illicit sex and children from two persons and claimed to have married a third who, however, never took her to his village or his home and there was no evidence of their repute or social acceptance as man and wife, *held*, the presumption of marriage stood completely destroyed; a Devdasi is so low in the social scale that no respectable person would invite the public odium by contracting a marriage with her though the public might tolerate illicit union with her: A.I.R. 1972 Mad. 200: (1972) 85 Mad. L.W. 29: (1972) 1 M.L.J. 364 (D.B.).

Presumption—Long cohabitation as husband and wife—Presumption in favour of marriage and against concubinage is rebuttable—Connection between man and a Devdasi woman proved to be illicit in its origin—Presumption of marriage held rebutted: (1962) 1 An.W.R. 51: A.I.R. 1962 Andh. Pra. 260.

Where the woman belonged to Devdasi community and there was long cohabitation between that woman and a man and further there was no prohibition in their contracting a valid marriage, *held*, a presumption as to marriage arose between the parties: A.I.R. 1993 Mad. 346.

Where in a suit for maintenance it was contended that the entries in the electoral roll and kutumb register could not be taken as evidence of marriage, *held*, as the entries in the kutumb register and the electoral roll were made by the public officers in due discharge of their duties, there was presumption about their correctness until same was displaced by good evidence: A.I.R. 1980 All. 109: 1979 All.W.C. 698.

Where oral evidence of long cohabitation as man and wife was corroborated by documentary evidence like the enumeration register of the village prepared in 1944 and the birth register of 1943 produced by a witness who was then the chaukidar of the village, *held*, in the absence of any reason for disbelieving the witnesses, presumption of marriage can be justly raised as also the presumption of correct recording of birth: A.I.R. 1982 Mad. 354: 1982 T.N.L.J. 301.

Where the factum of celebration of some form of marriage is established and where there is evidence as to living together for several years as man and wife, *held*, from such reputation in the locality and entry in voters list as wife and husband, performance of prescribed ceremonies and valid marriage can be presumed: (1990) 2 An.L.T. 251; A.I.R. 1979 Cal. 358 (D.B.) [Where the parties lived together for a considerable period, gave birth to children and the ration card, voters' list and school register corroborated the relationship, *held*, presumption of valid marriage between them, clearly arose.]

Where (in the absence of any law prohibiting a second marriage for a Hindu male) the respondent claiming to be second wife asked for maintenance from her husband and there was no direct evidence regarding the factum of marriage, *held*, on the basis of long cohabitation and documentary evidence which described the daughters of the respondent as daughters of the appellant and school certificates, etc., a presumption could be drawn that respondent was the legally wedded wife of the appellant: 1994 Cr.L.J. 1125 (Andh. Pra.).

Presumption of re-marriage—Execution of sale deed in the joint name of the lady and

her cousin brother cannot justifiably raise the presumption of re-marriage when it does not specifically mention the lady to be the wife of such person: 1976 All.W.C. (Rev.) 12.

Where a blind woman staked her claim to the properties of the deceased husband as his second wife admittedly living with him but the second wife repudiating the claim contradictorily deposed that the blind woman was kept for illicit relations and on grounds of mercy and there was evidence of the performance of the second marriage, *held*, presumption of the second marriage being valid may be drawn: (1994) 2 An.L.T. 445.

Presumption of marriage arising out of long co-habitation as husband and wife, *held*, is not rebutted merely because father of the husband, while executing his Will did not mention the name of the wife or her offspring or that there was no reference to her and her children in the compromise entered between the husband and his brothers: A.I.R. 1994 S.C. 133: (1994) 1 D.M.C. 484: (1993) 2 Hindu L.R. 517; A.I.R. 1992 S.C. 756.

Where a Christian lady who got herself converted to Hinduism and married a Hindu, was accepted as such by the community, *held*, their long cohabitation and conduct undoubtedly attracted not only the presumption but an irresistible inference of their marriage; she was a legally wedded wife and the children from the union were legitimate; her husband's ill-advised practice of describing her after enforcement of the Hindu Marriage Act, 1955, for fear of being held guilty of bigamy, as *"Abhimana Baryal"* indeed could not alter her status of a lawfully wedded wife to that of concubine: (1991-1) 107 Mad.L.W. 163.

Presumption as to validity of marriage from long cohabitation—Parties to marriage, Indian Roman Catholics—Marriage performed by Schismatic priest followed by long cohabitation—Everything necessary for validity of marriage will be presumed in absence of decisive evidence to contrary: A.I.R. 1960 Mad. 430.

But in case of persons who cannot *prima facie* contract a valid marriage living together as man and woman, there is no presumption of valid marriage: A.I.R. 1929 Nag. 343. Under S. 114, Evidence Act, continued cohabitation for a number of years with habit and repute may give rise to a presumption in favour of marriage. Habit and repute should be of that particular status which can lead to a recognition of lawful marriage. Where concubinage is recognised or connived at, the presumption becomes weak. On the other hand, where concubinage is not prevalent and is looked upon with disfavour, the presumption from long cohabitation and living together as husband and wife would be strong. But the presumption of marriage from long cohabitation does not arise where it is known to have arisen from concubinage. In such a case the presumption is that the concubinage continued till marriage is proved: A.I.R. 1951 Assam 148: I.L.R. (1952) Assam 74.

Where a Muslim woman allotted a share in the partition decree died during the suit's pendency and half her share was claimed by another defendant on the plea of their having been married to each other which was opposed on the ground that she was then mentally not fit to contract the marriage, *held*, the documentary proof showing that she was then in a lucid interval, a valid marriage between them is presumed to have been performed: A.I.R. 1976 S.C. 224: (1976) 1 S.C.C. 359: (1976) 2 S.C.R. 858.

Where the relation of *B* as the wife of the deceased *M*, an issueless last male-holder of property, is disputed and the evidence points to the fact of *B*'s staying with *M* from 1984 Sam., to 1997 Sam. when *M* died but having regard to the lapse of time the case does not admit of clear and direct proof of the performance of "Chadar Andazi" then under such circumstances the Court has to fall back on the presumption of marriage permissible under S. 114, and see whether the opposite party has been able to repel that presumption by clear and cogent evidence: A.I.R. 1955 Him. Pra. 37.

Where a daughter claimed as a sole surviving heir of her father who had died intestate but the opposite party pleaded her to be an illegitimate child as her parents had not been married together, *held*, the burden conclusively lay on the opposite party to prove that there was no valid marriage between her parents and she was illegitimate; presumption under S. 114 also supports such view. [A.I.R. 1918 Oudh 103; A.I.R. 1957 Madh. Pra. 174, Rel. on]: A.I.R. 1984 Bom. 229: 1984 Mah.L.J. 345: (1984) 2 Bom.C.R. 356.

The question was whether appellants Nos. 2 to 4 were sons of the concubine of

Dasharath Singh or were sons from his married wife. Evidence showed that Dasharath Singh brought her when she was a virgin. She lived for 25 years as his wife. It was not as if she was a widow or married wife of some one else. *Held*, that the aforesaid circumstances raised a strong presumption in favour of marriage and against illegitimacy: 1964 M.P.L.J. (Notes) 160.

102. Mortgage/pledge.—Mortgage by deposit of title deeds—Essentials—Intention to create security by deed—Presumption: (1964) 2 M.L.J. (S.C.) 162: A.I.R. 1965 S.C. 430.

Possession of mortgaged property repeatedly changing hands—Presumption, if any: A.I.R. 1969 Ker. 293 (F.B.).

Mortgagee in possession of land and raising crops—Presumption—Evidence of receipt of produce if necessary: A.I.R. 1958 Mys. 43.

Presumption of fact—Mortgage deed endorsed by mortgagee as fully satisfied—Presumption of satisfaction: 30 Nag.L.R. 196: A.I.R. 1934 Nag. 29.

It may well be more usual that mortgagees do not advance money in excess of the value of the property which they take as security, but no presumption as to value can be raised from the amount of the loan advanced. Loans are advanced quite frequently without any security at all: (1953) 55 Punj. L.R. 41: A.I.R. 1953 Punj. 292.

Registration of mortgage document in one district—Memorandum to be filed in other district—Unless it is proved to have been so filed notice to purchaser of mortgage will not be imputed—No presumption can arise under S. 114, Evidence Act: A.I.R. 1962 Pat. 236.

In a suit for redemption of an old mortgage where the original mortgagor is dead, and there is a lack of evidence owing to lapse of time presumptions are permissible to fill in gaps in the evidence which has been obliterated by the passage of time: 171 I.C. 174: A.I.R. 1937 Nag. 43.

Non-production of mortgage deed whether justifies an inference against the mortgagee. *See* A.I.R. 1982 All 503, cited under Note 58, *supra*.

National Savings Certificates issued by the Post Offices are its property; they can, thus, be pledged only by the Post Offices. Thus, where they were pledged by a contractor in favour of an authority under the signatures of the Postmaster as earnest money by their holder, *held*, the presumption arises that the pledge is proper; in case of any doubt it is open to the pledgee authority to inquire from the Post Office or the contractor; having made no such enquiry, the authority is presumed to have received the earnest money: A.I.R. 1994 All. 283 (D.B.).

103. Mahomedan law.—Applicability—Presumption of: 1957 Ker.L.T. 849.

Mahomedan law—Joint family—Claim to ancestral house—Ancestors related as brothers—Presumption as to jointness of family: 1966 B.L.J.R. 761.

104. Negligence.—Normal rule is that it is for the plaintiff to prove the negligence. However, in some cases this rule causes considerable hardship to the plaintiffs because it may be that the true cause of accident lies solely within the knowledge of the defendant who caused it. This hardship is avoided to a considerable extent by the principles of *res ipsa loquitur*. It means that an accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes and in such a case the mere fact of accident is *prima facie* evidence of negligence. Where some wagons were derailed, *held*, the fact of derailment itself was sufficient to raise the presumption of negligence on the part of Railways but the defendant was entitled to rebut the presumption: A.I.R. 1988 Del. 88: (1987) 32 Del.L.T. 297.

Negligence—Presumption and onus of proof: A.I.R. 1957 All. 363.

Fire explosive in a display of fire-works, falling midst of crowd and injuring an onlooker—Negligence on part of person-making and displaying it must be presumed: A.I.R. 1968 Ker. 151.

Carrier — Negligence — Consignment of mangoes reaching destination 2 days late—Delay of 2 days not being unreasonable, no presumption that damage was due to delay of 2 days can be drawn: A.I.R. 1969 Ori. 100.

Where the combustible material was being stored in the store rooms which were in exclusive control and supervision of the defendant and only its workers had access to those store rooms who were in the habit of smoking biris and cigarettes inside the

premises during working hours and the articles stored in the building were not self-combustible, *held*, a presumption could be raised that the fire was caused because of negligent act of defendant or its employees: A.I.R. 1979 All. 35 (D.B.).

When the plaintiffs succeeded in proving that a pedestrian (the deceased) was electrocuted from a live wire hanging down from an electric post, *held*, there was a presumption of fact that there was lack of proper care on the part of those in the management or control of the power supply system at the particular place: A.I.R. 1987 Ker. 253: 1986 Ker.L.T. 1124: 1986 Ker.L.J. 985: I.L.R. (1987) 1 Ker. 309.

105. Negotiable instrument.—(*See* also Note 20, *supra*). A cheque drawn, presented and paid is by itself no evidence of money lent or advanced by the drawer to the payee. It may be *prima facie* evidence to extinguish an existing debt, not to create a new one. A mere issue of a cheque in favour of the payee by itself will not be evidence of a loan, even if the cheque is encashed by the payee. However, it is open to the drawer to show by other evidence that the cheque was in fact loaned to the payee: (1980) 2 Karn.L.J. 202; I.L.R. (1974) 1 Del. 856.

In every suit on a negotiable instrument, the Court shall presume that such instruments were made, drawn, accepted or negotiated for consideration: (1979) 92 Mad.L.W. 225.

106. Partnership.—Books of accounts of partnership firm—Presumption as to genuineness: (1961) 1 M.L.J. 358.

While it is true that in a suit for dissolution of partnership and rendition of accounts, when the partnership is not disputed, the burden lies upon the other partners to prove that, though partnership existed earlier, but later either it is dissolved by mutual consent among the partners or that one of the partners had retired from the said partnership. But, where the plaintiff admitted that her signatures were obtained on blank papers and thus, did not dispute the signatures on the letter of retirement, but disputed the authorship of the contents of the same, *held*, the onus of proof automatically shifted from that of the defendants to the plaintiff and she had to prove that her signatures were obtained on the blank papers and that the letter of retirement was drawn up and fabricated. Thereafter, the defendants had to adduce rebuttal evidence on that aspect: (1992) 3 An.L.T. 77.

107. Paternity.—(*See* also Notes under S. 112, *supra*). Presumption as to legitimacy of children is rebuttable and burden is on person denying legitimacy: (1989) 2 Raj.L.R. 812 (Raj.).

Presumption as to legitimacy of child—It can be displaced only by proof of non-access: 1967 M.L.J. (Cr.) 311 (Ker.).

Where the son was born to a woman during the subsistence of her marriage with her previous husband even if it was alleged to be an outcome of an illicit connection with her subsequent husband, *held*, there is a conclusive presumption under S. 112 of his being a legitimate child: (1980) 21 Guj.L.R. 887: 1981 Hindu L.R. 211 (D.B.).

If a child is in possession of filiation acknowledged by the parents and has repute in the society, legitimacy should be presumed and if anybody challenges such legitimacy of the child, the onus is upon him to prove that the child is illegitimate. [A.I.R. 1918 Oudh 103; A.I.R. 1927 Mad. 733 (D.B.); A.I.R. 1929 P.C. 135; A.I.R. 1933 Lah. 520, Rel. on]: A.I.R. 1979 Cal. 3 (D.B.).

Fully matured child born after 212 days of marriage—Definite inference that wife conceived baby necessarily prior to actual date of marriage cannot be drawn. Hindu Marriage Act, 1955, S. 12(1)(*d*): A.I.R. 1970 Mad. 211: (1969) 2 M.L.J. 607: (1970) 83 Mad.L.W. 20 (S.B.).

The first defendant and a woman had been living together in illicit intimacy from about ten days after she left her lawfully wedded husband. A child was born within seven months after she left her husband. On the question whether the first defendant was the father of the child, *held*, there is no evidence that it is not a natural birth after the full period of gestation of about 280 days. S. 114 of the Evidence Act can be relied upon in such a case having regard to the common course of natural events and human conduct. If it is not a case of premature delivery, the coitus leading to conception should have come two months prior to the woman joining the first defendant after leaving her husband. In the absence of a finding that the first defendant was keeping the woman as his

concubine at the relevant period prior to the marriage one cannot assume that he is the father of the child: (1967) 1 M.L.J. 102: (1967) 80 Mad.L.W. 25.

Child born after period of 280 days—No presumption of illegitimacy—Application of principles of English Law—Not barred—Burden of proof: I.L.R. (1963) Bom. 77: A.I.R. 1963 Bom. 165.

Illegitimate children — Proof of their paternity—Extract from birth register—Probative value of—Information for record in birth register supplied by mother—Not binding on presumed father—Presumption of law as to paternity—Burden of proof as to paternity in such case: (1962) 2 M.L.J. 107: 1962 M.L.J. (Cr.) 427: A.I.R. 1962 Mad. 141.

Where marriage between a man and a woman was not established and a copy of birth certificate was produced to prove the paternity of child, the name of the child as well as the name of father of the man were not disclosed in the entry, and no one was examined who had informed the authorities with respect to birth of the child, *held*, it could not be inferred that the man was the alleged father of the child: (1990) 1 Hindu L.R. 113 (P.&H.).

108. Personal law.—A Hindu is governed in India by his personal law; he carries it with him wherever he goes. However, *prima facie*, it is the personal law of the region which governs him. The burden is, therefore, on him to prove that he had come from a different region where he was governed by a different law and or special custom prior to his migration. It is then for the other party to prove that the immigrant had renounced the law prevailing in the place of his origin and had adopted the law of the region to which he had migrated; the onus, therefore, would lie on the person so alleging: (1990) 1 Hindu L.R. 306 (S.C.).

A Hindu family, migrating from one part of India to another, is presumed to continue to observe the Shastras by which it was governed, and the presumption can only be displaced by showing that the immigrant has renounced the law of his place of origin and adopted the law of the place to which he had migrated: A.I.R. 1973 Pat. 160.

Presumption of continuance of status—Hindu law—Migrating family—Law applicable—Presumption of continuance of original law—Agarwals in Berar—Adoption by—Applicability of customary law: A.I.R. 1958 Bom. 79.

Presumption as to personal law—Halbi Koshtis of Central Provinces are not governed by Bombay School of law: A.I.R. 1957 Nag. 76.

Molesalam Garasias of Baroda Territory—No presumption that whole Hindu law applies to them: A.I.R. 1968 Guj. 229.

109. Pleader and client.—There is a presumption that a Counsel acts on the instructions of the client: A.I.R. 1976 All. 64: 1976 All.L.J. 667. *See* also A.I.R. 1954 Mad. 741, cited under Note 48, *supra*.

The statement in the notice by the Advocate that he had served it under the instructions of his client is not open to challenge and one has to proceed on the basis that the notice was in fact served by the client and not by the Counsel: 1979 All.L.J. 1348.

110. Possession — General. — Possession —Presumption. *See* 1963 Ker.L.J. 597.

The presumption that possession follows title cannot be called in aid by the plaintiff to prove his case of possession within twelve years before the institution of the suit in two cases: (*1*) when he has not adduced any evidence of possession at all, and (2) when his evidence is quite unworthy of credit, and is tantamount to his having not adduced any evidence at all. But where the evidence adduced on behalf of the plaintiff is not altogether valueless, the probabilities of the case and the presumption can be called in aid for the purpose of holding that the plaintiff has succeeded in proving his case of possession within twelve years before suit: A.I.R. 1958 Pat. 562.

The presumption that possession goes with title is not limited to particular kinds of cases where proof of actual possession is impossible on account of the nature of land such as boundary land, forest land or submerged land. The presumption applies to all kinds of land and where the plaintiff proved his title but not any act of possession and the defendant did not prove possession except at some intervals within 12 years of the suit, the presumption that possession follows title will come into play. [(1873) 20 W.R. 25 (P.C.) ; A.I.R. 1958 S.C. 434; 1962 Ker.L.T. 577, Rel. on; 1966 Ker.L.T. 86; 1966 Ker.L.T. 93, held no longer good law]: 1970 Ker.L.J. 320: 1970 Ker.L.T. 279: A.I.R. 1970 Ker. 310.

A presumption of title on the basis of possession is permissible only if the facts on record do not disclose another party's title to the property; thus, where the plaintiff seeking ouster of the defendant proved his title on the basis of a compromise decree and the defendant was found to be an encroacher on a portion of the suit property, *held*, it could not be presumed that the title to that portion vested in the defendant; the suit deserves to be decreed. [A.I.R. 1968 S.C. 1165, Rel. on]: A.I.R. 1990 N.O.C. 77 (Gau.).

The presumption that an open piece of land is in its owner's possession unless the trespasser by its substantial acts of possession excites the owner's attention to his having been dispossessed, *held*, is applicable to a jungle land situate in a village and not to a land situate in a crowded locality of Lucknow. [(1911) 8 All.L.J. 1176 (P.C.), Expl.]: A.I.R. 1973 All. 328.

Onus to show that possession was lawful is on accused—Mode of discharge of onus: 28 Cut.L.T. 17.

Land held by occupancy tenant at the time of regular settlement—Presumption—When rebutted. *See* A.I.R. 1958 Punj. 333.

Property, a waste land incapable of effective enjoyment—Title thereto found vested in plaintiff—*Held*, presumption arose that possession followed title: I.L.R. 45 Pat. 1553: (1966) 3 S.C.R. 663: A.I.R. 1966 S.C. 1931.

Where an open field, with no crop standing, is sold by the vendors and one of them puts the vendee by saying so to him at site, *held*, the possession is taken to have been transferred to the vendee: A.I.R. 1982 Guj. 340: (1981) 1 Guj.L.H. 967.

Where there was no direct evidence of possession of a land by the father, and the areas in the possession of his sons at the time of the first settlement were dissimilar, the periods of cultivation of the brothers were also dissimilar and they had separate houses within their respective holding, *held*, that it could not be presumed that the land must have been in the possession of the father: A.I.R. 1957 Him. Pra. 67.

In a case of zamindari property yielding rent only its collection by a claimant ordinarily is a very stable piece of evidence to support his case of possession: A.I.R. 1956 Pat. 233.

Oral lease not exceeding one year—Kabuliat by lessee only—Lessee going into possession—Presumption. *See* A.I.R. 1954 All. 475.

Whereas lessee of a wakf property *prima facie* proves a heritable right in the tenure at a fixed rate an assumption that the grant was originally lawful can be made. The presumption of an origin in some lawful title which the Court has so often readily made in order to support possessory rights, long and quietly enjoyed where no actual proof of title is forthcoming, is one which is not a mere branch of the law of evidence. It is resorted to because of the failure of actual evidence. The matter is one of presumption based upon the policy of law but even considered as an inference from proved facts the grant presumed is the thing which may well be regarded as likely to have happened. At the same time it is not a presumption to be capriciously made nor is it one which a certain class of possessors is entitled to *de jure*: I.L.R. 57 Cal. 1293: A.I.R. 1930 P.C. 103: 58 M.L.J. 641 (P.C.).

Presumption as to possession—Pakani Patrika—Name of X shown in the column of "Cultivators" for some years—Column left blank in subsequent years—Presumption is that X continued in possession in those subsequent years also—There is no warrant for assuming that the owner re-entered into possession in those years: (1979) 1 An.W.R. 58.

Where certain property was acquired by wife and children forming tavazhi by themselves, *held*, it could be presumed that said acquisition was on behalf of tavazhi. [A.I.R. 1975 Ker. 70 (F.B.); A.I.R. 1957 Ker. 27; 1975 Ker.L.T. 434, Rel. on]: A.I.R. 1982 N.O.C. 234: I.L.R. (1982) 2 Ker. 377.

111. Pre-emption.—Where a piece of land on which was situate a *gharat* was sold and sought to be pre-empted by a co-sharer only in respect of land which alone was sold as per the sale deed and the pre-emptor had no claim to the *gharat*, *held*, it could not be presumed that the pre-emption sought was only in respect of a portion of the property sold when the plaintiff had sued for being substituted for the vendee in the sale deed and did not ask for deduction of consideration for the *gharat*: A.I.R. 1983 Him. Pra. 71: 1983 Sim.L.C. 199: I.L.R. (1983) Him. Pra. 77.

Pre-emption—Suit for, brought by minor son of one of vendors—Defence that suit was collusive at the instance of vendors—Onus

on vendees to prove that suit was for vendor's benefit—Finding that vendees failed to establish it is finding of fact: 1964 Cur.L.J. 427 (Punj.).

Non-production of sale deed by the pre-emptors—Effect. *See* A.I.R. 1974 S.C. 2367, cited under Note 58, *supra*.

112. Trust.—Trusts Act, 1882, S. 82—Intention and presumption—Property purchased in name of sons—Merely on that ground no presumption can be drawn that property was purchased by sons with their own money: (1967) 69 Punj.L.R. 119.

Temple in South India, excluding Malabar and Kerala—Presumption is that it is public temple: (1966) 1 M.L.J. 109: A.I.R. 1966 Mad. 99.

The Court cannot draw adverse inference against the reigning Mahant for his failure to produce original Sanads in favour of the founding Mahant when the burden of proving that the properties of the temple were held by the reigning Mahant on trust for public purposes of a religious or charitable character was on the State Board of Religious Trust, who alleged that it was so. [A.I.R. 1938 P.C. 195, Rel. on]: A.I.R. 1971 S.C. 2057.

It is open to the Commissioner even at the stage of S. 6 of the A.P. Charitable and Hindu Religious Institutions and Endowments Act, 1987 to rely on the statutory presumption raised under S. 87(6) of that Act and proceed on the basis that an institution or an endowment is a public one: (1990) 2 An.L.T. 656: A.I.R. 1991 N.O.C. 25 (D.B.).

Where it was established that the petitioners and their ancestors had been enjoying the trusteeship for more than a century without any interruption, *held*, the presumption could be raised that they had been functioning as trustees from the time of its founder satisfying the definition of "hereditary trustee" in the Orissa Hindu Religious Endowment Act, 1951: A.I.R. 1984 Ori. 187.

113. Undue influence.—Undue influence—Presumption of: A.I.R. 1959 Mys. 102.

An employee merely averring that his signatures on his resignation were obtained by undue influence or coercion is not entitled to adduce evidence unless he pleads necessary particulars thereof; in the absence of such plea and proof, the Labour Court cannot draw an adverse inference which would render such resignation within the expression "otherwise terminates" within the meaning of S. 26(2) of the Bihar Shops and Establishments Act, 1953: (1989-1) 37 B.L.J.R. 555.

Where the executrix aged 75 and a patient of cancer, was living with and under the care of her close relation, that is, he was younger brother of her adopted son and was in a position to dominate her will and had obtained substantial benefit under the deed by way of agricultural land, *held*, whether or not he had used his influence over the executrix to obtain the advantage, could be established by the beneficiary by his own evidence; by not appearing as a witness in the suit, an adverse inference has to be drawn against him; as the deed *prima facie* appears to be unconscionable, the burden shifted on to him to prove that the deed was executed by the executrix without undue influence: A.I.R. 1975 Madh. Pra. 136: 1975 M.P.L.J. 156: 1975 Jab.L.J. 333 (D.B.).

Inferences arising from relationships between a testator and a legatee are certainly dependent upon the peculiarities of the society or community they belong to, their habits and customs, their values, modes and ways of thinking, their feeling, susceptibilities to particular pressures, influences and inducements; it is very difficult to reduce them to a general rule for all times and every where so as to raise the presumption of undue influence from a particular type of relationship. The only kinds of relationship raising such presumptions are those contemplated under S. 111. Other presumptions from a relationship can only be raised under S. 114; they are optional presumptions of fact based on proof of frequently recurring set of facts reasonably and naturally following therefrom, undue influence is only a matter of proof on established facts: A.I.R. 1974 S.C. 1999: (1974) 2 S.C.C. 600.

Merely because a Police Station is situated adjacent to Court hall, *held*, pressure or influence on accused on that account cannot be presumed: 1983 Cr.L.J. (N.O.C.) 95: 1981 Mad.L.W. (Cr.) 227: 1982 M.L.J. (Cr.) 96.

114. Will.—(*See* also S. 68). Will—Ancient—Execution—Evidence and proof—Probabilities—Will rational in character executed in presence of witnesses—Presumption that testator was of sound mind is justified—Absence of surname in signature of testator—Not suspicious: A.I.R. 1962 Andh. Pra. 29.

Will more than forty-five years old—Presumption as to soundness of testator's mind at time of execution—Proof of handwriting of attesting witnesses sufficient to prove soundness of mind of executor: A.I.R. 1969 Madh. Pra. 4.

Where a Will was proved by reliable and cogent evidence to have been executed, *held*, it could be presumed that the executor was sane and possessed of sound testamentary capacity; merely because some of the natural heirs had been deprived of their inheritance is not sufficient to negative the presumption: A.I.R. 1984 N.O.C. 51 (P.&H.).

Where a Will was proved by examining two attesting witnesses and the third witness though summoned through the Court and personally requested to appear as a witness but he did not, *held*, for non-examination of the third witness, no adverse inference could be drawn against the propounder; it was not incumbent upon him to compel the third witness to appear in the Court by resorting to O. 16, R. 10 of the Code of Civil Procedure: A.I.R. 1985 Cal. 349: (1984-85) 89 Cal.W.N. 832 (D.B.).

Where the testatrix was a highly educated person with rich worldly experience and had retired from Government service whereas the legatee was her sister who was also highly educated working as the head of an educational institution and living far away from the testatrix and the testatrix herself had presented the Will for registration and the Registrar also gave evidence to support the story and the testatrix died nearly 12 years after the registration of the Will, *held*, unless a definite case was pleaded to the contrary, the Court was not entitled to make surmises and assume anything contrary to the document, *i.e.*, Will: (1992-2) 110 Mad.L.W. 523: (1993) 1 Hindu L.R. 406: (1993) 1 M.L.J. 95.

Where a Will has been properly executed and registered by the testator but not found at the time of death, the question whether the presumption that the testator had revoked the Will can be drawn or not will depend on the facts and circumstances of each case. Even if such a presumption is drawn it is rather a weak one in view of the habits and conditions of our people. [A.I.R. 1967 Del. 128, Reversed]: A.I.R. 1979 S.C. 145.

Where the original Will was not found at the time of the death of the testatrix and there was no change in circumstances after the execution of the Will on account of which the testatrix might have revoked the Will, *held*, it could not be presumed that the Will was cancelled by testatrix. [A.I.R. 1979 S.C. 145, Rel. on]: A.I.R. 1986 P.&H. 402.

Where the certified copy of a Will executed and registered in 1941 in Burma was produced by a party in the Court in India and there was ample evidence on record to show that it was the husband of a party therein who was interested in keeping back the Will but he was not produced as a witness even when he had taken keen interest in the litigation and its outcome, *held*, the Court may draw adverse inference against the party which failed to examine him as a witness: A.I.R. 1973 Mad. 421: (1972) 2 M.L.J. 508: (1973) 86 Mad.L.W. 122 (D.B.).

Revocation of Will—Presumption—Will in possession of testator. *See* A.I.R. 1933 Cal. 657.

115. Miscellaneous.—Where the title-deed, *i.e.*, the sale deed, shows that the land is the property of a certain person, there is a presumption of fact in the absence of evidence to the contrary that the bungalow and the wells constructed thereon are his property, specially when it is not unlikely that he had some money to spare for that purpose: 1949 Nag.L.J. 261: A.I.R. 1949 Nag. 378.

Attestation—Evidence of one attesting witness falling short of proof of due attestation of document—On body of document two persons appearing to be attesting witnesses—*Held*, one could not presume from such signature that document was attested by other signatory also: (1967) 33 Cut.L.T. 811: I.L.R. (1967) Cut. 593.

Relinquishment of rights, in property—Person with certain rights, in property, dead—Inference that such person gave up the rights should not be lightly made: I.L.R. (1966) 2 Mad. 173: (1967) 1 M.L.J. 96: A.I.R. 1967 Mad. 404.

Plaintiff's land adjoining defendant's house—Land lying to north of defendant's house—Defendant opening door in north wall of his house with the purpose of having access to north—Plaintiff is entitled to relief for apprehended trespass against his land: A.I.R. 1963 All. 239.

Agricultural land—Presumption as to forest lands in Kerala: A.I.R. 1969 Ker. 304.

Madras Marumakkathayam Act (XXII of 1933), S. 33—Tarwad yielding appreciable income—Acquisition by manager—Presumption is that acquisition enures to tarwad: 1968 Ker.L.R. 273.

Documents entered into with *pardanashin* lady—Presumption: (1966) 8 Ori.J.D. 94 (*See* also Note 80, Ss. 101-104, *supra*).

The fact that a certain sum is paid towards the principal on a certain date does not justify the conclusion that the interest up to that date has been paid. In fact it is not a matter of presumption or inference at all: I.L.R. (1950) 2 Assam 137: A.I.R. 1950 Assam 216.

Presumption of a bill of lading: A.I.R. 1968 Mad. 42.

A document on plain paper unstamped and unregistered and not produced till it was filed, is presumed to be not genuine: A.I.R. 1930 Pat. 78.

Recitals in documents—Presumption of correctness—*Held*, that the recitals in the documents should not be accepted at their face value and their truth should be scrutinized in the light of other evidence: A.I.R. 1957 Andh. Pra. 744: (1957) 1 An.W.R. 31.

Where the facts actually brought on the record clearly show that certain document does not represent the factual situation correctly, there is no occasion for raising the presumption that *prima facie* tenor of a document represents the correct situation: (1960) 62 Punj.L.R. 224: A.I.R. 1960 Punj. 417.

Where the defendant raised no plea of the original agreement being insufficiently stamped in the trial Court and no specific issue on that point was framed and the original document was lost from the Court's custody, *held*, the presumption is that the document was properly stamped; the objection regarding it being insufficiently stamped could not be raised for the first time in appeal: A.I.R. 1989 Pat. 96.

Where respondent did not file any counter-affidavit denying the correction or genuineness of the documents on which reliance was placed by the petitioner, *held*, it was not open to the respondent to dispute the correctness or genuineness of the statement. However, that did not lead to a presumption of facts against respondent: A.I.R. 1991 Mad. 61.

Where there was no recital regarding transfer of embankment between two field, *held*, presumption regarding half of embankment belonging to each field's owner may be drawn: (1981) 2 M.P.W.N.64.

In ordinary cases the absence of a receipt for the deposit of money would throw very great doubt on the case of deposit. (In this case, having regard to the relationship between the parties, the Court did not draw any adverse inference against the alleged depositor for not having a receipt from his uncle evidencing the deposit): A.I.R. 1960 Cal. 484.

Where a customer, namely, an account holder in bank, even without any express grant of an over-draft facility overdraws on his account and the cheque issued by him is honoured, the transaction amounts to a loan and the customer is bound to make good the loan to the bank with reasonable interest: A.I.R. 1985 Bom. 432: 1985 Mah.L.J. 461: I.L.R. (1985) Bom. 1856 (D.B.).

Where grants did not expressly include the river bed within their compass, *held*, notwithstanding ending the legal position in America or in England it is fairly settled in India, tidality is not an essential basis to determine the river bed's ownership; if, at the relevant point, the river is either tidal or navigable, the presumption is that the river bed at those points vests in the Government: A.I.R. 1973 Andh. Pra. 281: (1973) 1 An.W.R. 218 (D.B.).

Water course running on anothers land—Right to user—Presumption: 1960 Cr.L.J. 1388: A.I.R. 1960 All. 656.

Plea of *D* that *P* had transferred to him only tenancy and not goodwill of business—When business run by *P* and *D* is same and premises are located in business locality, conclusion is that goodwill must have necessarily passed: A.I.R. 1968 Raj. 278.

Infringement of patent—Defendant admitting production of same drug—Presumption of infringement against defendant: A.I.R. 1969 Bom. 255.

Audit notes prepared under S. 17, Co-operative Societies Act, 1912—Presumption as to correctness of their contents—Cannot be made under section: A.I.R. 1970 Punj. 203: (1970) 72 Punj.L.R. 60.

Speed is good; haste is bad; and it is desirable that one should hasten slowly. Whether it was case of haste or speed would depend upon the objective situation found on an

overall appraisal. Thus, where the petitioner, a shareholder of the respondent-company, challenged the consent of the Collector of Capital Issues granted for the issue of shares to the respondent-company on the ground that as the consent was granted within hardly a period of two months from the date of filing an application regarding such consent, it reflected undue haste and favouritism, *held*, the material showed that the details of the proposals had been examined and discussed and that an examination of the merits had not been a casualty due to the speed with which the application was processed, especially in view of the fact that no injury had been caused to the investors and no substantial loss to their securities had been occasioned. Hence, it was difficult to say that the period of two months taken in granting consent by the Collector was so short that an inference of haste must follow: A.I.R. 1989 S.C. 2138.

Rectification of register—Powers of directors—Doctrine of estoppel and that of indoor management—Protection under when available—Transfer of shares by member to non-member—Transferee's name registered in company's register but cancelled subsequently without notice to transferee—Transfer not *ultra vires*—Transferee, *held*, was entitled to protection: I.L.R. (1962) 2 Punj. 52: A.I.R. 1962 Punj. 277.

Companies Act, 1956, Ss. 433, 434, 466—Inability to pay debts—Disputed debts—Company Court if can consider legality of debt—Procedure to be adopted in event of genuine dispute regarding a debt in winding up proceedings—Decretal debt stands on the same footing as any ordinary debt: (1967) 1 Comp.L.J. 172 (Cal.).

Succession—Presumption in favour of collateral adversely affecting female rights—Inconsistent with prevailing custom—Presumption must be deemed to be rebutted: A.I.R. 1968 S.C. 806.

Failure to implead legal representative within time—Presumption of fraud: (S.) A.I.R. 1957 Raj. 154.

Question affecting limitation—Onus: A.I.R. 1957 Cal. 399.

An inference of approbation of a book of an objectionable character by persons having access to the library of an individual or association possessing it is not necessarily justifiable: 16 I.C. 257: (1911-12) 16 Cal.W.N. 1105.

Cl. (*da*) of the Navodaya Vidyalaya Scheme does not lay down that students who had not studied in recognised rural schools in classes III, IV and V shall not be eligible for admission in the quota reserved for rural students in the Vidyalayas; it merely states that those having studied in the rural recognised schools shall be presumed to have a rural domicile; others would have to establish their rural domicile: A.I.R. 1988 All. 131: (1987) 13 All. L.R. 711 (D.B.).

Where a student had correctly answered a question in the mathematics paper but without the detailed calculations by which the correct answer was arrived at, *held*, may be the student had learnt the correct answer by heart, he may not be awarded any marks therefor because he did not know the detailed calculations; but it could not be presumed that he had used unfair means by copying from another examinee's answer book or from any other material: A.I.R. 1995 All. 81.

Where the settlees of a Housing Board Colony sought a *mandamus* to stop the Board from constructing building on the open space shown in the Colony's site plan as "reserved for other utility" and maintain it as such, *held*, the said description of the disputed area in the site plan alone was not sufficient to raise the presumption that the area was earmarked for the settlees' common use; the burden of proof not discharged by the settlees: A.I.R. 1982 Pat. 236: 1982 B.L.J.R. 357: 1982 B.L.J. 411 (D.B.).

Where the State Government failed to supply the information regarding Model Scheme for Carcass Utilisation at Village Panchayat level despite Court orders, *held*, an adverse inference could be drawn that the Scheme had remained merely on papers and it was never implemented: A.I.R. 1981 S.C. 1668: (1981) 4 S.C.C. 202.

Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule· A.I.R. 1990 S.C. 1607: 1990 Lab. I.C. 1304: (1990) 2 S.C.C. 715.

Merely because a person had heavy liability and previous undischarged decrees and was also closing his business offices at different places or that there was decline in his business, *held*, it could not lead to the

inference that the intention of the person was to obstruct or delay the execution of decree. To draw such inference further facts and circumstances would be necessary: A.I.R. 1987 Ori. 107: (1987) 63 Cut.L.T. 5.

Charge against Railway employee that he was instrumental in forcing the shutting down of air compressor in workshop—Weight of evidence in favour of employee before Enquiry Committee—General Manager presuming that employee was not only a member of crew which approached the compressor house to secure shut down but that he was also responsible for the shut down—*Held* that such a presumption was against all canons of natural justice and the conclusion of the General Manager could not be sustained: (1962) 64 Punj.L.R. 620: (1962) 1 Lab.L.J. 588: A.I.R. 1962 Punj. 482.

The ordinary presumption that ghee is intended for human consumption is not a presumption of law but a supposition based on common sense when there is no assertion to the contrary: 48 Cal.L.J. 502: A.I.R. 1929 Cal. 283.

Where a property purchased by a father with his own money in the name of his minor son, having no money of his own, was sold by the father to a third party without permission of the District Judge under S. 8 of the Hindu Minority and Guardianship Act, 1956, *held*, there being a presumption that the father paying consideration was the real owner and not the minor son, the sale by the father was not bad for want of permission from the District Judge: A.I.R. 1983 Ori. 36.

Hindu law—Widow—Alienation—Consent by reversioner—Inference. *See* A.I.R. 1958 All. 546.

Defamation—Defamatory words are presumed to be false—Rebuttal of such presumption—Onus is on defendant: 1969 M.P.L.J. 510: 1969 Jab.L.J. 544.

It cannot be said that before any initial presumption of accident can arise or be raised, the Court must consider the weight of all the facts and circumstances of the case. S. 114 does not lay down any such rule. Even some facts relating to a particular case may be sufficient to induce the Court to presume the existence of certain other facts. Any presumption under S. 114 is rebuttable and the presumption can always be rebutted by reference to certain other facts. But if the initial presumption as permitted under S. 114 can be raised only after consideration of all the facts of the case there can be no question or scope for rebutting that presumption. The section deals both with presumptions on which the Court may decide to act after consideration of the whole of the evidence as well as initial presumption. Under our law presumption is a generic term which includes presumptions *juris et de jure*, whose very nature is to exclude all proof against what they assume as true as well as every sort of rebuttable presumption such as rebuttable presumption of law, strong or violent presumption of fact, fixed presumption of law and fact, as well as those arising from evidence direct or presumptive which shift the burden of proof to the other party. No person shall, in the absence of criminative proof, be supposed to have committed any violation of criminal law whether *malum in se* or *malum prohibitum* and this presumption holds good in all civil and other proceedings for whatever purposes originated. Where it is established that a person died of a cause such as drowning or a fall from great height presumption against violence or suicide must be raised and in the absence of any evidence in rebuttal would be allowed to prevail. Where the question for determination is whether death was caused by accident or design, the initial presumption must be in favour of death by innocent cause. Of course, such a presumption like all other rebuttable presumptions may be dislodged by showing facts and circumstances which may be sufficient to nullify the probative value of the presumption. A presumption may be rebutted by presumptive as well as direct evidence. Presumption of the nature under consideration, when it arises, is entitled to great weight, and when there is no other evidence, is decisive in a civil case. *Held* that after giving careful consideration and giving utmost weight to the same, the Court was unable to regard the relative heights of the deceased and the window and the breadth of the parapet of the building as sufficient to dislodge the presumption of innocent death. This presumption was one which the policy of law and the ends of justice require to be made and it was not possible for the Court to regard it as rebutted by the mere naked facts of the relative heights of the assured and the window and the breadth of the parapet. These bare facts about dimensions and

[1][**114-A. Presumption as to absence of consent in certain prosecutions for rape.**—In a prosecution for rape under clause (*a*) or clause (*b*) or clause (*c*) or clause (*d*) or clause (*e*) or clause (*g*) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.]

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1. Inserted by Act 43 of 1983, S.6 (w.e.f. 25-12-1983).

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height by themselves were not sufficient to tilt the scales in favour of the insurers-defendants and particularly so when the evidence demonstrated that the assured when he met his death was young married man with four children and domestically quite happy, and that he was a wealthy businessman in very affluent circumstances and in good health and had no known reason or occasion to put an end to his life: A.I.R. 1956 Bom. 633.

Where the father of the appellant-husband gave details of the incident in which accusation was made by the wife against the husband that he had illicit relations with his brother's wife, *held*, there was a strong presumption that the father of the husband being an old respectable person would not depose about an incident in open Court which would disgrace and ridicule his family members unless it was true: A.I.R. 1989 P.&H. 310: (1989) 1 Hindu L.R. 565: (1989) 95 Punj.L.R. 553: (1989) 2 D.M.C. 104 (D.B.).

In the case of a young woman giving birth to her first child and entirely unattended during the process, no presumption can reasonably be made under S. 114 that the child was born alive: A.I.R. 1941 Pesh. 22.

In commercial establishments, normally, allocation of duties and administrative work is not always done by orders in writing unlike in Government offices; it is a matter of arrangement amongst the top officers. Where as a custom and practice the Administrative Manager dealt with matters relating to a disciplinary action, he will be presumed to have that power; no written delegation is necessary because commercial concerns are not statutory authorities: 1981 Mah.L.J. 646: 59 F.J.R. 130.

Foreign-State owned trade enterprise, registered and incorporated in that country—Suit against such enterprise filed in India—Consulate of that country in India certifying such features of enterprise—No evidence or statement however given on such enterprise being part of or department of that foreign Government—Such enterprise must be presumed to be a legal entity—Such enterprise being part of or department of that foreign Government is not satisfactorily established in such a case: (1968-69) 73 Cal.W.N. 192.

There is every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property: 1956 Nag.L.J. 418: A.I.R. 1956 Nag. 59.

Annexation of Goa territory—No presumption as to annexation: 1968 Cr.L.J. 316: A.I.R. 1968 Goa 17.

Section 114-A—Notes.

The presumption about want of consent under S. 114-A is not conclusive. Evidence may still be given to disprove it. But in the absence of any evidence of disproof, there is no option with the Court but to raise a presumption about non-consent if circumstances for raising the presumption under S. 114-A exist. It must, however, be conceded that immoral character would still not be an absolutely irrelevant circumstance. It may render the story itself as incredible. It may take away probative force of the story, told as it is by a woman with no scruples or morals. It may be difficult to believe a woman of immoral character if she says that some persons had sexual intercourse with her unless there existed satisfactory proof in support of the story of sexual intercourse. Thus, where prosecutrix alleged that accused persons raped her and it was proved that she was a woman of easy virtue and the doctor found no injuries on her private parts and she did not make any complaint about the alleged incident to any body for five days coupled with late recording of report by her after five days with false explanation for the delay, *held* , no presumption under S. 114-A could be raised by the Court: 1992 M.P.L.J. 35: (1992) 1 Hindu L.R. 544: (1992) 1 Rec.Cr.R. 569 (D.B.).

CHAPTER VIII
ESTOPPEL

115. Estoppel.—When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Presumption under S. 114-A is attracted to cases of rape falling under sub-S. (2) of S. 376, I.P.Code, except when the case is under Cl. *(f)* thereof and no such presumption is attracted to cases of rape falling under S. 376(1), I.P.Code. Therefore, a charge should always be framed in cases of rape either under sub-S. (1) or sub-S. (2) of S. 376, I.P.Code and conviction should also be so distinctly recorded, instead of under S. 376, I.P.Code as such: 1993 Cr. L.J. 1825 (Madh. Pra.). *See* also (1993) Rec.Cr.R. 367 (P.&H.) (D.B.).

If the conditions given in S.114-A are satisfied, the Court shall presume about the absence of consent on the part of the prosecutrix but that presumption is rebuttable by contrary evidence. However, before that presumption can be drawn, there should be reliable evidence amounting to proof to hold that sexual intercourse took place between the accused and the woman concerned. If there is no satisfactory evidence on that question, it would be clearly wrong to resort to the presumption and to hold that the woman did not consent, since that would be begging the question if sexual intercourse at all took place. Therefore, where it was doubtful if any sexual intercourse took place with the prosecutrix at the time of alleged incident, *held*, presumption under S. 114-A was not attracted: 1993 Cr.L.J. 120: (1992) 1 Crimes 889 (Madh. Pra.).

In a prosecution for rape, absence of marks of injury on victim is not fatal in each case; nor does the absence of such physical injuries on the prosecutrix warrant the presumption of consent on her part: 1990 Cr. L.J. 1179 (Madh. Pra.). *See* also A.I.R. 1981 S.C. 559: 1980 Cr. L.J. 1344: (1980) 4 S.C.C. 262: (1981) 1 S.C.R. 402.

Section 115—Synopsis.

1. Scope, meaning and nature of estoppel.
2. Essentials of estoppel.
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4. "Thing"—Meaning of.
5. Applicability of estoppel.
6. Waiver and estoppel.
7. *Res judicata* and estoppel.
8. Estoppel and waiver *qua* fundamental rights.
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10. Estoppel by silence.
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15. Acquiescence—Illustrative cases.
16. Rule of standing by.
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18. Issue estoppel.
19. No estoppel when truth is known.
20. No estoppel when both parties are labouring under a mistake.
21. No estoppel against statute.
22. Estoppel in case of statement or concession on point of law.
23. Estoppel when benefit of legislation has been taken.
24. Approbate and reprobate.
25. Promissory estoppel—Scope and applicability.
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(*b*) In case of incentive schemes for setting up industries.
(*c*) In case of allotment of plot/flats, etc.
(*d*) In case of lease, licence, permit, etc.
(*e*) In excise cases.
(*f*) In case of house/property tax.
(*g*) In case of sales tax.
(*h*) In case of electricity charges.
(*i*) In case of Railways.
(*j*) In case of promise to give loan.
(*k*) Other cases.
26. Estoppel against University/Education Board.

Illustration

A intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it.

The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

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27. Estoppel in cases of admission to educational institutions.
28. Estoppel by negligence.
29. Estoppel by pleadings.
30. Estoppel by admission.
31. Estoppel by attestation.
32. Estoppel by compromise or consent.
33. Estoppel in cases of auction-sale.
34. Estoppel in execution proceedings.
35. Estoppel by election.
36. Estoppel by conduct.
37. Waiver—General.
38. Waiver of statutory notice.
39. Waiver of objection to admissibility of evidence.
40. Waiver—In case of remand.
41. Waiver—Illustrative cases.
42. Estoppel against estoppel.
43. Estoppel in cases of fraud.
44. Estoppel by judgment/decree.
45. Estoppel against valuation of suit.
46. Estoppel by acceptance of costs.
47. Estoppel between landlord and tenant.
48. Estoppel in criminal cases.
49. Estoppel in case of preventive detention.
50. Estoppel in company matters.
51. Estoppel in taxation matters.
52. No estoppel against recovery of excess duty or price paid.
53. Estoppel in land acquisition matters.
54. Estoppel in arbitration matters.
55. Estoppel in recruitment/appointment matters.
56. Estoppel in service matters.
57. Estoppel in labour matters.
58. Estoppel in matter of family arrangement.
59. Estoppel between vendor and vendee.
60. Estoppel in pre-emption cases.
61. Estoppel between mortgagor and mortgagee.
62. Estoppel in case of principal and agent.
63. Estoppel in case of consignor and consignee.
64. Estoppel in case of partnership.
65. Estoppel in bank cases.
66. Estoppel in matrimonial matters.
67. Estoppel in respect of burden of proof.
68. Estoppel in case of *benami* transaction.
69. Estoppel against minor.
70. Estoppel against reversioners.
71. Estoppel in case of adoption.
72. Estoppel by record.
73. Estoppel in election matters.
74. Estoppel in case of easement.
75. Estoppel by deed.
76. Estoppel by recital in deed.
77. Estoppel in case of acknowledgment of settlement of account.
78. Estoppel when transferor of property acquires title subsequent to transfer or when he had limited interest.
79. Estoppel in case of trust.
80. Estoppel against insurer.
81. Plea of estoppel in appeal.
82. Miscellaneous.

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1. Scope, meaning and nature of estoppel.—Section is not exhaustive, and estoppels are not confined to this section: I.L.R. 15 Pat. 721: A.I.R. 1937 Pat. 169. *See* also I.L.R. 22 Pat. 554. The whole law of estoppel in *pais* is not laid down in S. 115. A familiar rule is that there cannot be estoppel against statute but that rule is not to be found in the four corners of the section: A.I.R. 1949 Cal. 20. S. 115 is not exhaustive of the doctrine of estoppel by representation: I.L.R. 33 Cal. 915. *See* also (1915-16) 20 Cal.W.N. 1335; 23 Pat.L.T. 213: A.I.R 1942 Pat. 317; 23 M.L.J. 335; A.I.R. 1930 All. 330. But *see* I.L.R. 35 Cal. 904: (1907-08) 12 Cal.W.N. 721 (P.C.). There are three kinds of estoppel: (*1*) by record, *see* Evidence Act Ss. 40 and 44: 39 C.L.J. 40; 48 I.A. 49 (2) Estoppel by deed, *see* I.L.R. 12 Lah. 546. (3) Estoppel in *pais* or by conduct which is dealt with in Ss. 115 to 117, *see* (1917-18) 22 Cal.W.N. 891 (P.C.). Estoppel is a rule of evidence and the general rule is enacted in S. 115 of the Evidence Act. This is the rule of estoppel by

conduct as distinguished from an estoppel by record which constitutes the bar of *res judicata*: (1953) 2 M.L.J. 782: A.I.R. 1954 S.C. 82. *Res judicata* and estoppel—Relative scope of. *See* A.I.R. 1958 All. 207. Estoppel is nothing more than a rule of evidence. The law of India and England is the same as regards estoppel: A.I.R. 1933 Pat. 708; A.I.R. 1939 Pat. 296: 182 I.C. 618. The law of estoppel which S. 115 enacts is the same as the English Law: 65 I.A. 75: I.L.R. (1938) Mad. 360: A.I.R. 1938 P.C. 32: (1938) 1 M.L.J. 268 (P.C.). Estoppel is both a rule of pleading and evidence and it extends to things which are matters of pleading and not proof. In India there is no room for any application of the doctrine of estoppel outside the provisions of S. 115. A party is not estopped from suing; he is estopped from making the allegations necessary to enable his suit to succeed: I.L.R. 22 Pat. 554: A.I.R. 1944 Pat. 30.

Law of estoppel is not exhausted by Ss. 115 to 117—There is scope for invoking equity or estoppel even outside area covered by these provisions: 1969 Ker.L.R. 1.

Ss. 115 and 116 are not exhaustive; there may be rules of estoppel applicable in India other than those contained in the sections; a man may be estopped not only from giving a particular evidence under the Act but also from doing any act or relying upon any particular argument or contention which the rules of justice, equity and good conscience prevent him from using as against his opponent: A.I.R. 1974 Pat. 364 (D.B.).

Ss. 115 to 117 are not exhaustive and the principle of estoppel contained in these sections may be applied by analogy to parties not mentioned therein. Where the defendant had recovered the properties in the suit from third parties after litigation prosecuted by him as the guardian of the plaintiff, and continued in possessions as guardian and manager of the plaintiff, he could not, without discharging his duties as guardian and manager by giving up possession, be heard to plead that the decree in favour of his ward was illegal, and he was entitled to retain the property as reversioner: 1961 M.P.L.J. 58: A.I.R. 1961 Madh. Pra. 27.

The rule in this section is not modified by S. 43 of the Presidency Small Cause Courts Act: A.I.R. 1940 Mad. 700: (1940) 1 M.L.J. 605.

Both Ss. 92 and 115 are provisions of the same Evidence Act. They have to be read together. Reading the two sections together the effect is to exclude the plea of estoppel when the proof of the oral agreement on which the estoppel is based would be contrary to the provisions of S. 92. S. 115 would apply only when the representation is in writing, but would not help when it is oral in the face of S. 92. It is wrong to suppose that S. 115 is substantive law, while S. 92 alone is procedural law. If the two are read together, both can operate. There is nothing in S. 115 to show that it overrides S. 92. There is no estoppel against a statute. It is clear, therefore, that no estoppel can be pleaded against the statutory bar of S. 92: 1979 Rajdhani L.R. 7: I.L.R. (1979) 1 Del. 84.

Estoppel is rule of evidence which prevents one party from denying the existence of a fact which he represented as existing and upon which representation another person has been induced to act to his detriment: (1991) 2 Cal.H.N. 41.

The law of estoppel by representation is confined to the provisions of S. 115 and apart from the provisions of this section there is nothing like what is called equitable "estoppel" evolved by the English Judges. The provisions of S. 115 are in a sense a rule of evidence. They are founded upon the well known doctrine laid in (1837) Ad. and El. 469. The object of estoppel is to prevent fraud and secure justice between the parties by promotion of honesty and good faith. Consequently, where one person makes a misrepresentation to the other about a fact he would not be shut out by the rule of estoppel if that other person knew the true state of facts and must consequently not have been misled by the misrepresentation. Further, the person setting up an estoppel against another must show that his position was altered by reason of the representation or conduct of the latter, otherwise even the general principle of estoppel cannot be invoked by him: (1965) 2 S.C.W.R. 644: A.I.R. 1965 S.C. 1812.

The principle of conclusiveness of statements as to the points decided is well settled and cannot be doubted. No man is to be vexed twice over for the same cause and but for this rule there would be no end to litigation and no security for any person. This rule not only prevents a new decision but also a new investigation and inquiry in order to avoid harassment to the same persons again

and again. It is also clear that a litigant cannot be permitted to assume inconsistent position in Court to the detriment of his opponent. If a party takes up a particular position at one stage of a litigation it cannot turn round and resile from that position. In other words, pleadings contrary to the earlier ones are prohibited. But before applying the principle of estoppel against a person his declaration, act or omission must be clear, unambiguous and of an unequivocal character. Estoppel can arise only from a clear and positive statement.

Held, that in the case of A.I.R. 1963 S.C. 134, wherein the appellant in the case, was intervener, the State of Bihar, the respondent in that case, had no doubt stated that Mining Boards were constituted under S. 10 of the Mines Act, 1923, but it could not be held that they admitted the validity of the constitution of those Boards. Simply because Mining Boards were constituted under S. 10, it did not mean that the constitution was valid. Moreover, even if those Boards were continuing to operate at the time of framing the Coal Mines Regulations, 1957, it would not necessarily mean that the constitution of the Boards themselves was valid and in accordance with law. There was no admission by the respondents before the Supreme Court about the validity of the Mining Boards and the principle of estoppel would not apply against them. *Held* further, that reference was made to the Mining Board as provided in S. 59(3) of the Mines Act, 1952 and that the Coal Mines Regulations, 1957 must be held to be valid: A.I.R. 1966 Pat. 410.

Estoppel has no operation or efficacy whatsoever except as a bar to testimony. Its sole office is either to place an obstacle in the way of a case which otherwise might succeed, or to remove an impediment out of the way of a case which might otherwise fail. It has no other function. Emphatically it is not a cause of action in itself; nor does it create one, though the application of this, as of any other rule of evidence in the course of litigation may result in a total or partial establishment or disestablishment of the case made by one or other of the parties. Estoppel merely operates as a bar to the suit; it does not extinguish the right: (1970) 72 Punj.L.R. 283: I.L.R. (1970) 1 Punj. 689: A.I.R. 1970 Punj. 462 (F.B.).

Question of estoppel is not a question of fact; it is an inference of law from facts proved; it is liable to be dealt with in a second appeal if the appellate Court below failed to consider some facts proved; thus, the High Court is not bound by its decision even if it is assumed to be finding of fact; it can be interfered in the second appeal. [A.I.R. 1959 S.C. 57; (1969) 2 S.C. (N) 481, Disting.]: A.I.R. 1979 P.&H. 12.

Plea of estoppel and acquiescence cannot be adjudicated upon unless it is pleaded because it is a question of fact: A.I.R. 1981 N.O.C. 235 (All.).

A question of estoppel is a mixed question of fact and law, and without definite allegations in the pleadings, a party should not be permitted to resort to the plea of estoppel: I.L.R. (1961) Mad. 134: (1962) 1 M.L.J. 258: (1960) 73 Mad.L.W. 541: A.I.R. 1961 Mad. 114; 1981 All.L.J. 602.

A plea of estoppel cannot be entertained unless it has been raised in the pleadings and an issue has been struck on same: 1978 Tax. L.R. 673 (All.) (D.B.).

Estoppel is a rule of evidence prescribed by S. 115 of the Evidence Act. Nevertheless it is necessary to establish the facts on which the plea of estoppel may be founded, and it is well settled that no amount of evidence can be looked into upon a plea which was never put forward. The Court must apply the rule to the primary facts of the case: 1979 (U.P.) R.C.C. 153: 1979 All.L.J. 118.

Estoppel is a rule of evidence which prevents one party from denying the existence of a fact which he represented as existing and upon which representation another person has been induced to act to his detriment: A.I.R. 1971 Cal. 407: (1971-72) 76 Cal.W.N. 556.

Estoppel is only a rule of evidence; one cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said: (1976) 1 Cut.W.R. 493 (D.B.).

The question whether the principle of estoppel would apply to a particular case depends on the facts and circumstances of that case. One of the tests is whether the person who had received certain advantages on account of the so-called misrepresen tation of the other really knew the correct state of affairs and yet continued to receive

the advantages in question or not: A.I.R. 1990 Ori. 10: (1989) 67 Cut.L.T. 199 (D.B.).

An estoppel, that is to say, the language upon which the estoppel is founded must be precise and unambiguous: (1904) 6 Bom.L.R. 864 (F.B); 13 Beng.L.R. 12 (P.C.); I.L.R. 26 Bom. 499; A.I.R. 1926 Mad. 1052; I.L.R. 10 Luck. 361: 11 O.W.N. 1571: A.I.R. 1935 Oudh 121. *See* also 161 I.C. 514: A.I.R. 1936 Pat. 133.

Estoppel can arise only from a clear and definite statement. Where the act or omission is not of an unequivocal character, or where the document or the words used are ambiguous, the bar of estoppel does not come into operation: 1957 Pat.L.R. 288 (D.B.).

Estoppel is a rule of evidence by which a person is not allowed to allege and prove a thing under certain circumstances. The application of this principle in India is embodied in S. 115 of the Evidence Act. Before the plaintiff could be held bound by the rule of estoppel, it must be established that the defendants have acted on his representation, act or omission. Where the defendant's position has not altered even the least on account of any act on the part of the plaintiff, the principle does not apply: A.I.R. 1968 Pat. 487.

A person claiming the benefit of a general estoppel under S. 115 cannot be placed on exactly the same footing as a person who obtains a transfer from an ostensible owner and claims protection under S. 41, T.P. Act. S. 41, T.P. Act, no doubt deals with a branch of estoppel, but S. 115 does not impose on the person acting on the faith of a representation made to him the same duty of making inquiries into the truth of the representation as is imposed on a transferee from an ostensible owner by S. 41, T.P. Act: 11 O.W.N. 1097: A.I.R. 1934 Oudh 460. *See* I.L.R. 20 Cal. 296 (P.C.); I.L.R. 46 All. 758: 47 M.L.J. 591 (P.C.); (1957) 2 M.L.J. 603.

A person who puts forward the plea of estoppel must prove every one of the legal requirements necessary to be established before he could avail of such a plea: A.I.R. 1965 Mys. 258.

The law of estoppel will not be invoked in favour of a party who comes to Court with dirty hands; where a suit between two cotenants one of whom claims to be sole tenant is compromised and one of them subsequently goes behind it and revives the matter, the other will not be estopped from pleading the true facts: 18 R.D. 507.

Doctrine of estoppel: A.I.R. 1966 Andh. Pra. 147.

Plea open to plaintiff's as well as defendants: 3 O.W.N. 993: A.I.R. 1927 Oudh 97.

Plea of estoppel—When to be raised—It has to be pleaded and proved—It cannot be raised for first time in writ petition and provide basis of decision on question of rights: 1969 All.W.R. (H.C.) 857.

A wrong decision on a question of estoppel, will also lead to a failure to exercise jurisdiction or to a wrong assumption of jurisdiction: A.I.R. 1973 Raj. 56: 1972 W.L.N. 451: 1972 Raj.L.W. 469.

The onus of establishing facts giving rise to estoppel rests on the party pleading it: A.I.R. 1924 P.C. 212: I.L.R. 46 All. 728: 47 M.L.J. 591 (P.C.).

Both S. 91 and S. 115 embody rules of evidence, the latter projects a positive state of affairs; the Courts of law are to render justice, not to encourage multiplicity of proceedings. Where a registered partition deed contains a specific reference to three earlier partition deeds and also a recital that one of the parties, having a share in an undivided *pangu* was being conveyed some other property in lieu thereof, *held*, it constitutes an admission of the earlier as well as the latest partitions; parties relying on the registered partnership deed are estopped from contending that there were no earlier partitions as mentioned in the deed: (1985) 98 Mad.L.W. 887.

Estoppel—Meaning and nature of—Assam Municipal Act (I of 1923), S. 55 (2)—Scope of — Assam Land and Revenue Regulation (I of 1866), Rules under R. 18—Proceedings in respect of encroached lands—*Held*, Deputy Commissioner could act under the rule—Order of removal of construction—Suit for declaring it illegal held not maintainable: I.L.R. (1963) 15 Assam 402: A.I.R. 1964 Assam 60.

2. Essentials of estoppel.—To invoke the doctrine of estoppel embodied in S. 115, Evidence Act, 1872, three conditions must be satisfied: (1) representation by a person to another; (2) the other shall have acted upon the said representation; and (3) such action shall have been detrimental to the interests of the person to whom the representation has been made. Where the first two conditions are satisfied but the third is not, there is no scope to invoke the doctrine of estoppel:

A.I.R. 1965 S.C. 1055; (1969) 35 Cut.L.T. 60: I.L.R. (1968) Cut. 859; 39 Comp. Cas. 436: A.I.R. 1969 Bom. 323; (1917-18) 22 Cal.W.N. 891 (P.C.); 57 I.C. 263; (1937) 39 Bom.L.R. 730; A.I.R. 1937 Lah. 272; (1979) 1 M.P.W.N. 39; 1979 All.W.C. 357: 1979 All.L.J. 659; A.I.R. 1982 All. 414.

To invoke the doctrine of estoppel by representation, it is essential that the party to whom it was made in acting upon it should have altered his position to his detriment. It envisages a combination of several essential elements, the representation or a statement to be acted upon, action on the faith of such statement and in the manner intended and resultant prejudice or detriment to the person acting: A.I.R. 1955 Hyd. 172: I.L.R. (1954) Hyd. 745; (1950) 2 M.L.J. 575.

In order to create estoppel the party asserting it has to show that it has been induced to act to its detriment or misled to its injury. The essence of doctrine of estoppel is that where a person does or omits to do something which influences the action of another who relies or acts thereon, equity will not permit him to controvert the same to the injury of the other party. It is, however, a shield for defence but not a weapon of attack and does not furnish a basis for action: I.L.R. (1961) 2 Punj. 391: (1961) 63 Punj.L.R. 302: A.I.R. 1961 Punj. 314.

The pre-requisites for invoking estoppel are: (*1*) a representation by a person or his authroised agent to another person in any form, declaration, act or omission; (*2*) it must be of an existing fact and not a promise *de futuro* or an intention, whether or not enforceable in contract; (*3*) it must have been made to be relied upon; (*4*) the other party must have believed in its truth; (*5*) the declaration, act or omission must have actually caused the other party to act on its faith and alter his former position to his prejudice or detriment; (*6*) the representation made must have been the proximate cause of the other party acting to his prejudice; (*7*) the person invoking estoppel must show that he had neither the means to know nor was he aware of the true state of things; and (*8*) only that person can invoke estoppel in his individual capacity (and not as a representative of his assignee) to whom the representation was made or for whom it was meant: A.I.R. 1982 S.C. 121: (1982) 1 S.C.C. 223: (1982) 95 Mad.L.W. (S.N.) 121.

In order to establish estoppel the party invoking it has to prove the following facts: (*1*) the other party had made a declaration or a representation regarding a particular facts; (*2*) that declaration or representation was made with intention of causing or permitting the invoker to believe that fact to be true and to act upon such belief; and (*3*) it was on the basis of such belief, and without the knowledge of true facts, the party to whom the representation was made has acted to his prejudice; it is only on the proof of all such facts that invoker can claim that the other party should not be allowed to resile from that position. But if the invoker knew the true state of affairs, it would not be open to him to plead estoppel; it could not ordinarily be presumed that he was actually misled by the representation or declaration made by the other party and altered his position to his prejudice because of such declaration or representation: A.I.R. 1971 Mys. 174: (1971) 1 Mys.L.J. 154.

Doctrine of estoppel is attracted (*a*) when a party by act or conduct represents to the other party of a certain state of facts upon which the other party acts to his detriment; (*b*) when a party represents to the other party in regard to a position in law which is accepted and acted upon by the other party to his detriment; (*c*) but where the jurisdiction of a Court or Tribunal by statute depends upon a certain state of facts or position in law, no representation as to facts or law by one party to the other can confer jurisdiction on the Court or Tribunal to adjudicate upon the controversy; (*d*) the Court or Tribunal will have to determine on evidence adduced before it by the parties before it as to whether it has the jurisdiction to hear and determine the controversy. [Case law exhaustively discussed]: A.I.R. 1977 Cal. 161: (1976-77) 81 Cal.W.N. 481: (1977) 1 Cal.L.J. 125.

The plea of estoppel can be availed of only if there is representation of existing fact with intent to cause some belief or induce the other side to form the belief that the representation made is true. On such representation the other side must have been led to believe the representation and must have also been induced to act on the basis of the representation. Moreover, the other side must have so acted to its detriment. Again, the plea of estoppel is not available in matters of waiver of rights. It has got to be realised that

estoppel deals with questions of facts and not of rights. No one can be estopped from asserting his right, which he might have stated that he will not assert. There cannot be estoppel against statute: A.I.R. 1991 Guj. 43: (1990-2) 31 Guj.L.R. 808: (1990-2) 10 Guj.L.H. 471; 1971 All.L.J. 385.

The party asserting the estoppel must have acted on the assurance given to him, must have relied on the representation made to him, which means that the party has changed or altered the position by relying on the assurance or representation. It is essential that the promisee must have acted on the promise made to him and having so acted, must have changed or altered his or her position. Where petitioner applied for post-graduate training course and her name appeared in the selection list and she alongwith others were directed to go for an interview but subsequently government took a policy decision of not sending senior doctors for post-graduate training and, thus, petitioner who was not selected challenged said decision of the State Government on the ground of promissory estoppel, *held*, the process of selection or nomination was not complete so as to hold out a promise or assurance to the petitioner that she would be nominated for the course when she was asked to go for interview. Therefore, the fact that on the direction of the Government all the candidates selected by the Selection Committee including the petitioner undertook journey to appear in the interview, the expenses of which were admittedly borne by the Government, did not amount to the petitioner acting on any representation of the Government so as to make her alter her position. Thus, the petitioner was not entitled to invoke the doctrine of promissory estoppel. [A.I.R. 1987 S.C. 2414, Disting.]: A.I.R. 1994 Sikkim 1.

The doctrine of equitable estoppel applies to a case where a person is given an unequivocal assurance and on the faith thereof, he acted detrimental to his interest and he suffered an irretrievable injury in that pursuit. In such an event, having made such a promise, the maker thereof is precluded to resile therefrom and pass an order detrimental to the interest of the person who believed the promise, placed reliance thereon, acted on that basis to his detriment and he cannot adequately be compensated: A.I.R. 1986 Andh. Pra. 196.

Where one party has by his words or conduct made to the other, a promise or assurance which was intended to affect the legal relation between them and to be acted upon accordingly, then, once the other party has taken him at his words and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him. He must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word: A.I.R. 1974 Madh. Pra. 193: 1974 M.P.L.J. 329: 1974 Jab.L.J. 476 (D.B.).

There is no doubt that S. 115 incorporates an equitable doctrine which prevents a party from adopting two inconsistent positions. Nevertheless, the basis upon which equity operates against the party which makes a representation is that the party relying on the estoppel has been misled into altering its position to its disadvantage due to the representation. The party to which a representation is made must have been induced to act on the belief that the representation was true. Where all the facts are within the knowledge of both parties there is no question of one party acting on the faith of an incorrect representation: (1972) 8 Del.L.T. 17.

In order to found a plea of estoppel, there must be proof that a party suffered detriment by acting upon the representation of the other party: 1969 Ker.L.T. 378: 1969 Ker.L.R. 617: A.I.R. 1970 Ker. 21 (F.B).

The criterion in applying S. 115 of the Evidence Act in cases of estoppel is whether one party by any specific act or omission had led the other party to believe in the correctness of certain action or attitude affecting his interest materially: 1952 All.L.J. (Rev.) 61: 1952 R.D. 81. An estoppel by conduct can only come into play if by the conduct of one party the other party has changed his position in a way to his prejudice: (1946) 48 Bom.L.R. 313: A.I.R. 1946 Bom. 469.

No case of estoppel can be established by a party if it is not shown that any action of his was induced by any representation or conduct of the other party: 32 S.L.R. 340: 172 I.C. 981: A.I.R. 1938 P.C. 87 (P.C).

In order to sustain the plea of estoppel it must be proved that the defendants relying

on the declaration made by the plaintiffs were misled to act to their detriment in such a manner as they would not otherwise have done: I.L.R. 14 Lah. 218: A.I.R.1933 Lah. 179. *See* also 38 Mad.L.W. 896: A.I.R. 1933 Mad. 471.

Before an estoppel can take place, it would be necessary for the party relying on the same to establish that he had been led to do something detrimental to his own interests owing to the action of the other person: 119 I.C. 337: A.I.R. 1929 Oudh 494. *See* also 1937 O.W.N. 423.

It is not open to a party to raise the plea of estoppel against another if he has not been led by any representation made by the other to change his position in any way: I.L.R. (1947) Nag. 341: A.I.R. 1948 Nag. 19: 1947 Nag.L.J. 230.

Where there is no representation, no acting on it, no change of position as a result thereof, the doctrine of estoppel is not attracted: 1968 Lab.I.C. 1546 (Del.).

What is material is that the party must have acted upon the assurance so as to alter its position: A.I.R. 1991 Raj. 45: (1989) 2 Raj.L.W. 386 (D.B.); (1991) 53 E.L.T. 545 (Cal.).

If the act of the plaintiff does not adversely affect the right of the defendant, no case of estoppel by such act can arise: I.L.R. (1973) Mys. 790.

It is well settled position that for an estoppel to be operative there must be a representation and the person to whom the representation made is to act upon that representation to his detriment and thereafter the person making the representation is precluded to resile from the representation acted against the interest of the person making representation. It is now settled law that the admission made by the party in the pleadings is inconclusive and no opportunity need be given to explain the same. If there is evidentiary admission, the only presumption is, that there is an admission made, but is a rebuttable presumption. Unless the admission amount to estoppel it cannot be used against him. The title cannot pass by a mere admission: (1984) 2 An.W.R. 40.

If, in course of legal proceeding, a party induces other party to change its position by agreement, it could not later on resile from it. 1968 Lab.I.C. 1108 (Cal.). *Held*, no question of *res judicata* or estoppel by conduct or record could arise in the case: 1968 Lab.I.C. 302 (All.).

Under S. 115, a person is estopped only when he has by his declaration or act intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. If a person in suit claims a certain status on the strength of the interpretation put by him on a certain document, he cannot be said to have led the other party to believe a thing or act on its belief, for it was open to the latter to examine the document and to decide for himself whether the interpretation put by the opposite party was correct or not: 1940 O.W.N. 1233: 1940 R.D. 582.

Before estoppel can be invoked against a person, the party invoking it must prove that that person had so conducted himself as to induce in him a belief in the existence of some fact and thereby changed his position. But the owner of a tree with branches overhanging the land of another cannot invoke the rule of estoppel merely on the ground that the other person did not take any action. He has to prove that this inaction made him change his position. Ordinarily, the owner of a tree with branches over-hanging another's land cannot claim that the omission of the owner of the plot to protest against the over-hanging branches induced him to change his position, because there is no position to change. The case is one of trespass, and the trespasser, in the absence of special circumstances cannot rely on estoppel or acquiescence—Which is a species of estoppel against the owner of the plot: 1965 All.W.R. (H.C.) 414: 1965 All.L.J. 1068.

The law enacted in S. 115 relating to estoppel as a consequence of declaration, act or omission causing another's belief and action thereon, does not differ from the English law on that subject. The main question, in determining whether estoppel has been occasioned, is whether the representation has caused the person to whom it has been made to act on the faith of it. The existence of estoppel does not depend on the motive or on the knowledge of the matter, on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act, or to abstain from acting, should have been fraudulent, or that he should not have been under a mistake or

misapprehension. Thus, the main question is whether the representation has caused the person to whom it has been made, to act on the faith of it. The word "representation" covers declaration, act or omissions, which may be express or implied and may be made in any form.

The suit site belonged to one Rao. The super-structure had been erected by the first defendant at her own cost. Rao had not only encouraged the first defendant to build the house but had actively helped her by applying and getting a licence from the Municipality. Rao and his wife the first plaintiff had attended the "Grahapravesam" ceremony and thereafter Rao had not laid any claim to the house or site. *Held*, that the plaintiffs were estopped from questioning the right of the first defendant to the suit site and from seeking to evict her. Not merely had Rao and the first plaintiff stood by but Rao had actively encouraged and had even assisted the first defendant in constructing the house. In this situation the present case fell fairly and squarely within the ambit of S. 115. The conduct which would have estopped her husband Rao from claiming the site, would equally occasion estoppel against the first plaintiff, as she was a representative in estate of her deceased husband: (1964) 2 An.L.T. 299: (1965) 1 An.W.R. 112: A.I.R. 1965 Andh. Pra. 163.

It is quite unnecessary in order to create estoppel that the person whose acts or declarations induced another to act must have been under no mistake of himself, or must have acted with an intention to mislead to deceive: I.L.R. 28 Pat. 519: A.I.R. 1950 Pat. 9.

Under S. 115, Evidence Act if a person, by his declaration act or commission intentionally causes or permits another person to believe a thing to be true and act upon such belief, then the former is estopped from denying the truth of the thing.

The petitioner was claiming all the land lying within the boundaries mentioned in the settlement in question. His case was not that he should be given fresh settlement of the land found in excess of the description as to extent appearing in the settlement. *Held*, that his application before the Director of Settlement and Land Records to grant the excess land in its favour, did not operate as estoppel: A.I.R. 1969 Manipur 84.

Estoppel can only arise when one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief.

Where a person in her application for letters of administration of a Will alleged that a certain property belonged to the testator, *held*, that she could be estopped from subsequently showing that the testator was not the owner only if it was established that she intentionally caused or permitted the opposite party to believe that thing to be true and to act on that belief. Where it was obvious that the other party had not acted in regard to that property on the basis of that statement no question of estoppel against the applicant could arise: I.L.R. (1962) 2 All. 683: 1962 (Supp.) 3 S.C.R. 294: (1962) 2 S.C.A. 490: A.I.R. 1962 S.C. 1471.

In order to bring the case within the mischief of S. 115, it is necessary that there should first be a declaration, act or omission. That declaration, act or omission must be intentional and should have caused or permitted any person to believe a thing to be true and to act upon such belief to his detriment. Where the plaintiffs claimed that on the death of their father they being coparceners became owners of 15/16th share in the property left by him and their defendant sister was entitled to a 1/6th share according to Hindu Succession Act and they further pleaded that mutation with regard to inheritance of deceased in favour of plaintiffs and defendant in equal shares was illegal and void and the respondent contended that the appellants were estopped by their act and conduct from claiming their share over and above the shares mutated in their names because one of them was present at the time of sanction of the mutation, *held*, mere presence of one of the appellants before the mutation officer would not make the mutation legal as it was hit by provision of Hindu Succession Act, 1956. Therefore, the appellants were not estopped by their own act and conduct from filing the suit: (1994-2) 107 Punj.L.R. 681.

For invoking the doctrine of promissory estoppel the petitioner must show that there is an express and unequivocal promise. Secondly, it must be demonstrated that the petitioner acted to his prejudice on the said express representation. Where the petitioner himself represented to the Reserve Bank of

India that he wanted to hold Ice Shows in India for a limited duration till the first round of shows in various cities in India was over and such permission was granted but when permission was refused for holding the Ice Shows for the second set of shows, the petitioner invoked principle of promissory estoppel, *held*, there was no express permission to hold shows in India in perpetuity. Having himself committed to certain duration and certain shows, if he had incurred any further expenditure, it had nothing to do with any representation made by the Reserve Bank of India: A.I.R. 1981 Del. 314.

Estoppel does not depend on the motive or on the knowledge of the matter, on the part of the person making the representation. It is not essential that the intention of the person should have been fraudulent or that he should have been acting with the full knowledge of circumstances and not under a mistake or misapprehension. It is not necessary that there should be a design to mislead. A representation, even when made innocently or mistakenly, may operate as an estoppel. Thus, where plaintiff widow challenged certain alienations made by her son and claimed that she was absolute owner of the properties left by her husband but she had given her express consent to the transfers made by her son, *held*, the plaintiff having consented to the transfers, disentitled herself to claim the property. [I.L.R. 20 Cal. 296 (P.C.), Rel. on]: A.I.R. 1976 Madh. Pra. 106: 1975 M.P.L.J. 857: 1976 Hindu L.R. 49.

3. "Representative"—Meaning of.—The term "representative" in S. 115 is not limited to a gratuitous transferee or to subsequent transferee for value with notice. It includes a *bona fide* assignee for value without notice of the circumstances creating an estoppel: A.I.R. 1934 Mad. 302: 66 M.L.J. 563.

Anything done by a person in his representative character cannot create an estoppel on what is a personal claim by himself by a perfectly different arrangement: 7 Cal.W.N. 940: 32 Mad.L.W. 412: A.I.R. 1930 P.C. 249 (P.C.).

A party deriving interest from a person bound by an estoppel before the date on which the estoppel arises is not bound by the estoppel as his representative because an estoppel cannot affect the interests which had been acquired before the date on which the estoppel arose: 23 Pat.L.T. 213: A.I.R. 1942 Pat. 317.

Where the suit is one on behalf of the community and the plaintiff does not claim any title or set up any personal right in him, no estoppel can be pleaded against him in his representative capacity by reason of any individual act he might have committed: 1959 Ker.L.J. 932.

There is no principle of law, short of estoppel, by which a party who is at once the representative of two different persons (*A* and *B*) is precluded from holding up as a shield against the claims of another (*C*) his rights as representative of one of these two persons (*B*) merely because the other person (*A*) whom also he represents did something in disregard of his right as a representative of the first (*B*): A.I.R. 1957 Cal. 106.

An estoppel binds the representator and his privies. Thus, where *A* represents that a van belonging to *B* is his and *B* is a privy to that representation being made, *B* is bound by it. It would also appear that anyone whose title is obtained from the representator as a volunteer is a privy for this purpose. But it is very doubtful whether a purchaser for value without notice is bound by the estoppel. This part of the doctrine of estoppel has been worked out by Courts of equity and chiefly in relation to the sale of land. There is no trace of its application to contracts for the sale of goods: (1957) 2 All E.R. 525.

4. "Thing"—Meaning of.—A representation that the interests of a deceased had devolved upon the persons making the representation is a "thing" within the meaning of S. 115 as it is not a question of law but is mixed question of law and fact: A.I.R. 1929 Cal. 819: (1928-29) 33 Cal.W.N. 873. *See* also A.I.R. 1938 Oudh 110: 173 I.C. 991.

Opinions on the legal effect of an adoption is not a "thing" within S. 115: 46 P.R. 1912: 13 I.C. 482.

5. Applicability of estoppel.—Rules of estoppel cannot be applied in case of change of conditions of service of the Government employees under Art. 309 of the Constitution or of the teachers in aided schools under the Kerala Education Act, 1959. [A.I.R. 1968 S.C. 718, Disting.]: A.I.R. 1971 S.C. 1997: 1971 Lab.I.C. 1178: 1971 Ker.L.T. 422.

The person or authority on whom the power of revision is conferred cannot be assimilated to the position of a party to a suit or

a proceeding within the meaning of the expression as occurring in S. 115 of the Evidence Act so as to attract the applicability of the principle of estoppel as envisaged therein. In the first place, there cannot be any estoppel against any statute, and in the second place the principle of estoppel cannot be pressed into service against the exercise of statutory powers. Thus, where the petitioner applied before the Assistant Settlement Officer for the grant of ryotwari patta under S. 11(9) of the Andhra Pradesh (Andhra Area) Estates Abolition and Conversion into Ryotwari Act, 1948 which was duly granted and no revision was filed but subsequently, the Director of Settlements exercising revisional jurisdiction under S. 5(2) of the said Act cancelled the order of the Assistant Settlement Officer on the ground that the impugned land belonged to the Government and did not form part of an estate and Assistant Settlement Officer wrongly treated as estate and granted patta, *held*, the doctrine of estoppel could not be invoked by the petitioner: (1978) 2 An.W.R. 11. *See* also 1985 Cr.L.J. 1517: 1985 Ker.L.J. 718.

A statutory body (Institute of Chartered Accountants) charged with the duty of regulating professional conduct cannot be estopped from reviewing its earlier decision: (1974) 2 Kam.L.J. 229.

Estoppel—Applicability to writ proceedings: A.I.R. 1967 Ker. 259.

Where proceedings initiated under the Eviction of Unauthorised Occupants Act, 1971 were dropped as a result of agreement entered into between parties and when subsequently landlord again initiated eviction proceedings, the aggrieved tenant in a writ petition under Art. 226 of the Constitution pleaded promissory estoppel, *held*, the question whether tenant was lawful occupant or not was a question of fact which was to be decided by competent authority, namely, Estate Officer. Therefore, though a plea of promissory estoppel could be raised in a petition under Art. 226 of the Constitution but in instant case it would be better and more appropriate that such a plea was raised before the authority which was competent to determine questions of fact and law: A.I.R. 1987 Del. 231: (1987) 1 Ren.L.R. 561: (1987) 1 Ren.C.R. 684.

Estoppel is a rule of civil action. There is no estoppel in criminal law: I.L.R. 40 All. 393: 45 I.C. 519.

Estoppel—Effect on reality of transaction (1957) 2 All E.R. 525.

If a party persuades a Court to believe a certain false statement that cannot operate as an estoppel between the parties to that proceeding in a different suit. The party concerned may be liable to other penalties civil or criminal but the statement cannot operate as estoppel: 1942 O.W.N. (B.R.) 578. As to conditions of applicability, *see* 1932 All.L.J. 605: A.I.R. 1932 All. 643. *See* also (1943) 2 M.L.J. 508: A.I.R. 1944 Mad. 62.

A suit for specific performance of a contract entered into between a proposed co-operative society instituted by someone on its behalf, *held*, is incompetent; a contract with a non-existing person is a nullity; no estoppel can, therefore, be pleaded against a non-person: A.I.R. 1979 Guj. 134: (1979) 20 Guj.L.R. 801 (D.B.).

There is no basis for application of rule of estoppel to matter arising under S. 5-A of Bihar Private Irrigation Works Act: (1963) 1 S.C.R. 98: A.I.R. 1962 S.C. 1964.

S. 45-B of Bihar Land Reforms (Fixation of Ceiling Areas and Acquisition of Surplus Land) Act, 1961 being a special provision conferring wide special powers upon the State Government and the Collector, it completely nullifies any plea of *res judicata*, estoppel or review by permitting re-opening of any disposed of case and its disposal afresh. [I.L.R. (1979) 58 Pat. 989; A.I.R. 1984 Pat. 57; 1983 B.L.J. 33, Rel. on]: A.I.R. 1984 Pat. 337 (D.B.).

A Corporation cannot indirectly do by placing itself under the disability of estoppel, what it could not have directly done by reason of statute or prohibition. There is a fundamental distinction between the capacity of a natural person and of an artificial person which has been created by statute or charter. To a natural person whatever is not expressly forbidden by the law is permitted by the law. In the case of an artificial person, *e.g.*, a Corporation, which can be created either by charter or by statute the rule applicable to a natural person is reversed. Whatever is not permitted expressly or by necessary implication by the constituting instrument is prohibited, not by any express or implied prohibition of the Legislature but by the doctrine of *ultra vires*: A.I.R. 1949 Cal. 20. *See* also A.I.R. 1947 Cal. 273.

6. Waiver and estoppel.—*See* (1953-54) 58 Cal.W.N. 545: A.I.R. 1955 Cal. 338; I.L.R. (1955) Nag. 82: A.I.R. 1955 Nag. 67; A.I.R. 1958 Manipur 7.

Per *S.K. Das, J.*—The generally accepted connotation of "waiver" is that to constitute "waiver" there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants as inference of the relinquishment of a known right or privilege. Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right; estoppel is a rule of evidence: (1959) 35 I.T.R. 190: A.I.R. 1959 S.C. 149.

Waiver and estoppel are not one and the same thing. They differ from each other in various respects. Waiver is an intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of that right. Waiver is created upon knowledge of all the facts by both the parties; in case of estoppel by representation, the fact that representee has knowledge of the facts destroys the plea of estoppel. Mere silence will not be waiver. A person may waive the provisions made for his individual benefit but he cannot be deemed to have waived in law the statutory provisions which are based on public policy. Where therefore, the plaintiff having nominated another arbitrator in place of his previous arbitrator in contravention of Rr. 62 and 64 of the Hyderabad Stock Exchange Rules, the defendant at the earliest opportunity objected to the right of the plaintiff nominating him and pressed this objection in clear terms and made it clear that it was under protest that he was taking part in the proceedings. *Held*, that the defendant's objection to the jurisdiction of the arbitrator would not be considered to have been waived by his continuing to attend before the arbitrator and leading evidence. Whatever part he took in the proceedings before the arbitrators must be deemed to have been taken under continuous protests. Thus, neither the plea of waiver nor of estoppel could be maintained. The award therefore, must be held to be void as the arbitrator had no valid authority to make the same: A.I.R. 1958 Andh. Pra. 384.

Waiver is distinct from estoppel; waiver is contractual and may furnish a cause of action; it is an agreement to release or not to assert a right. Thus, a party pleading waiver has to show that there is an agreement whereby the other party had agreed not to press his right in future in consideration of some compromise from some other person; thus, an amendment sought to plead waiver with no allegation of such an agreement could not be allowed in appeal: A.I.R. 1973 Guj. 34 (D.B.).

Rules of waiver and estoppel both are based on the principle that no person should be allowed to approbate and reprobate at the same time. But waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right; estoppel is a rule of evidence. In waiver there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege. Waiver is a question of fact and it must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for it is laid in the pleadings: (1991) 2 Cal.L.J. 188: (1991) 2 Cal.H.N. 234.

The essence of waiver is estoppel; if there is no estoppel, there can be no waiver; the connection between the two is very close. But nevertheless there is an essential and fundamental difference between the two: that is, estoppel is a rule of evidence and waiver is a rule of conduct. The accepted connotation of waiver pre-supposes an intentional relinquishment of a known right, a voluntary abandonment of an existing legal right, or a conduct justifying inference of the relinquishment of a known right or privilege. Despite a tendency to mix up waiver and estoppel as a single idea when they are not, the principle underlying the two maxims is the same: a party will not be permitted to approbate and reprobate or to blow hot and cold on the same matter: A.I.R. 1981 Pat. 1: 1980 Pat.L.J.R. 208: 1980 B.L.J.R. 592 (F.B.).

Having regard to the true legal meaning and the generally accepted connotation of the words "waiver" and "estoppel", it is apparent that the person against whom waiver is to be pleaded must be aware of his existing legal right or privilege which, by his words, deed or conduct, he must be shown to have intentionally and voluntarily given up. In order that estoppel may operate against a

person, it must be shown that the existence of a fact, or a certain state of things, is represented by him or his authorised agent, by words or conduct, to another or to some one on his behalf, with the intention that such other person should act upon the faith of the representation and that the action, in fact, is accordingly taken by such person so as to alter his own previous position: A.I.R. 1988 Him. Pra. 39: 1988 Punj.L.J. 48 (D.B.).

Estoppel arises only where one party makes a statement of the existence of certain facts to the other with the intention that the other party should and does, act upon the faith of that statement, that other party is then entitled to plead estoppel against the first party; waiver, on the other hand, is based on contractual relation between the parties whereby one of them or its agent, subject to consideration, agrees to waive its right. Thus, where by a registered deed certain lands were gifted but their mutation was not attested and thereafter the donor, won over by another party, bequeathed to that party his entire estate including the gifted lands but when the donee's suit for possession was resisted on the ground that on the donor's refusal to attest mutation, the donee had declined the gift and was thus deemed, under law, to have waived his rights under the gift deed and was estopped from filing, the suit on the gift-deed and also because the donee had not fulfilled the condition of the gift that he would render service to the donor and his wife, *held* it was merely the donee's way of protest and did not amount to waiver; such a gift could be revoked only through a properly instituted suit. Under S. 126 of the Transfer of Property Act, and in no other manner, if the donor did not choose to do so, no estoppel could be pleaded against the donee even if it is assumed that the donor did not institute such a suit because of the donee's statement of refusal: 1988 Punj.L.J. 249.

There is no estoppel by waiver. Waiver is distinct and different from estoppel; waiver is contractual whereas estoppel is governed by S. 115 of the Evidence Act. Estoppel is not a cause of action whereas waiver may constitute a cause of action. Waiver is an agreement to release or not to assert a right whereas estoppel is a rule of evidence which comes into operation if a statement as to the existence of a fact has been made by a party or his authorised agent to another party or some one on his behalf, with the object or intention, that the other party should act upon the faith of the statement and the other party does act upon the faith of the statement. Where an agent with authority to make an agreement on behalf of his principal agrees to waive his principal's right, the principal will be bound. [A.I.R. 1968 S.C. 933; A.I.R. 1935 P.C. 79, Foll.]: A.I.R. 1976 Andh. Pra. 205 (D.B.); A.I.R. 1975 S.C. 2065.

The rule of evidence governs estoppel but creates no substantive right; it is a matter only of proof of the conduct of the party which by its representation to another induces it to alter its position. Waiver, on the other hand, is contractual; it constitutes a cause of action when the party agrees to waive its right: A.I.R. 1974 All. 296.

Where mutation entries were made by consent but only the plea of estoppel and not of waiver was raised in the written statement and only the issue relating to estoppel was raised and tried, *held*, the Court could not deal with the question of waiver on the issue of estoppel and hold that there was an estoppel by waiver; estoppel and waiver are not the same thing: A.I.R. 1972 Him. Pra. 20: (1971) 1 Sim.L.J. 1 (D.B.).

Estoppel and waiver—Charge decree for maintenance—Execution—Failure to mention charge for future maintenance in sale proclamation—Does not necessarily operate as estoppel or waiver of right to claim future maintenance from same property: (1962) 75 Mad.L.W. 444: (1962) 2 M.L.J. 348: A.I.R. 1963 Mad. 144.

7. *Res judicata* and estoppel.—(*See* also Note 43, *infra*). *Res judicata* and estoppel—Relative scope of: A.I.R. 1958 All. 207.

Where a finding in a previous suit could not operate as *res judicata* as the point in that suit was not directly and substantially in issue in the latter suit, *held*, the doctrine of estoppel would also be not attracted: A.I.R. 1971 All. 334: 1971 All.L.J. 614 (D.B.).

Suit for ejectment of tenants—Pending this suit real owner establishing her title to same suit property—Plaintiff's suit for ejectment is barred by *res judicata*—Rule of estoppel—Its applicability: A.I.R. 1964 All. 82.

Suit for ejectment of tenant based on the ground that premises were used in breach of contract of tenancy—Another ground

though open not taken—Suit dismissed—Subsequent suit for ejectment based on the other ground, *held*, barred by constructive *res judicata*: I.L.R. (1964) 2 Punj. 231: A.I.R. 1964 Punj. 408.

Where in an eviction petition under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the tenant in his written statement sought fixation of the standard rent for the demised premises but did not press it any further and afterwards the tenant initiated separate proceedings for fixation of the standard rent, *held*, the tenant was barred from maintaining the fresh proceedings not only by the principle of *res judicata* but also by estoppel: A.I.R. 1991 Guj. 180: (1991-2) 32 Guj.L.R. 898.

The bar under S. 13 of the C.P. & Berar Letting of Houses and Rent Control Order, 1949 applies only to the landlord who seeks to determine the tenancy; it is not attracted if the tenant, even without delivery of physical possession, surrenders the tenancy to the landlord. Thus, where the tenant had surrendered his tenancy and the matter as to the time to be allowed to him for vacating the premises was referred to arbitration and the award therein had been made rule of the Court and during the execution proceedings the tenant filed objections thereto, *held*, the tenant having not raised them in the suit, he was precluded by the principles of *res judicata* to raise them in the execution as well as by the rule of estoppel: A.I.R. 1988 S.C. 375: (1987) 4 S.C.C. 585.

Where a suit for declaration and injunction against interfering with the plaintiff's possession in the suit property on valuation then valid under the law of the State of Travancore was decided against the State right upto the stage of the dismissal of its Special Leave Petition by the Supreme Court and thereafter the State sued the decreeholder for the same reliefs on the same valuation of the same properties, *held*, apart from the bar of *res judicata* the State was estopped from challenging the valuation as by adopting the same valuation it had waived its right of objection: (1974) 87 Mad.L.W. 333 (D.B.).

General principle of *res judicata*—Applicability apart from S. 11, C.P. Code: A.I.R. 1958 All. 54.

Res judicata not expressly pleaded will be deemed to have been waived: A.I.R. 1967 All. 423.

Exclusion of evidence in second trial, on ground of issue of estoppel—In previous trial issue must have been distinctly raised and decided: 1965 Raj.L.W. 317: A.I.R. 1965 Raj. 221.

Transferee from a debtor—When can take benefit of the provision—Specific issue raised and decided in prior suit that debtor was not agriculturist—Transferee not entitled to raise the issue again: A.I.R. 1962 Andh. Pra. 425.

Two brothers jointly starting business—Finding that no family nucleus was utilised—Finding does not operate as *res judicata* or estoppel: A.I.R. 1967 All. 557.

Suit by Municipal Board for restraining enforcement of restitution order against it on the ground that ownership in property vested in it—Maintainability of—Question of ownership was not decided in previous suit against Board—*Held*, Board was not estopped from maintaining regular suit: I.L.R. (1965) 1 All. 435: A.I.R. 1965 All. 527.

Res judicata and estoppel—Principles do not apply to assessment proceedings: (1964) 51 I.T.R. 131 (Andh. Pra.).

Reference of Industrial dispute, once refused—State Government not barred from referring again—Previous refusal to refer does not operate as *res judicata* or as an estoppel: I.L.R. (1964) 1 All. 560: A.I.R. 1964 All. 328.

8. Estoppel and waiver *qua* fundamental rights.—There can be no estoppel against the exercise of fundamental rights on the principle of waiver; the State cannot arrogate to itself the right to commit breach of the fundamental rights of any person by waiver, estoppel or the like; any continuing action violating fundamental rights of any person must come to an end; no law or legal principle can prevent a Court from giving remedy. [A.I.R. 1959 S.C. 149, Foll.]: A.I.R. 1982 Bom. 135.

Estoppel—Rule of—Does not apply in case of fundamental rights: A.I.R. 1968 Bom. 91; A.I.R. 1961 Ker. 289.

There can be no estoppel against fundamental rights, nor can an erring State or other public authority succeed on such issues as waiver where questions of natural justice and reasonableness of action are in issue: (1992) 2 Cal.L.J. 9: (1992) 2 Cal.L.T. (H.C.) 492.

Question of waiver of fundamental rights does not arise—Constitutional right to equality extends also to procedural matters: 1969 Lab.I.C. 631: A.I.R. 1969 All. 278 (F.B.).

The right not to be discriminated against as enshrined in Art. 14 of the Constitution of India, is one of the fundamental rights. Those have been enshrined as a matter of

constitutional policy and for public good and the doctrine of waiver or acquiescence cannot be applied thereto. A citizen cannot voluntarily get discrimination or waive his fundamental right against discrimination: A.I.R. 1982 Gau. 37.

S. 10 of the Divorce Act, 1869 provides for grant of a divorce decree to the Christian husband on mere proof of adultery but it requires Christian wives to further prove cruelty or desertion, besides adultery, to obtain the same relief; the section is, thus, to that extent violative of Art. 15 of the Constitution; the challenge to the *vires* of the provision, *held*, cannot be repelled on the ground that wives having voluntarily entered into Church marriages made a representation of not claiming dissolution of marriage on the ground of mere adultery are barred from so claiming afterwards by the principle of promissory estoppel; there can be no estoppel against the Constitution or waiver of fundamental rights; provision declared *ultra vires*. [A.I.R. 1986 S.C. 180, Foll.]: A.I.R. 1995 Ker. 252 (S.B.).

Where concession of 5 marks granted for admission to the candidates coming from families having no graduates was held to be in violation of Art. 14 of the Constitution of India, *held*, their admission could not be sustained on the rule of estoppel because there could be no estoppel against the Constitution: (1991-1) 107 Mad.L.W. 113 (D.B.).

In terms of the prospectus for admission to post graduate course in Medicine, some candidates seeking admission to certain specialities were entitled to an outright admission for the 3 year course while for others like the petitioners who sought admission to other specialities at the end of the first year of housemanship, a fresh examination was contemplated to entitle them to take the remaining 2 year course. The petitioners after completing one year course questioned said arrangement on the ground of violation of Art. 14 of the Constitution and the respondent pleaded estoppel. *Held*, when infraction of Art. 14 of the Constitution is pleaded, estoppel is not an answer. Art. 14 holds out a mandate to the State for regulating its conduct and while the State's conduct is under review with reference to the equality clause, estoppel based upon the performance of a citizen is not the answer to negative such a plea. Therefore, the respondents could not plead estoppel against petitioners: A.I.R. 1981 Ori. 97: (1981) 51 Cut.L.T. 305 (D.B.).

As far as the fundamental rights are concerned, there is no waiver or acquiescence. Thus, where petitioner students were not considered eligible for being admitted to the M.B.B.S. course on the ground that they were not "local students" as defined in the rules for admission to the said course and they challenged the rules on the ground of being violative of Art. 14 of the Constitution but it was argued that since the rules were in force for last about twenty-nine years and, therefore, the challenge to the constitutional validity of the rules should not be entertained, *held*, the petitioners were not estopped from challenging the constitutional validity of said rules: A.I.R. 1993 Guj. 90.

No question of estoppel or waiver arises where the state lacks the constitutional power to enforce a rule which is unconstitutional and, thus, *ultra vires*. Where the petitioner who appeared at the pre-medical test was not selected for admission and thereafter he questioned the validity of the reservation of seats made by the State Government for certain classes and groups of candidates which reservation, according to the petitioner, deprived him of being admitted for Medical Course but the State Government pleaded that the petitioner having knowingly signed the form and having agreed to abide by all the terms and instructions incorporated therein was not entitled to any relief on the ground of constitutional invalidity of any of such terms and instructions, *held*, merely the signing of the form by the petitioner would not confer upon the State a power to discriminate in violation of the constitutional injunction. Thus, no question of estoppel arose: A.I.R. 1975 All. 1: 1974 All.L.J. 779 (F.B.).

Principle of promissory estoppel can have no application to representations made regarding the assertion or enforcement of fundamental rights. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Thus, where the petitioners had conceded in the High Court that they had no fundamental right to construct hutments on pavements and that they would not object to their demolition after a certain date, *held*, subsequently, the petitioners were not estopped from setting up their fundamental rights in the Supreme Court as

a defence to the demolition of the huts put up by them on pavements or parts of public roads. [A.I.R. 1959 S.C. 149, Rel. on]: A.I.R. 1986 S.C. 180: (1985) 2 Bom.C.R. 434: (1985) 3 S.C.C. 545.

Waiver of fundamental right under Art. 30—when established: A.I.R. 1969 Ker. 191: 1968 Ker.L.J. 799: 1968 Ker.L.T. 815.

There can neither be estoppel against law nor waiver of the fundamental rights guaranteed by the Constitution. Where the petitioner—Educational Society, a religious minority institution, challenged R. 74(2) of the Goa, Daman and Diu Grant-in-Aid Code for Secondary Schools and Colleges and other Educational Institutions except the Primary Schools (1963), as violative of Art. 30 (1) of the Constitution and the respondent contended that as the petitioner had voluntarily accepted the terms and conditions contained in the said Code as far back as in 1963, it created a relationship of contractual nature and, thus, the petitioner could not be permitted, after a lapse of 14 years, to complain against the agreed terms and invoke Art. 30(1) of the Constitution, *held*, the petitioner was not estopped from challenging said provision as it was violative of Art. 30 (1): A.I.R. 1980 Goa 1.

The obligation on the part of the Presiding Officers to inform the accused of his fundamental right of free legal assistance at State's cost in case he is unable to engage the services of a lawyer on account of poverty or indigence, is absolute and is not conditioned upon the accused himself applying for such legal assistance. Where in the Courts below it was not the case of the petitioners that being indigent they could not arrange for legal assistance, *held*, they were not estopped from pleading that they were denied the fundamental right of free legal assistance: 1988 Cr.L.J. 457 (Madh. Pra.).

9. Estoppel by representation.—A mere representation of intention cannot be the basis of estoppel: A.I.R. 1938 Cal. 172. In order that a representation may operate as an estoppel it must be a representation of an existing fact and not of mere intention or future promises: I.L.R. 42 Cal. 254; 39 I.C. 385; I.L.R. 28 Bom. 399: (1905) 7 Bom.L.R. 184; I.L.R. 41 Mad. 315; 34 M.L.J. 463; A.I.R. 1957 Mad. 169. *See* also A.I.R. 1937 Nag. 402; A.I.R. 1959 Pat. 278; 1975 Mah.L.J. 262.

It must be of an existing fact and not of a future act: (1937) 39 Bom.L.R. 1257: A.I.R. 1938 Bom. 148. Also estoppel does not confer any title but is merely a rule of evidence which prevents one party from denying the existence of a fact which he represented as existing and upon which representation another person had been induced to act to his detriment: I.L.R. 56 Cal. 989: A.I.R. 1930 Cal. 230. *See* the under-mentioned decision. There can be a good title by estoppel. A Jute Mill sold certain bales of Hessian cloth to *B* who sold it to *K*. *K* in his turn sold the goods to the plaintiff. The Jute Mill issued delivery orders to *B*. The delivery orders were ultimately endorsed in favour of the plaintiff. The plaintiff wrote to the Jute Mill stating that the delivery orders were documents of title. Delivery orders were sent to the Jute Mill for registering the name of the plaintiff as holder. The Mill in its reply did not dispute that the delivery orders were not documents of title nor did it dispute that the plaintiff had no title to the goods. The Mill had withheld delivery and refused registration solely on the ground of their alleged lien. Ultimately the Mill returned the delivery orders with an endorsement that the Mill had a lien on the goods. The plaintiff had paid full price in respect of the goods, covered by the delivery orders. *Held*, that by the acts and conduct of the Mill, the Mill was estopped from denying that the plaintiff had title to the goods or was the owner thereof. The plaintiff, therefore, had title by estoppel to the goods and consequently the Mill by withholding delivery or refusing to deliver the goods was guilty of wrongful detention and conversion of the goods: A.I.R. 1957 Cal. 143.

There is undoubtedly a clear distinction between a representation of an existing fact and a representation that something will be done in future. The former may, if it amounts to a representation as to some fact alleged at the time to be actually in existence, raise an estoppel, if another person alters his position relying upon that representation. A representation that something will be done in the future may result in a contract, if another person to whom it is addressed acts upon it. A representation that something will be done in future is not a representation that it is true when made. But between a representation of a fact which is untrue and a representation express or implied—to do something in future, there is no clear antithesis. A representation that something will be done in future may involve an existing intention to act in future in the manner represented. If the representation is acted upon by another person it may, unless the statute governing the person making the representation provides

otherwise, result in an agreement enforceable at law. A public body is also not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice: A.I.R 1971 S.C. 1021: (1970) 3 S.C.R. 854.

The rule of estoppel is based on equity and good conscience. If a person by representation or conduct amounting to representation induces another person to act as he would not otherwise have done, the person who made the representation cannot be allowed to deny the truth of his representation to the loss and injury of the person who acted on it: 1969 B.L.J.R. 283.

The basic principle is that a person who makes an unambiguous representation by words, or conduct, of an existing fact, and causes another party to act to his detriment in reliance on the representation will not be permitted subsequently to act inconsistently with that representation. The representator could not subsequently allege in dealing with the representee that the facts were different from those represented. Thus, where in a suit for possession, the defendant-Government represented that the value of the property of which possession was claimed was Rs. 20,00,000 and the plaintiffs paid Court-fee accordingly and thus, altered their position in reliance on it, *held*, the representator could not subsequently be allowed to act inconsistently with the representation because by so doing the representee will be prejudiced. In a way it was a representation of promise, the Government was bound by its representation: A.I.R. 1982 Del. 290: 1982 Rajdhani L.R. 196.

The burden of proving the ingredients of S. 115 lies on the party claiming estoppel. The representation which is the basis for the rule must be clear and unambiguous and not indefinite, upon which the party relying on it is said to have, in good faith and in belief of it, acted. Under the section the representation which estops a person making it from acting contrary to it is one on the belief of which the other person acts in a manner he would not have done but for it and on believing it to be true: (1969) 2 S.C.C. 1: (1969) 2 Lab.L.J. 554: A.I.R 1970 S.C. 426.

Conditions for—Party must show that a particular representation has been made and that the other party acted upon that representation to his detriment—No representation on the fact of consent terms of an order that the debtor would not apply for extension of time—No estoppel against him in so applying: (1969) 2 Comp.L.J. 145 (Bom.).

Question of estoppel could arise where party to whom representation is made acts on such representation in such manner as to change his position and is likely to suffer irreparably if party making representation is permitted to draw back from such representation: (1966) 1 Mys.L.J. 716: A.I.R. 1967 Mys. 119.

It is true that if there is a representation, by one of the parties to suit or proceeding, of certain facts which would necessitate some other proceeding, and as a result of that representation being accepted the Court passes a certain order, then the party making that representation would be estopped from stating in separate proceedings that the facts represented were not true. No party can, however, be estopped because of a legal argument put forward on his behalf: A.I.R. 1944 Mad. 62: (1943) 2 M.L.J. 508.

If a man, either by express terms or by conduct, makes a representation to another of the existence of a certain state of facts, he is estopped from denying the existence of such a state of facts although the other acts in a way different from the way intended by the maker of the representation: A.I.R. 1949 Cal. 20.

Even though the matter may have passed from the stage of a representation into an agreement, there are cases where the Courts are entitled to entertain a plea of estoppel in order to prevent fraud or circuity of action: (1953) 2 M.L.J. 782: A.I.R. 1954 S.C. 82.

It is not necessary to invoke successfully the defence of estoppel that the representation should be fraudulent: I.L.R. (1943) Kar. 227: A.I.R. 1943 Sind 177.

It is not necessary for the purpose of S. 115 that any fraud or deception should be pleaded. If it is found that any representation was intentionally made by one party and it was acted upon by the other party the rule of estoppel will apply: (1938) 40 Punj.L.R. 848: A.I.R. 1938 Lah. 558.

The existence of estoppel does not depend on the motive or knowledge of the person making the representation and it is not essential that the intention of the person

representing should be fraudulent. A rule of estoppel is purely personal against the person estopped and does not create any substantive right *in rem* except against the person estopped or against his representative. No estoppel can ensue on a representation of a mere opinion or of a point of law: I.L.R. 50 All. 885: A.I.R. 1928 All. 459. *See* also 101 I.C. 803: A.I.R. 1927 Oudh 538.

The word "intentionally" in S. 115 does not mean that the conduct of the person making the representation should have been fraudulent or that it should not have been made under a mistake or misapprehension. The motive or state of knowledge of the representator is immaterial. The law only considers the position of the person to whom the representation was made: A.I.R. 1960 All. 164.

S. 115 does not apply when there is no evidence that any representations were made: A.I.R. 1943 Mad. 159: (1943) 1 M.L.J. 219.

Estoppel may certainly arise in consequence of representation by the omission of a party to do or say something but unless there is a duty imposed by law on the party to do or say something, the omission to do that thing or say that thing cannot give rise to estoppel: A.I.R. 1959 Cal. 69.

Representation—Railway Authorities representing that consignment not arrived—Consignee acting on it—Railway cannot later on establish that consignment had arrived earlier. [A.I.R. 1933 Pat. 45, Disting.]: A.I.R. 1970 Ori. 157.

Where a contractor having executed works for the Railways had claimed additional payments occasioned by escalation of costs due to delay on the part of Railways but withdrew the claim therefor whereupon the Railways paid his final bills computed on the agreed rates whereafter the contractor sued the Railways for damages and compensation caused to him by the delay which was resisted by the Railways on the ground of waiver and estoppel, *held*, the doctrine was not attracted; the contractor had made no representations; the Railways had suffered no detriment; they did not pay anything more than what was lawfully payable by them: A.I.R. 1982 Karn. 50: (1981) 2 Karn.L.J. 276 (D.B.).

Where in a contract for the purchase of the right to cut and remove trees, the Government expressly stipulates and the contractor expressly agrees that the Government will not be liable for the loss occasioned by any shortage in the estimated volume of the trees, it is an express term of the contract and the contractor must be tied down to it. He cannot go back on his agreement simply because it does not suit him to abide by it: 1959 Ker.L.T. 670: A.I.R. 1960 Ker. 94 (D.B.).

Assurance or admissions by Government through affidavits in earlier proceedings or on the floor of the Legislature, which are mere expressions of opinion, limited to the context and also being rather vague hopes are not specific assurances or representations which are binding on the Government so as to create estoppel: A.I.R. 1975 S.C. 2164: (1975) 4 S.C.C. 67.

Whether persons acting on representation made by the Government can claim, in the absence of execution of formal contract under Art. 299 of the Constitution that Government shall be bound to carry out the promises. *See* A.I.R. 1968 S.C. 718.

"Representation"—Estoppel against Government—Interpretation by Government officer—Effect of. *See* A.I.R. 1958 Cal. 203.

Contract between plaintiff and Government on printed forms—Plaintiff to supply bhusa at certain stations, in certain qualities at certain period—Written agreement containing clause that non-supply of wagons not to be excused for non-performance—Oral agreement that Government would supply wagons—Plaintiff led to belief up to last moment that wagons would be supplied—Wagons not made available—Estoppel. *See* A.I.R. 1957 Punj. 141.

Where a contractor was served a notice of demand by the Government for Rs. 21,314.15 out of which the Government claimed to have already realised Rs. 20,574. 64 from his pending bills on the ground that the Government incurred extra expenditure, which was acknowledged by the contractor within 2 days agreeing to the recovery of the balance claimed amount from his security deposit, *held*, this did not estop the contractor from preferring a counter-claim of Rs. 5,000 for breach of contract and impugn the Government's right to recover the extra expenditure; there was no representation by the contractor which led to any action on the part of the Government to its detriment. [A.I.R. 1965

S.C. 1055, Rel. on]: A.I.R. 1973 Del. 15 [Overruled on another point in A.I.R. 1983 Del. 508]

Representation—Feeding the estoppel: A.I.R. 1960 Andh. Pra. 592.

Representation—None against statute—Lessee agreeing not to claim protected status under Berar Regulation of Agricultural Leases Act—Subsequent claim for protected status and determination of fair lease money—No estoppel: 1958 Nag.L.J. (Notes) 50 (Rev.).

Representation by person that he is partner—Credit given on faith of such representation. *See* A.I.R. 1958 Mad. 8.

"Representation"—Declaration made under S. 29, Sea Customs Act—If conclusive as to value of goods—Figures in bill of entry if constitute estoppel—Value as per invoices if should be accepted. *See* A.I.R. 1958 Ker. 47.

Where a brother entered into an agreement of sale representing himself to be the property owner, *held*, he is estopped from contending thereafter that his brother was also a half-owner of the property agreed to be sold: (1991) 43 Del.L.T. 113: A.I.R. 1991 Del. 178 (D.B.).

Where a Santhal woman suing for her share in the estate of her deceased father in her own right had earlier appeared as a witness in another suit instituted by the defendants in the second suit to which she was not a party and deposed in support of the gifts made in her sons' favour by her mother as a limited owner of the properties involved in the second suit was sought to be estopped from prosecuting her suit because, as alleged by the defendants, she had not then asserted her claim to the properties but for which the defendants would have impleaded her in their earlier suit, *held*, there being nothing on record that the plaintiff had made any representation to the defendants before their institution of the earlier suit that she was not interested in the inheritance of her father, she cannot be estopped from claiming her share in her father's estate in the suit: A.I.R. 1971 Pat. 185: 1970 Pat.L.J.R. 573 (D.B.).

Representation — Sale certificate — Evidence of title—Estoppel. *See* A.I.R. 1958 Pat. 290.

The doctrine of estoppel by representation is a rule of evidence and except as a bar to testimony it has no particular significance. Thus, where the plaintiff, who had derived title by inheritance alongwith others from original lessor to disputed premises, filed a suit for eviction against the defendant-tenant, *held*, the defendant was entitled to show that the plaintiff alone was not entitled to relief of eviction. The mere fact that defendant paid rent to the plaintiff was not sufficient to entitle the plaintiff relief of eviction as he represented only a section of the entire body of owners. [A.I.R. 1969 Madh. Pra. 32, Dissent. from]: A.I.R. 1981 Cal. 413: (1980) 2 Cal.L.J. 518 (D.B.).

Defendant erecting building on debutor land—Representation by Receiver that he would become permanent tenant—Receiver is estopped from ejecting defendant: (1941-42) 46 Cal.W.N. 483.

Where in a suit for eviction, there is no recital in the plaint of any plea of estoppel against the defendant, *held*, that there is no justification for invoking the doctrine of estoppel on the basis of averments in a previously instituted suit by the defendant against the plaintiff, where those averments cannot be the foundation of the theory of estoppel and cannot be said to be consistent only with the theory of any representation by the defendant: (1956) 69 Mad.L.W. (Andh.) 30: 1956 An.W.R. 544.

Rent suit—Appeal—Death of one of the plaintiffs respondents—Representatives not impleaded—Representation by other plaintiffs that they were the representatives—Plaintiffs are estopped from saying that the lower appellate Court's decree was a nullity because of the failure to add legal representatives of the deceased: A.I.R. 1929 Cal. 819: (1928-29) 33 Cal.W.N. 873.

Where a person obtains a release from a liability upon the understanding of foregoing a definite claim against a third party, that person is estopped from asserting or enforcing the claim to the detriment of third party: A.I.R. 1930 All. 434 (2): 1930 All.L.J. 1012.

There is no estoppel where some representation is made in a mistaken view of fact. Where an examination in which petitioner appeared was cancelled as a whole for adoption of unfair means on a large scale, but subsequently the petitioner got a telegram to appear for re-examination which he did but his result was withheld on the ground that as he had been expelled from the examination having been caught red-handed while using

unfair means, he was not entitled to appear at the subsequent re-examination and the petitioner pleaded estoppel, *held*, the examination as a whole had been cancelled, hundreds of telegrams must have been sent to different examinees to appear at re-examination. Perhaps, someone sending the telegram did not know that this petitioner was one of those who had been expelled and could not appear at the re-examination. Therefore, the petitioner could not invoke doctrine of estoppel. [A.I.R. 1975 Pat. 12; A.I.R. 1967 S.C. 1269; A.I.R. 1970 S.C. 150, Rel. on]: A.I.R. 1976 Pat. 301.

Where a large piece of village land was sub-divided into plots for setting up a residential colony and an announcement was made on behalf of the co-owners of the land on microphone that plot No. 19 thereof would be reserved for a *dharamsala* and in some maps the plot was also shown to be so but without any stipulation in the deed to that effect and it was not proved as to who in fact had made the representation on behalf of the co-owners, *held*, the representation could not form the basis of estoppel; promises made over loudspeakers are often claptraps of politics; the announcement was a mere puffing up of property put up for sale; the owners, not having been divested of their title in plot No. 19, were free to sell it to any one: A.I.R. 1973 S.C. 814: (1973) 1 S.C.C. 294.

A representation in order to attract the rule of estoppel need not always be a representation of a physical fact, but may as well be the representation of an attitude or a state of mind, inasmuch as, the state of man's mind is as much a matter of fact as the state of his digestion. If a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. Generally speaking, if a party has an interest to prevent an act being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has more right to challenge the act to their prejudice than he would have had if it had been done by his previous licencee. An arbitration clause in a contract for execution of certain work by *A* with the Government of India provided that except otherwise provided in the contract, all questions and disputes arising out of or relating to the contract would be referred to the arbitration of the "Superintending Engineer of the Circle for the time being". Disputes arose between the parties and therefore, the Government appointed one *M* as an arbitrator to adjudicate on the claim made by it against *A* and informed the *A* about the appointment. Both the parties knew that *M* was not competent to act as arbitrator according to qualification prescribed by the arbitration clause. *A* not only submitted to arbitration of *M* on the Government's claim but also put forward a counter-claim against the Government for adjudication by the same arbitrator, took part in the proceedings from beginning to end, agreed to extensions of time for filing award and when the award went against him, sought to set aside the award on the ground that *M* was not competent to act as arbitrator. *Held* that in the circumstances, although there could be no representation by *A* as to the actual competence of the arbitrator, the rule of estoppel will still bind him and will still prevent him from contending that *M* was not qualified under the terms of the agreement to arbitrate in the dispute: A.I.R. 1958 Cal. 415.

It is well established proposition of law that if a man conducts himself in such a way that a reasonable man would take his representation to be true, and acts upon it, then the party making the representation is precluded from contesting the truth. The property was joint and *D* was the *karta* of the family. *D* had knowledge of the sale by his younger brother *R*. Later on with full knowledge of the facts, he not only attested his signature to the sale deed but he also went with his brother *R* to the office of the Registrar, where he identified *R* as the seller. *D* never cared to inform the purchaser that *R* had no saleable interest in the property. *Held* that though *D* made no verbal representation to the purchaser this was an instance of estoppel by conduct, where under the conditions of the case, representation might be inferred from silence or inaction. In the circumstances of the case, on the finding of the lower Court, it was a legitimate inference that *D* not only witnessed the execution of the deed, but also

consented to the transaction and he was estopped from challenging it: A.I.R. 1956 Madh. Bh. 16.

Where an agent of an Insurance Company acts as a mere channel of communication in regard to certain representations made by the principal and intended to be communicated to the assured, and the latter takes up a policy of life insurance on the faith of such representation, the provisions of S. 115 apply and the company is estopped: A.I.R. 1945 Oudh 152: I.L.R. 20 Luck. 194.

Representation—Pre-decretal agreement against execution of decree made by parties relying on settled case law—Judgment-debtor acting on it, refraining from pressing its contentions—Judgment creditor precluded from challenging agreement: 1960 Ker.L.T. 863: A.I.R. 1961 Ker. 179.

Where a Government servant was allotted Government accommodation but under the Rules he failed to intimate Directorate of Estates of his having been transferred and, thus, continued in unauthorised occupation but on payment of normal rent and when his transfer came to knowledge of the Directorate, his allotment was cancelled and he was charged damages equivalent to market rent, *held*, he could not invoke estoppel; no representation or conduct amounting to representation could be attributed to the Directorate to make him believe that he was permitted to occupy the flat on normal rent nor was he induced to change his position on its faith or to his detriment; rather it was he who had concealed the fact of his transfer from the Directorate clearly against his duty: A.I.R. 1987 S.C. 808: 1987 Lab.I.C. 627: (1987) 1 S.C.C. 551: (1987) 2 Lab.L.J. 3: (1987) 100 Mad.L.W. 624.

10. Estoppel by silence.—*See* 6 Cal.L.J. 601; 7 Cal.L.J. 604; I.L.R. 9 All. 413; I.L.R. 32 Cal. 359. *See* also I.L.R. 31 Bom. 566 (P.C.). Mere silence cannot amount to a representation so as to give rise to an estoppel, but where there is a duty to disclose, deliberate silence may become significant and amount to a representation giving rise to an estoppel: (1945) 47 Bom.L.R. 470: A.I.R. 1945 Bom. 511.

The law of estoppel draws a distinction between representations and omissions, and omission to speak will furnish a basis for estoppel, only when the circumstances are such as to throw upon the party sought to be bound by estoppel the duty to speak out the truth: 44 Mad.L.W. 859: A.I.R. 1937 Mad. 158.

The duty of bringing the legal representation on the record of a case rests upon the plaintiff in that case. There is no duty upon the legal representative to volunteer. His inaction cannot be used against him because there is no duty on him to speak. His conduct cannot be used as an admission or even as an estoppel: I.L.R. (1950) Nag. 491: 1950 Nag.L.J. 281.

Silence may amount to acquiescence if it is an omission to act according to the circumstances of a particular case. Where a site is sold with a condition attached that it should not be used as a shop, but it is allowed to be used as a shop by the first vendee and his successors and the shop is even re-built without any objection being raised by the vendor, the latter is estopped from raising the objection subsequently: (1940) 42 Punj.L.R. 133.

Silence—No objection taken—Estoppel by conduct: 1959 Jab.L.J. 75.

A representee when remains silent, no estoppel arises by the reason of representation when the person represented does not alter his position and as a corrolary presumption to the fact, there is no scope for invocation of estoppel: (1988) 1 Cal.L.J. 493: (1987-88) 92 Cal.W.N. 999.

Where there was no evidence of any detriment to the appellants as a consequence of the silence of the respondent or which had caused the appellants to alter their position in any way and there was no conduct amounting to a representation intended to induce a course of conduct on the part of the appellants, *held*, that there was no question of estoppel: 44 Mad.L.W. 128: A.I.R. 1936 P.C. 193 (P.C.).

A mere silence cannot operate as an estoppel unless it is established that there was a duty to speak: 119 I.C. 882: A.I.R. 1930 Pat. 150; 28 Nag.L.R. 227: A.I.R. 1932 Nag. 165; (1933-34) 38 Cal.W.N. 344: A.I.R. 1934 P.C. 83 (P.C.); A.I.R. 1959 Cal. 69. *See* also A.I.R. 1937 Mad. 158: 44 Mad.L.W. 859 [Case where the Collector sent a letter intimating to the mortgagee that the entire debt has been paid off, the mortgagee did not inform the Collector that a portion of the debt yet remained unpaid]. Estoppel by omission: 1 P.L.J. 16; (1919-20) 24 Cal.W.N. 269: I.L.R. 47 Cal. 446; I.L.R. 15 Mad. 303.

In order to apply the principle of estoppel by silence there must be a duty to speak and a person who is sought to be bound by that principle must be shown to be aware of the transaction. No general rule can be formulated as to when silence may operate as estoppel, but certainly it can apply only when a party fails to make his rights known, where fairness and good conscience require that he should do so to protect the interest of others. Where no duty is cast by law on a person to speak and act, silence does not amount to estoppel. Further, the principle of estoppel would have no application when both parties are equally acquainted with true facts. Where properties were purchased in the names of the partners and their two brothers and other purchase was made up in the name of brothers only and thereafter in a suit for dissolution of firm both the properties were allotted to one partner, the other partner being unaware of the proceedings, *held*, the other partner could not be estopped from objecting the division of entire property as the principle of estoppel by silence had no application: A.I.R. 1980 Pat. 77: (1979) 27 B.L.J.R. 549 (D.B.).

Silence—Effect of—Appeal—Powers of appellate Court to consider new point—Waiver or estoppel of right to object—When arises. *See* A.I.R. 1957 Punj. 60.

Where no reply was sent by the Assistant Engineer to the enhancement of rates proposed by the contractor in response to the query whether he was prepared to accept the scheduled rates, *held*, mere silence of the Assistant Engineer could not amount to acquiescence. [A.I.R. 1966 S.C. 275, Foll.]: A.I.R. 1973 Raj. 223: 1973 W.L.N. 132: 1973 Raj.L.W. 339.

11. Estoppel by acquiescence—General.—*See* also under Estoppel by silence. *See* A.I.R. 1954 All. 447; I.L.R. (1954) Mad. 537: (1954) 2 M.L.J. 486; 23 Cal.L.J. 82; I.L.R. 41 Cal. 771; I.L.R. 2 Lah. 258: A.I.R. 1921 Lah. 110; 2 P.L.J. 600; A.I.R. 1927 Oudh 89; 61 I.A. 18: I.L.R. 12 Rang. 13: 66 M.L.J. 239 (P.C.); I.L.R. 9 Luck. 538: A.I.R. 1934 Oudh 178; I.L.R. 17 Luck. 164: A.I.R. 1941 Oudh 611; I.L.R. (1943) Kar. 338: A.I.R. 1943 Sind 221; 1968 Cur.L.J. 674. There is a distinction between acquiescence and mere acquiescence: 1936 A.M.L.J. 81.

It is not merely a positive or active declaration that can be the basis for a plea of estoppel, but also an act or omission can constitute such basis. An estoppel may arise from silence as well as words. However, to constitute an "estoppel by silence" or "acquiescence" it must appear that the party to be estopped must be bound in equity and good conscience to speak and that party claiming estoppel relied upon such silence or acquiescence and was misled thereby to change his position to his prejudice: A.I.R. 1968 Del. 131.

The doctrine of acquiescence is only another phase of estoppel. The foundation of the doctrine of estoppel and acquiescence is that one party has made to the other representations which were intended to be and were in fact acted upon by the other spending money or doing an act which he would not have otherwise done, which involved expenditure or a change of position. In the case of estoppel the material representations are active, while in the case of acquiescence the representations are to be inferred from silence. The doctrine of acquiescence also goes by the name of the doctrine of standing by. If an owner of land finds another person trespassing upon his land and building on it, mere silence or inaction on his part at the time will not be sufficient to support a case of acquiescence. Mere silence or mere inaction cannot be construed to be a representation. To support a case of acquiescence there must be something more than mere silence or mere inaction. Inaction or silence in circumstances which require a duty to speak is the foundation of the doctrine. When inaction or silence would amount to fraud or deception, then and then only can the doctrine of standing by or acquiescence be applied. The party seeking the aid of the doctrine has to prove (*1*) that he made a mistake of his legal rights; (2) that he expended money or did some act on the faith of the mistaken belief; (3) that the legal owner or possessor of the legal right knew of his own right which is inconsistent with the right claimed by the party relying on the doctrine; (4) that the possessor of the legal right knew of the mistaken belief of the other; and (5) that the legal owner encouraged the other party in his expenditure of money or in the other acts, either directly or by abstaining from asserting his legal rights: (1935-36) 40 Cal.W.N. 1370: A.I.R. 1936 Cal. 711; A.I.R. 1986 Kam. 77: I.L.R. (1986) Kam. 1130. *See* also A.I.R. 1937 Mad. 158; A.I.R. 1939 Mad. 187: (1939) 1 M.L.J. 75 [Representation as to authority of widow to adopt];

1937 O.W.N. 330: A.I.R. 1937 Oudh 226; I.L.R. 13 Luck. 192: A.I.R. 1937 Oudh 263; (1936) 38 Punj.L.R. 931: A.I.R. 1936 Lah. 700; I.L.R. 15 Pat. 721: A.I.R. 1937 Pat. 169; I.L.R. (1938) Lah. 296: A.I.R. 1938 Lah. 88; A.I.R. 1940 Pat. 438: 21 Pat.L.T. 277.

In order to sustain a plea of acquiescence, it is necessary to prove that the party against whom the said plea is raised, had remained silent about the matter regarding which the plea of acquiescence is raised, even after knowing the truth of the matter: (1987) 100 Mad.L.W. 1137 (S.C.).

The doctrine of estoppel by acquiescence comes into play when a party having a right over a property stands by and sees the other person dealing with the property in a manner inconsistent with the first party's rights and which takes no action while the impugned act is in progress; the first party in such a circumstance is deemed to have lost its rights on estoppel by acquiescence: A.I.R. 1980 Gau. 70 (D.B.).

For a defence on the basis of estoppel by acquiescence to be successful it is necessary that the defendant should have acted in good faith believing that he had a valid right to do the act in question and that the plaintiff knowing that the defendant was under this mistaken belief should have abstained from doing anything to prevent him from spending money in doing that act: A.I.R. 1984 N.O.C. 105 (All.).

"Acquiescence" is used where a person on becoming aware of the violation of his rights then not known to him refrains to seek redress; in that sense it is an element in *laches*; its proper use is, however, where a person having a right sees another person about to infringe or actually infringing that right stands by and gives to the wrong-doer the impression of his assent but for which the wrong-doer would have abstained: (1994) 3 Kam.L.J. 493.

Generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous licencee. An estoppel does not itself give a cause of action; it prevents a person from denying a certain state of affairs. There can be no acquiescence or waiver in a case where both the parties are unaware of their rights in the disputed property, and both are labouring under some mistake about their respective rights in regard to such land. Unless both are fully cognizant of their right to dispute them, the parties cannot be said to acquiesce in the claims of the other. Where, therefore, acquiescence is relied on, it must be shown that the person acquiescing was aware of the matter in which he acquiesced and of the effect of such acquiescence. The plaintiff and defendants were neighbouring plot owners. In constructing their house, the defendants made encroachment on plaintiffs land. None of the parties knew their respective rights in regard to the encroached land, and, both were labouring under some sort of mistake about their respective right in the said land. Only when the defendant's construction had progressed for several months, and when a boundary dispute cropped up between the parties, and when the plaintiff measured the land that he learnt that the portion on which the defendants were constructing the building belonged to him, and, immediately thereafter he brought a suit for possession. *Held*, that no building equity has arisen in favour of the defendants, nor any equitable rights have sprung up in their favour, which can prevent the plaintiff, in the circumstances of the case to claim possession by demolition of the building on the encroached portion of his land. As no finding of acquiescence or waiver can be founded on the finding that both the parties were labouring under some sort of mistake about their respective rights in regard to the encroached portion of the land, the plaintiff is not estopped from claiming vacant possession of the encroached land by demolition of the building standing thereon: A.I.R. 1957 Pat. 308: I.L.R. 36 Pat. 362.

Acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights: I.L.R. 17 Luck. 164: 1941 O.W.N. 1021: A.I.R. 1941 Oudh 611.

Acquiescence is a matter of legal inference from the facts established in a case. The mere inactivity of the person concerned for a

particular number of years apart from anything else in the case does not necessarily lead to the inference of acquiescence. The question of acquiescence cannot be reduced to a rule of thumb. Where a party relied upon omission or inactivity of the other as depriving the latter of his legal rights, nothing short of conduct amounting to fraud can sustain a plea of acquiescence: I.L.R. (1953) Nag. 601: A.I.R. 1954 Nag. 97.

Mere inactiveness for particular numbers of years is not sufficient. Acquiescence is matter of legal inference of fact proved in each case: 1982 M.P.W.N. 356.

A mere silence to object unaccompanied by any positive act or conduct when there is no duty to speak would not amount to acquiescence and would not debar objection, at a later stage: I.L.R. (1952) Trav.-Co. 960: A.I.R. 1953 Trav.-Co. 146.

Mere non-action against an incorrect settlement entry is not as such an act or omission as will, without more, be sufficient in law to induce or mislead another person to act upon the same and so to act to his prejudice: (1958-59) 63 Cal.W.N. 689.

Acquiescence in an invalid and illegal objection does not bind the plaintiff or prevent him from exercising his right: A.I.R. 1933 Sind 258.

The principle of *laches* and acquiescence is not an empty principle and if as a result of laches and acquiescence on the part of a party some equities have come into existence, the party guilty of laches would be estopped from agitating the question again and laying the matter open once again for the decision of the Court. It is a settled legal position that a wife can waive her right to a share when a partition takes place between father and his sons. Thus, where the wife not only failed to ask for a share on a partition but also failed and neglected to agitate and establish her right by taking the matter to higher Court even after her application to be joined as a party was rejected and she waited for about two years after the partition suit was ultimately disposed, *held*, the wife was not only guilty of laches and acquiescence but she had by her conduct waived her right to a share and, therefore, she was estopped from filing a fresh suit: 1980 Hindu L.R. 588: (1980) 21 Guj.L.R. 615 (D.B.).

There is no question of waiver or acquiescence on the part of a person claiming specific performance of a contract so long as the period prescribed by the Limitation Act does not expire. Thus, where plaintiff filed a suit for specific performance of a contract of sale two years after the execution of alleged agreement to sell in his favour when the performance was refused, *held*, there could be no question of waiver or acquiescence on the part of the plaintiff as the period of three years prescribed under the Limitation Act had not lapsed: A.I.R. 1984 Pat. 277: 1984 Pat.L.J.R. 827.

Where *patta* holders to the knowledge of the authorities had been paying land revenue, local taxes and raising construction on the lands for half a century, *held*, they are not liable to summary eviction contemplated under the Settlement Rules framed under Regn. 1 of the Assam Land Revenue Regulations; the authorities are even estopped to take summary proceedings against *patta* holders: A.I.R. 1984 N.O.C. 308: (1984) 1 Gau.L.R. 474 (D.B.).

12. Acquiescence — Construction by tenant.—Oral lease reserving yearly rent—Tenant building permanent structure—Estoppel—T.P. Act, 1882, S. 53-A: A.I.R. 1957 Cal. 635.

Where landlord at no point of time had ever objected to the construction by the tenant in the suit premises and it was all done with the knowledge of the previous landlord and in fact he himself was supervising some of the repairs and alternations, *held*, it was not open to the landlord and that too after several years, to turn round and say that after allowing the tenant to make all such repairs and alterations and after incurring sufficient expenditure in that behalf, that he should vacate on the ground that he had carried out the repairs without his written consent: A.I.R. 1990 Bom. 182.

If a lessee of land chooses to make unauthorised constructions on the land even though at his own risk and the lessor does not take any action, the latter cannot, on that account, be estopped from challenging the action of the lessee in a suit brought for his ejectments: 1971 All.L.J. 385.

Landlord acquiesced in the construction and use of latrine by tenant on landlord's land for more than 30 years—Landlord is estopped either from claiming possession by demolition or damages from tenant: 1980 All.W.C. 688: (1981) 7 All.L.R. 153.

13. Acquiescence—Construction by stranger.—A person is not justified in keeping silent when he is aware that another person has encroached upon his land and is erecting a costly building. He will be estopped by his conduct from claiming possession of the area encroached upon by demolition of the construction erected thereon: (1939) 41 Punj.L.R. 573: A.I.R. 1939 Lah. 502. *See* also A.I.R. 1940 Oudh 164; (1941-42) 46 Cal.W.N. 483.

Where the act of building upon the land of another is not *bona fide*, a plea of estoppel by acquiescence cannot avail: I.L.R. 15 Luck. 689: A.I.R. 1940 Oudh 164. *See* also 189 I.C. 735: A.I.R. 1940 Rang. 172; I.L.R. 15 Luck. 619.

Where construction was not under a mistake of ownership and the owner of encroached land immediately took steps for stopping the construction, *held*, principle of acquiescence could not be invoked: 1982 M.P.W.N. 356.

Where nature of the construction made on a portion of trespassed property clearly showed that it must have taken several months to complete the construction and though the owner of the trespassed land resided only about a mile away from the suit property, he raised objection only after completion of construction, *held*, the principles of acquiescence were applicable. [A.I.R. 1965 Mad. 318, Foll.]: A.I.R. 1981 Mad. 220: (1981) 94 Mad.L.W. 617: (1981) 1 M.L.J. 258; A.I.R. 1977 Mad. 342: (1977) 90 Mad.L.W. 531.

Conduct—Plaintiff permitting a wooden platform to be placed before his shop—If estopped from objecting to erection of building: A.I.R. 1934 Lah. 900. *See* also I.L.R. 17 Pat. 358: A.I.R. 1938 Pat. 569.

Acquiescence by inaction—Co-owner allowing building to proceed considerable extent—Acquiescence implied—Position of the other person altered—Party acquiescing is estopped from challenging the actions of such other person—Party wall alleged to be sold alongwith other property: 1961 M.P.L.J. (Notes) 184.

Where the defendant constructed a wall in a passage used as a lane for passing and re-passing by the plaintiff and the plaintiff filed a suit for mandatory injunction 9 years after the construction of said wall but the prayer for removal of wall on the ground that it amounted to encroachment on the passage land was made 4 years after the institution of said suit for injunction, *held*, the plaintiff being guilty of acquiescence was not entitled to an order of removal of said wall: A.I.R. 1983 S.C. 452: (1983) U.J. (S.C.) 411.

Defendant's standing by actively encouraging plaintiffs in erecting structures after encroachment on public street abutting defendant's land—There may be personal estoppel against defendants claiming right of way (*Obiter*): I.L.R. (1966) 1 Mad. 550.

Construction of edifice by *A* with inscription, on land of another—Present of edifice to owner—Effacement of inscription by owner after some years—*A*, if can claim right to maintain inscription infact as easement—*A* whether had licence to display its name—Owner, whether estopped by acquiescence from setting up right to efface inscription: 1962 Ker.L.T. 497: A.I.R. 1962 Ker. 312.

Prior transferee allowing subsequent purchaser to build on land—Negligence of prior transferee to take necessary steps to protect himself—Estoppel to assertion of title: I.L.R. 6 Rang. 643: A.I.R. 1929 Rang. 17.

Where the claimant came into possession by trespass on the property illegally, constructed sheds thereon without bringing any material to show acquiescence of the other party or its knowledge about the trespass or its encouraging the claimant in expending money on the construction either directly or by abstaining from asserting its legal rights, *held*, acquiescence was not established; the trespasser was not entitled to a temporary injunction: A.I.R. 1986 Karn. 77: I.L.R. (1986) Karn. 1130.

Where a person (who purchases land from person having no title to it) in possession of land, not in mistaken belief of his rights but in assertion of his rights which he correctly believed to be his, builds structures on the land and the person who is entitled to possession know of this, the latter is not estopped by acquiescence from bringing a suit for possession when the person in possession, had he exercised care and diligence expected of a man of ordinary prudence, would have easily discovered where the true title lay: A.I.R. 1960 Pat. 474.

14. Acquiescence—In jurisdiction of Court/Tribunal.—Lack of jurisdiction is a point of law apparent on the face of the

record, consent and conduct do not confer jurisdiction on any authority. Thus, where for want of any legal assistance, the petitioner did not object to the lack of jurisdiction, *held*, he could not be estopped under any legal principle from raising that question afterwards: A.I.R. 1982 Guj. 220: (1981) 1 Guj.L.H. 414: (1982-2) 23 Guj.L.R. 19. *See* also (1971) 1 M.L.J. 181.

Estoppel against a party cannot confer jurisdiction on a Court when it had none: 1931 All.L.J. 715: I.L.R. 54 All. 25: A.I.R. 1931 All. 490 (F.B.).

In a case where there is a total lack of jurisdiction there cannot be any submission to jurisdiction and any acquiescence cannot operate as an estoppel: 1977 Lab.I.C. 1311 (Cal.); 1983 B.B.C.J. 503.

The doctrine of approbate and reprobate or consent or waiver, which would apply to the conduct of parties, is not applicable to the case of a statute or an order passed without jurisdiction; there being a complete lack of jurisdiction no consent or acquiescence can cure the illegality. An order which is not an order of a Court of competent jurisdiction can never be pleaded as an estoppel: I.L.R. 29 Pat. 318: A.I.R. 1950 Pat. 318; A.I.R. 1971 Mad. 368: (1971) 84 Mad.L.W. 134 (D.B.).

It is well settled that jurisdiction does not originate in the consent of the parties and further that where jurisdiction is absent, it cannot be re-established by consent or acquiescence. This being the position, the petitioner in a petition against an order passed in appeal cannot be shut out from getting relief from the Court on the ground that he had acquiesced in the appeal being taken up and decided by the officer, having no jurisdiction: 1975 Lab.I.C. 947: (1975) 1 Serv.L.R. 234: 1974 B.L.J.R. 869. *See* also (1981) 2 Karn.L.J. (S.N.) 21.

A party may be estopped from raising the question of jurisdiction, but it does not estop the Court: 1958 An.L.T. 774.

Divorce Court—Principle of estoppel—(Case from England)—Estoppels bind the parties but not Court—Principles of *res judicata* and estoppel—How far are applicable: (1957) 1 All E.R. 161.

Where a Court has jurisdiction to entertain and try a suit and all the defendants submit to its jurisdiction, *held*, the decree passed by it cannot be said to be a nullity; the parties thereto are estopped from impugning it as such under S. 47 of the Code of Civil Procedure: A.I.R. 1982 Cal. 34.

Acquiescence by parties would not confer jurisdiction on any Court or other authority to hear and determine a matter where such Court or authority lacks inherent jurisdiction to hear and determine the same. Thus, where the petitioners did not raise any point questioning the jurisdiction of the Revenue Minister at the time of hearing of revenue petition by him, *held*, said omission would not prevent them from challenging the order of the Revenue Minister subsequently for want of jurisdiction: A.I.R. 1976 J.&K. 25: 1976 Kash.L.J. 16.

There cannot exist an estoppel against a statute and jurisdiction cannot be conferred upon the Court by the inaction of parties or even by the agreement of parties. If the original agreement intended to confer jurisdiction upon the Court, when it had none, the agreement would be bad, but no estoppel as such would result. Where in first ejectment application filed by the landlord, the tenant failed to question maintainability of application on account of pecuniary jurisdiction of the Court, *held*, he was not estopped from raising such a plea subsequently: A.I.R. 1983 Bom. 20.

Parties proceeding before Rent Controller on footing that relationship of landlord and tenant existed between them—No objection raised by tenant in his reply or cross-examination in Courts below—*Held*, tenant was estopped in revision from raising plea that there was no relationship of landlord and tenant: (1981) 94 Mad.L.W. 343.

An estoppel by judgment arises if the controversy has been finally determined by a competent Court. The judgment must be one within its competence. If the decision of the Court is a nullity there can be no basis for raising the plea of estoppel. Thus, where the earlier order of the Controller was not the kind of order envisaged under S. 4 of the East Punjab Urban Rent Registration Act, 1949 and was thus, a nullity as it was made in terms of the statements of the parties and no enquiry at all was held by the Controller as to what should be the fair rent of the building, *held*, it was open to the petitioner-landlord to ignore the earlier order and apply afresh for fixation of fair rent and the plea of estoppel by judgment or by conduct was not available

to the respondent-tenant. [A.I.R. 1958 Bom. 1; (1962) 64 Punj.L.R. 467 and Civ. Rev. No. 648 of 1960, Dt. 6-4-1961 (Punj.), Dissent.]: A.I.R. 1975 Him. Pra. 43 (F.B.).

Civil suit for payment of wages—Employer acquiescing in jurisdiction of civil Court—New point of law that dispute could be entertained by authority under S. 15 of Payment of Wages Act and that jurisdiction of civil Court was absolutely barred under S. 22 raised for first time in revision—*Held*, that it being a case of intrinsic or basic want of jurisdiction under S. 22 of the Payment of Wages Act, the defect was not curable by acquiescence: 1962 M.P.L.J. 343: A.I.R. 1962 Madh. Pra. 310.

Claim petition under Payment of Wages Act—Authority holding to have jurisdiction to try claim petition—Subsequently, on perusal of certain Notification in view of which authority had no jurisdiction earlier order reviewed—Review being of order passed without jurisdiction, not barred by estoppel: 1979 W.L.N. (U.C.) 14 (Raj.).

Acquiescence—What constitutes—*Held*, employer had not acquiesced in the jurisdiction of Industrial Tribunal—Employer held not barred by principles of estoppel or *res judicata*.

Held, on facts, that it could not be argued that the employer's conduct before the Labour Court in the first dispute amounted to any admission that they were engaged in an industry. Nor could any such admission be spelt out of the objection before the City Civil Court which was not concerned to go into the question as to whether there was an industry within the meaning of the Industrial Disputes Act or not. Hence, the employers could not be said to have acquiesced in the jurisdiction of the Industrial Tribunal. The doctrine of *res judicata* or any principle analogous thereto did not apply to the facts of the present case. The former awards would no doubt bind the parties thereto within the limits imposed by the Industrial Disputes Act but the same would not be binding for all time to come and it was very much doubtful whether in the absence of a direct finding on this point the parties could be held to be estopped from raising the same afterwards. The first Labour Court never decided the jurisdictional fact, namely, whether the employers carried on an industry or not. It was, therefore, not possible to hold that the former award operated as a bar to the employers objecting to the jurisdiction of the Industrial Tribunal in the present dispute: A.I.R. 1964 Cal. 80.

Where the petitioner himself called for an enquiry with regard to the election of new office-bearers of the Mazdoor Union and submitted to the jurisdiction of the Registrar, Trade Unions, he cannot be allowed to urge that the Registrar, Trade Unions had no jurisdiction to make an enquiry; once he took a chance of getting a favourable order from the Registrar, he was estopped from challenging the jurisdiction if the result of the enquiry happened to be against him: (1962-63) 23 F.J.R. 43: (1963) 1 Lab.L.J. 60: A.I.R. 1962 Pat. 338.

Acquiescence in jurisdiction—Tribunal not having jurisdiction to decide question referred to it—No objection raised as to want of jurisdiction—Petitioner not estopped from raising objection in writ petition: I.L.R. 42 Pat. 661: (1963-64) 24 F.J.R. 325: A.I.R. 1963 Pat. 118.

Where a Joint Director was redesignated under R. 44 of the Rajasthan Minor Mineral Concession Rules, 1977 as the Additional Director without indicating any change in the jurisdiction of the incumbent and the objection as to the lack of jurisdiction was raised later on, *held*, the party could not be estopped on the ground of the objection not having been taken earlier; waiver or estoppel must be by conscious act and conduct; the party's appearance and acquiescence was in ignorance of the correct position for which it could not be held liable: A.I.R. 1981 Raj. 315: 1981 Raj.L.W. 391.

Interference in revision—Discretion of High Court—Cross suits—Small cause suit and original suit jointly tried by Court having both jurisdictions on its original side at instance of one party and in spite of objection by other—Revision—Party inviting joint trial cannot raise objection as to Court's jurisdiction—No interference if decree is found to be correct: 1962 Ker.L.T. 319: A.I.R. 1963 Ker. 51.

Estoppel—Acquiescence—Statutory reference to arbitration—Reference invalid—No objection to jurisdiction raised—No question of acquiescence or estoppel arises: 1962 All.W.R. (H.C.) 25.

Application for execution of decree—Notice served on judgment-debtors—No objection to jurisdiction raised—Petition dismissed for non-prosecution—Second execution application—Judgment-debtor cannot raise objection to jurisdiction of Court in second application: 1970 Raj.L.W. 217: A.I.R. 1970 Raj. 246.

Departmental enquiry—Acquiescence and submission to jurisdiction of Enquiry Officer without raising any objection—Petitioner cannot be allowed to challenge jurisdiction of Enquiry Officer: A.I.R. 1965 Mys. 283.

Where on the request of the delinquent teacher, a committee of educationists other than the School Committee was constituted to hold an enquiry against the said teacher and he participated in it and raised no objection as to its jurisdiction, *held*, subsequently, he was estopped from raising objection as to the jurisdiction of said Committee to enquire against him: A.I.R. 1992 S.C. 717.

Acquiescence—Absence of jurisdiction of certification officer—Acquiescence—No ground for refusing relief: 1969 B.L.J.R. 906.

Acquiescence in jurisdiction—Suit filed in Court of Munsif giving jurisdictional valuation according to S. 8 of the Suits Valuation Act — Dismissal of suit in both lower Courts—*Held*, landlord was estopped from challenging pecuniary jurisdiction of Munsif Court: A.I.R. 1967 Pat. 246.

Objection to jurisdiction not taken before lower Tribunal—High Court has still power to interfere: (1967) 1 M.L.J. 247.

Appellants, submitting to jurisdiction of High Court—They cannot take exception to such jurisdiction: A.I.R. 1968 S.C. 1286.

Acquiescence in jurisdiction—Effect on right to dispute jurisdiction. *See* (1956) 2 M.L.J. 288: A.I.R. 1956 Mad. 680. *See* also 1981 All.W.C. 161: (1981) 7 All.L.R. 298.

Where under a contract between the employer and the contractor, it was stipulated that only the Courts at Delhi would have jurisdiction to determine all disputes arising between them but the contractor filed suits elsewhere when dispute arose, but they were no longer pending and there was nothing to show that the employer had changed his position in consequence thereof, *held*, mere filing of the suits in another place than what was decided did not amount to waiver to estop said party from filing suit at Delhi subsequently: A.I.R. 1975 Del. 123 (D.B.).

Where the insured instituted an application under S. 20 of the Arbitration Act, 1940 at Simla for reference of its dispute with the insurer to arbitration and the insurer contended that only Courts at Chandigarh had jurisdiction to try the application as per the insurance contract as well as under S. 20 of the Code of Civil Procedure, *held*, the insurer was not estopped in the circumstances to contend that the Courts at Simla had no jurisdiction in the matter: A.I.R. 1977 N.O.C. 332: 1977 Sim.L.C. 456.

Where a creditor objected under S. 35 of the Provincial Insolvency Act, 1920 to adjudication proceedings instituted in the Insolvency Court on the ground of want of territorial jurisdiction but did not, though represented by Counsel, press his objection when the debtor was adjudicated as an insolvent, *held*, the objector had thereby waived his right to raise the objection; he was, thus, precluded from pressing the same objection at the hearing: A.I.R. 1984 Cal. 213: (1984) 1 Cal.H.N. 142: (1983-84) 88 Cal.W.N. 453.

Where the objection regarding territorial jurisdiction of the Bombay Court in a mortgage suit on the ground that the mortgage-land was situated in Bihar was overruled by the Bombay High Court, which order was not set aside in appeal or revision, *held*, the judgment-debtor could not raise same objection in execution proceedings before the Court in Bihar: A.I.R. 1985 Pat. 98: 1984 B.B.C.J. (H.C.) 849: 1985 Pat.L.J.R. 119 (D.B.).

Objection regarding territorial jurisdiction—Does not go to root of jurisdiction—Validity of decree cannot be challenged on that ground in execution proceedings—Judgment-debtor held estopped from taking that objection in execution: (1961) 2 M.L.J. (S.C.) 157: (1961) 2 An.W.R. (S.C.) 157: A.I.R. 1962 S.C. 199.

When an *ex parte* decree passed in a petition filed by a wife under Ss. 10 and 13 of the Hindu Marriage Act is set aside in appeal and the case is remanded and the husband, before, the trial Court, contests the petition on merits, raising also an objection as to the territorial jurisdiction of the Court, by not raising such objection in the appeal against the *ex parte* decree, the husband has neither

waived such objection nor submitted to the jurisdiction of the Court.

It is true that the objection as to the territorial jurisdiction of a Court does not stand on the same footing as an objection to the inherent lack of competence of a Court to try a case and an objection to the territorial jurisdiction cannot be allowed unless it has been taken at an earlier opportunity and unless there has been a consequent failure of justice. When an *ex parte* decree passed in a wife's petition under Ss. 10 and 13 of the Hindu Marriage Act is set aside in appeal and the case is remanded and the husband contests the petition before the trial Court on merits raising also an objection as to the territorial jurisdiction of the Court, the husband cannot be said to have waived the objection as to the jurisdiction of the trial Court merely on the ground that he had not raised it in the appeal against the *ex parte* decree. He was then merely concerned with having the *ex parte* decree set aside.

Further, where an inferior Court has no jurisdiction from the beginning, a party by taking a step in a cause does not waive his right to object to the jurisdiction of the Court. When the wife filed her petition under Ss. 10 and 13 of the Hindu Marriage Act, the trial Court could have assumed jurisdiction to try it only if any one of the ingredients of S. 19 of the Hindu Marriage Act had been satisfied and failure on the part of the husband to raise an objection to the jurisdiction could not turn the trial Court into a legally constituted one if otherwise it did not possess the requisite jurisdiction. It cannot also be said that the husband should be deemed to have waived the objection as to jurisdiction as he resisted the petition on merits as well. Thus, the husband in such a case has neither waived such objection nor submitted to the jurisdiction of the Court: 1969 Kash.L.J. 90: A.I.R. 1970 J.&K. 19.

Order declaring property as evacuee property is without jurisdiction—Suit for declaration that the order is without jurisdiction not barred by S. 46—There cannot be estoppel against such order without jurisdiction: A.I.R. 1964 Pat. 338.

Where in 1984 the Supreme Court withdrew two criminal trials pending before the Special Judge and transferred them to the High Court for trial by a sitting Judge which was subsequently found to be violative of S. 7(2) of the Criminal Law Amendment Act, 1952 and Arts. 14 and 21 of the Constitution of India, *held*, the Supreme Court recalled that order [published in A.I.R. 1984 S.C. 684] *ex debito justitiae* as no suitor should suffer for the Court's wrong; no Court, however high, has the power to give an order unwarranted by the Constitution: A.I.R. 1988 S.C. 1531: (1989-1) 37 B.L.J.R. (N.O.C.) 19: (1988) 2 S.C.C. 602.

Suit filed in revenue Court prior to Act transferred to civil Court at instance of defendant after Act came into force—Suit exclusively triable by revenue Court—Defendant not estopped from contending that suit is not triable by civil Court because there is no estoppel against statute and parties cannot by consent confer jurisdiction on Court when there is none—Question of jurisdiction must be decided in accordance with provisions of the Act: 1963 Raj.LW. 284.

Where the Minister for Forests had manifestly exercised the powers of the "Jagir Administrator" fully knowing that he had no power or competence to determine the claim of an *ex-jagirdar* of an abolished *jagir*, *held*, even though it is dangerous to allow the State to contend, where it finds convenient to, that its own laws, rules, regulations or orders are invalid, the Court's have nevertheless to determine the contention; the plea of estoppel is, thus, not available against the State's order which is without jurisdiction and illegal: (1972) 1 An.W.R. 170 (D.B.).

There is an estoppel against a plaintiff, who himself institutes a suit in the Small Cause Court although the allegations in the plaint clearly make out an offence punishable under Chap. 17, Penal Code within the meaning of Art. 35 (*ii*) of Sch. II, Provincial Small Cause Courts Act, excluding the suit from the jurisdiction of the Small Cause Courts Act, if the judgment goes against him, from contesting in revision that the Court was acting without jurisdiction in entertaining and deciding his plaint. The parties cannot by consent or by course of conduct or by action or inaction create jurisdiction in a Court where there is none under the law. A decree, order of judgment by a Court in such set of circumstances would be the doctrine of blowing hot and cold cannot cover a case where a Court is asked to decide a point over which it has no jurisdiction. No doubt Court acts on the invitation of the plaintiff but it has

also to act according to the dictates and command of the law governing the Court's jurisdiction. There can be no estoppel against law or a statute. The rule of estoppel is applied specially on the ground that the party on the faith of the representation has changed his position and suffered thereby. But there can possibly be no prejudice in a case where the plaintiff says that he filed the suit in the wrong Court. It is true that the defendant had to defend himself but then he succeeded in having the suit dismissed on the merits prejudice, therefore, if any, so far as the defendant is concerned is not the change in position by reason of the representation of the plaintiff but at best prejudice in the shape of having to defend the case and that prejudice can always be compensated by payment of costs: (1964-65) 69 Cal.W.N. 545: A.I.R. 1965 Cal. 59.

Where the Commissioner of Land Revenue had appellate power over the impugned order of the Forest Settlement Officer and revisional power over the impugned order of the Tehsildar under the A.P. (Telangana Area) Ijara and Kowli Land Cancellation of Irregular Pattas and Abolition of Concessional Assessment Act, 1961 and with the consent of the parties thereto he heard both of them together and disposed them by a common judgment, *held*, the parties were estopped from challenging the Commissioner's jurisdiction; it was not a case of inherent lack of jurisdiction: A.I.R. 1983 N.O.C. 103 (Andh. Pra.).

15. Acquiescence — Illustrative cases.— Where pursuant to the order of remit the appellant took a chance by participation in the proceedings before the Rent Controller, taking up the matter in appeal and thereafter the appellant challenged the remit order, *held*, having acquiesced in the proceedings, the appellant could not challenge the first remit order: A.I.R. 1993 S.C. 1616: (1993) 4 S.C.C. 499: (1993) 1 U.J. (S.C.) 273.

Reference to civil Court ordered by Collector in appeal in mutation proceedings— Order of Collector not appealed from—Parties not estopped from raising objections to the reference, in civil Court: 1963 Raj.L.W. 186.

Where the Industrial Tribunal ordered for analogous hearing of two proceedings to which petitioners were parties and the petitioners participated in the proceedings, *held*, when they did not object to the procedure proposed but instead certainly participated in the proceeding, acquiescing silently they cannot be allowed to turn round and challenge the proceedings, as they had by their conduct totally consented to the procedure adopted: 1981 Lab.I.C. 496.

Where a party, having the right to prefer an appeal against the impugned order, chose to prefer an appeal under S. 13(2) of the Monopolies and Restrictive Trade Practices Act, 1969, an alternative and perhaps a more effective remedy, *held*, it could not amount to acquiescence in making of the impugned order and estopping the party from challenging it; no acquiescence or estoppel could be spelt out from such conduct: A.I.R. 1979 S.C. 798.

Where it was established that even after his being exonerated by the criminal Court, the petitioner was not given his substantive post, but another post temporarily, and he had no other option but to work under the new conditions imposed on him as he could not afford to lose his Government service, the mere fact that the petitioner had to work in the new post for about seven days will not be in any way, sufficient to create any estoppel against him nor will the doctrine of acquiescence or waiver operate against him: A.I.R 1956 Manipur 34.

Prior proceedings void—Decision therein cannot operate as estoppel: 1962 B.L.J.R. 960: A.I.R. 1964 Pat. 247.

Where the petitioners filed revision application against an order setting aside an *ex parte* decree passed in their favour but during the pendency of said revision application, the suit was heard on merits in which both the parties participated and the suit was dismissed, *held*, the revision application of the petitioner was not maintainable in view of principle of waiver or acquiescence. The petitioners were aware that if they succeeded in the case then their *ex parte* decree would be maintained and there would be no necessity for any further hearing of the suit. They had, therefore, a right to maintain the *ex parte* decree and once the petitioners went to trial for the sake of obtaining a contested decree then they must be deemed to have relinquished their right of maintaining the *ex parte* decree. [A.I.R. 1968 S.C. 933; A.I.R. 1968 S.C. 1286; A.I.R. 1983 Pat. 257 (F.B.), Rel. on]: A.I.R. 1984 Pat. 32: 1984 Pat.L.J.R. 57: (1984) 34 B.L.J.R. 50: 1984 B.L.J. 19.

Where respondent-company manufactured and marketed home appliances under the same trade mark as that of the applicants' with the actual aid, help and financial assistance by the applicants and their family

members for a period of more than $7^1/_2$ years, but later on applicant accused respondent of infringement of trade mark, *held*, the doctrine of acquiescence and the honest and concurrent user would be attracted: A.I.R. 1993 Mad. 120.

Where the plaintiff on coming to know of the infringement of its trade mark in 1986 immediately filed a criminal complaint and in 1987 it filed a civil suit, *held*, the plaintiff could not be held guilty of acquiescence, delay and laches. [A.I.R. 1985 Del. 210, Rel. on]: A.I.R. 1989 Del. 157.

Where the respondent refused to enroll the petitioner as an Associate Member but the petitioner sought relief against said decision after more than $10^1/_2$ years, *held*, as the petitioner failed to seek remedy within a short time he acquiesced in the decision, thus he had waived his right to get the relief: A.I.R. 1992 Guj. 140.

Where a candidate is compelled to subject himself to the elections notwithstanding the infringement of the rules, his right to challenge the same cannot be questioned on the ground of acquiescence: 25 Cut.L.T. 42: I.L.R. (1959) Cut. 189.

Election to office—One of contestants elected and accepting office—No writ can be issued against him, he having accepted office and opposite party having acquiesced in the election proceedings and further successful party not being party to the proceedings under Art. 226: A.I.R. 1963 All. 447.

Where a house left by a Hindu father is mortgaged by his son and the widow of the deceased has signed the mortgage deed after hearing its contents and as token of consent, the widow has acquiesced in transaction to the extent of surrendering her rights of residence and maintenance, and is estopped from claiming those rights against the mortgagee: A.I.R. 1941 Pesh. 17.

Acquiescence—Partition of joint family property—Joint Hindu family governed by Benaras School—Unregistered deed effecting partition amongst sons to the exclusion of widow—Acquiescence on part of widow not pleaded—Validity of the deed cannot be upheld on ground of acquiescence: A.I.R. 1968 S.C. 1299.

Where in a case of partition of separate propety of *karta*, one share was given to his wife also and the other sharers were also parties to the partition deed, *held*, on death of *karta*'s wife said sharers could not contend that property under partition being ancestral property would devolve on them and not on the daughters of the deceased: A.I.R. 1990 N.O.C. 131 (Ker.).

Widow making gift of her deceased husband's property to her daughter and daughter's husband jointly—Daughter acquiescing for less than 12 years in the position that her husband was co-owner of that property does not constitute estoppel so as to deprive her reversionary right: 119 I.C. 152: A.I.R. 1929 Mad. 467.

Defendant acquiescing in order of restoration—Revision—Estoppel. *See* A.I.R 1954 Madh. Bh. 12: I.L.R. (1953) Madh. Bh. 383. *Quo warranto*—Acquiescence. *See* (1954) 1 M.L.J. 102: A.I.R. 1954 Mad. 563.

A person who, though not a party to the litigation that effected a division of holding, has nevertheless profited from it and has all along abided by it, cannot later on seek to question the division of holding on the ground that he was not a party to that litigation: 1941 All.W.R. (Rev.) 924: 1941 R.D. 813.

Where the wife acquiesced in her husband's acts and allowed him to deal with the property as his own and derived benefit therefrom, *held*, that she could not be permitted to turn round and impugn the transaction: 7 Mys.L.J. 112.

Person who pleads acquiescence must be under mistaken belief of his right and person against whom it is pleaded must be aware of the mistaken belief—Auction-purchaser in execution sale building in property purchased by him—Facts indicating that knowledge of trust nature of property would have known to auction-purchaser with little inquiry—He cannot plead acquiescence against trustee: 1953 All.W.R. (H.C.) 77: A.I.R. 1953 All. 449.

Where a private operator was allowed to operate on impugned route illegally which had a common overlapping with the nationalised route for nearly 29 years but subsequently authorities refused to renew the permit and respondent-operator pleaded estoppel, *held*, the conduct of the appellant in acquiescing in the renewal of the permits over a long period could not create or constitute an estoppel from enforcing its rights under the Scheme and from objecting against the renewal of the permit in view of the subsistence of a valid scheme: A.I.R. 1995 Karn. 103 (D.B.).

Merely because the plaintiff had claimed storage charges at the rate of Rs. 4 per ton per month and there was silence on the part of the defendant, it cannot be said that there

was acquiescence on the part of the defendant and that there was an implied undertaking on his part to pay godown rent at that rate: (1965) 2 S.C.W.R. 289: A.I.R. 1966 S.C. 275.

Plaintiff's suit resting on partnership and breach of terms thereof by second defendant, *i.e.*, by breaking one of the terms of the partnership, second defendant got the rent bill in his name and became direct tenant under the first defendant, the landlord—Defendant pleading a letter from plaintiff's Solicitor to first defendant that plaintiff had no objection to second defendant, sub-tenant, becoming direct tenant under the first defendant—Solicitor examined as witness by defendant—*Held*, lack of authority on the part of the Solicitor was so patent upon his evidence that question of onus, be it of proving a negative in the first instance, became an academic interest—To put it in another way landlord defendant had discharged plaintiff's onus though unwillingly by examining Solicitor as his witness—Plaintiff thrown overboard by questionable means in 1956 by defendant—Plaintiffs suit filed in 1958—No full knowledge on part of plaintiff—*Held*, acquiescence of plaintiff was not acquiescence in the context of facts—Plaintiff could not be held to have rectified action of the Solicitor: (1963-64) 68 Cal.W.N. 786.

Assessee making payment of sales tax on demand notice under S. 8 of the U.P. Sales Tax Act—Subsequent challenge to liability under S. 8-A (4)—Doctrine of acquiescence has no application: (1964) 15 S.T.C. 335 (All.).

Where certain licensees of liquor in Pondicherry, applied for transit permit for sending liquor to Mahe, a Pondicherry town land locked in State of Kerala, though under the Rules no such permit was necessary, and the Authorities refused such permit, but subsequently, the licencees realising their mistake challenged said action as unconstitutional, *held*, principle of estoppel was inapplicable and the State Government could not plead that the petitioners had in the past acquiesced in such action: A.I.R. 1990 N.O.C. 61: (1989) 2 Ker.L.T. 924 (D.B.).

Acquiescence—Transfer by ostensible owner—Consent—Necessity—Effect of consent—Estoppel: A.I.R. 1958 Pat. 537.

Fixation of salaries—General principle is to appoint at minimum of scale—Rule subject to contrary intention—Fixation of pay by authority—Acceptance of, by employee—He is estopped from claiming higher salary—Appointment authority has no power to review fixation of salary made by him and accepted by employee: I.L.R. (1962) 2 All. 392: A.I.R. 1963 All. 570.

Assam Land (Requisition and Acquisition) Act (XXV of 1948), S. 7(2)—Compensation—Meaning —Interest on amount not included—Right to claim interest—Basis of—Acceptance of award by petitioner—Petitioner not estopped from claiming interest thereon: I.L.R. (1961) 13 Assam 382: A.I.R. 1962 Assam 20.

16. Rule of standing by.—*Per* Division Bench:—To found a plea of estoppel on the doctrine of standing by, it must be affirmatively established that the parties against whom that estoppel is sought to be pleaded were aware of what was being done and consciously stood by: (1959) 2 An.W.R. 79.

Merely by standing by or by not raising any objection, a woman does not lose her right to get a share and such a conduct does not amount to acquiescence or relinquishment. Thus, where though the wife of the deceased was entitled to one-sixth share in the joint family property, no share was allotted to her when the partition took place by a deed of surrender and she did not sue for partition even though nearly 17 years had passed after the partition, *held*, no inference of acquiescence, relinquishment or cesser of right could be raised against the wife more so when specific pleas to that effect were not taken during the course of assessment: 1982 Hindu L.R. 282 (Madh. Pra.).

The limitations of the rule regarding standing by are that first, the stranger building on the land belonging to another must do so supposing it to be his own, and secondly, that the owner of the land, perceiving his mistake, abstains from setting him right and leaves him to persevere in his error. But if a stranger builds on another's land knowing it to be his, there is no principle of equity which would prevent the owner of land claiming the land with the benefit of all the expenditure made on it: 1951 Nag.L.J. 544: A.I.R. 1951 Nag. 347: I.L.R. (1951) Nag. 909.

17. Equitable estoppel.—*See* (1954) 2 M.L.J. (Andh.) 95: A.I.R. 1954 Andhra 29; I.L.R. 37 Mad. 270; (1920-21) 25 Cal.W.N. 29

(F.B.); I.L.R. 48 All. 362: A.I.R. 1926 All. 367; I.L.R. 58 Cal. 358; A.I.R. 1931 Cal. 485; 58 I.A. 91: I.L.R. 58 Cal. 1245: 60 M.L.J. 538 (P.C.); 1931 All.L.J. 653: I.L.R. 53 All. 747: A.I.R. 1931 All. 689.

The doctrine of equitable estoppel applies to a case where a person is given an unequivocal assurance and on the faith thereto, he acted detrimental to his interest and he suffered an irretrievable injury in that pursuit. In such an event, having made such a promise the maker thereof is precluded to resile therefrom and pass an order detrimental to the interest of the person who believed the promise and placing reliance thereon acted on that basis and he cannot adequately be compensated: A.I.R. 1989 Andh. Pra. 159: (1989) 2 An.L.T. 491.

Merely because on the basis of the existing rate an agreement is entered into and between the date of agreement and the date of importation the rate of duty is changed, there is no ground for applicability of the principle of equitable estoppel. In the case of revenue no such principle can be applied on such basis: (1989) 40 E.L.T. 47 (Cal.).

In respect of an action, which is in conformity with law, *held*, doctrine of equitable estoppel does not apply: I.L.R. (1986) Karn. 2794 (D.B.).

Equitable principle of estoppel—Applicability—Cannot override provisions of statute: A.I.R. 1968 Pat. 487.

The doctrine of promissory or equitable estoppel can never be invoked in the abstract; the Courts are bound to consider all aspects including the result sought to be achieved and the public good; the Courts have to do equity and its basic principles must ever be present in the Court's mind; and the doctrine must yield when the equity so requires, that is when it is shown that the enforcement of estoppel would result in inequity: A.I.R. 1991 Mad. 371 (D.B.).

The doctrine of promissory or equitable estoppel evolved through successive Supreme Court decisions is now well established in the country's administrative law. Its fundamental basis is that where any party has by his word or conduct made to the other party an unequivocal promise or representation, which is intended to create legal relations or effect legal relationship to arise in the future knowing fully as well as intending that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that the said party should not be permitted to go back upon it, if it would be inequitable to do so, having regard to the dealings which have taken place or are intended to take place between the parties. Since the doctrine has its roots in equity, its invocation, as per judicial consensus, requires clear, sound and positive foundations in the petition and specific proof thereof; general assertions and claims that the doctrine is attracted because the party invoking it had acted on the representation and suffered detriment would not do: A.I.R. 1991 Mad. 371 (D.B.).

As pointed out by the Supreme Court in A.I.R. 1965 S.C. 1912, the object of estoppel is to prevent fraud and secure justice between the parties by promotion of honesty and good faith, and consequently, where one person makes a misrepresentation to the other about a fact, he would not be shut out by the rule of estoppel, if that other person, knew the true state of facts and must consequently not have been misled by the misrepresentation: (1975) 88 Mad.L.W. (S.N.) 37 .

Void lease—Tenant putting up structures *bona fide*—Right to value thereof: (1932-33) 37 Cal.W.N. 473: A.I.R. 1933 Cal. 612. *See* also 1937 All.L.J. 793: A.I.R. 1937 All. 512; I.L.R. 13 Luck. 192: A.I.R. 1937 Oudh 263. No plea of equitable estoppel can be maintained against a statute: 1935 All.L.J. 51: A.I.R. 1935 All. 127. As to part-performance, *see* I.L.R. 39 Mad. 509 (P.C.); I.L.R. 42 Cal. 801; I.L.R. 40 Mad. 1134: 33 M.L.J. 252.

The villagers *V* on whose behalf *A* purchased some properties, subsequently sold it to *B* and *B* in his turn sold a portion to *C* and the rest to others. The suit by the villagers for a declaration of title and possession with past profits was decreed in appeal. In second appeal, it was contended that the plaintiffs were estopped by their conduct, that payment should be made to him for improvements and liability for *mesne profits* was also objected to. *Held*, for the principle of equitable estoppel to apply all the following conditions must apply: (*i*) *C* must be mistaken as to his legal rights; if he is aware he is infringing the right of another he takes the risk of

the other asserting his rights; (*ii*) *C* must expend money or do some act on the mistaken belief; otherwise he does not suffer by *V*'s subsequent assertion of their rights; (*iii*) *V* must know of their own rights; for acquiescence is founded on conduct with knowledge of one's own legal rights; (*iv*) *V* must know *C*'s mistaken belief. If they know that *C* is mistaken, it is not equitable for them to allow *C* to continue in his mistake; but if *V* have no such knowledge there is nothing which calls upon them to assert their rights; (*v*) *V* must encourage *C* in his expenditure of money or doing any other act by abstaining from asserting their rights. *V*, the villagers, the owners of the property might have been under the impression that *B* or *C* were only in management of the property. Nothing was shown that they encouraged *B* or *C*. The plaintiffs were not estopped from claiming the rights in suit. For S. 51 of the T.P. Act to apply and a claim to compensation for improvements to arise the improvements must have been made by *C* under the mistaken belief that he was absolutely entitled to the properties. In the case he might have been negligent but it is not inconsistent with *bona fides*. He had converted the dry lands into wet lands. The real value of the improvement is the enhanced marketable value of the property. In view of the fact that there was no notice by *V* claiming the property past profits were not allowed in the peculiar circumstances and on equitable consideration: A.I.R. 1952 Mys. 117: I.L.R. (1952) Mys. 384.

Where a lessee of a shop, by his conduct, allows an advertisement erected by another person on the wall of an adjacent building and projecting into the air space above his shop to remain in position, he is not estopped thereafter from ever objecting to the sign remaining there. The fact that the lessee, by his conduct, must have conveyed to the person erecting the sign that he would not object in future does not constitute an estoppel. Nor would there arise any equitable estoppel if the person erecting the sign was in no way induced to act to his prejudice to such an extent as would entitle him to a continuance of the exhibition of that sign for ever, or, at any rate during the length of the lease: (1957) 2 All E.R. 343.

Equitable estoppel—Lease—Lessee intentionally failing to deliver possession contrary to agreement—No equity in his favour—He cannot be allowed to take advantage of his own wrong: 1969 Cur. L.J. 723: 1969 Ren. L.R. 485: (1969) 71 Punj.L.R. 1095.

After an oral agreement was made between the plaintiff and the defendant for the grant to the defendant by the plaintiff of a permanent lease of land on certain terms, the plaintiff urged the defendant to erect permanent structures on the land and took an active part in obtaining sanction for them and assured the defendant that he would never evict him. The defendant completed the structures within two years of the agreement (*i.e.,*) when a considerable part of the time within which the agreement could be enforced had yet to run. The defendant, however, neglected to enforce the agreement and obtain a registered lease within the time limited by law. After the expiry of the period of limitation for a suit to enforce the agreement, the plaintiff sued to eject the defendant. *Held*, (*1*) that the defendant could not avail himself of the doctrine of part performance under S. 53-A of the T.P. Act, as the agreement was not in writing; (2) that the plaintiff was not estopped from evicting the defendant as on the facts of the case there was no room for applying the doctrine of equitable estoppel; the statement of the plaintiff that he would not evict the defendant could not serve as a basis for an estoppel, as there was a valid agreement for a permanent lease to which it was referable. Further, it was only a promise and thus a representation not of an existing fact but of an intention for the future; (3) that the defendant was not entitled to any compensation for the structures erected by him but could remove them from the land, having regard to S. 108 (*h*) of the T.P. Act: (1945-46) 50 Cal.W.N. 851: A.I.R. 1947 Cal. 353.

Mere execution of a release deed in favour of a *tarwad* member even if the *karnavan*, asserting his right to a share would not amount to a division in status; it is too wide a proposition that assertion of a right in *tarwad* properties on transfer of individual shares therein tantamounts to the exercise of the right to partition; it would not result in division of status prior to alienation, which could render the transfer as of a divided interest. Thus, it could not be construed as relinquishment of his joint interest; since both the alienor and alienee knew the position in law of *tarwad* properties, there could be no representation

by the alienor to induce the alienee; the doctrine of equitable estoppel was not attracted: A.I.R. 1984 Ker. 51 (D.B.).

Principle of equitable estoppel should be applied to prevent manifest injustice to one who has acted on basis of representation of facts made by the other—University after efflux of long period of time allowing passing of final degree examinations cannot deny degree certificate on ground that petitioner had failed in one of the subject—*Held*, principle of equitable estoppel should come to rescue of the petitioner to prevent manifest injustice—University would be prevented from taking a stand on a question of fact, contrary to what it held out as existing, for all these years, on which basis both University and the petitioner had acted: I.L.R. (1985) Karn. 2763.

For admission to Medical Colleges the Government issued the following rule on 26th June 1961. "Candidates applying for admission to P.P.C. in Medicine and to the first year of M.B.B.S. course, must have passed the qualifying examination in one attempt". A few days thereafter, *i.e.*, on 3rd July, 1961, this rule was amended by omitting the clause which disabled candidates who did not pass the qualifying examination in one attempt from applying for admission to the Professional Course. *Held*, that there was no scope for invoking the doctrine of equitable estoppel. This rule did not create any obstacle in the way of her seeking admission in other Colleges. Government was invested with authority to amend the rules from time to time. Therefore, there was no restraint on the power of the Government to amend these rules: I.L.R. (1962) Andh. Pra. 917: (1962) 1 An.L.T. 27: (1962) 1 An.W.R. 60: A.I.R. 1962 Andh. Pra. 212.

Having made an implied representation that if a candidate satisfied the standard set up for selection of candidates (for admission into the Medical College), it is not open to the authorities concerned to retract from it. The petitioner was led into the belief that she would be selected if she secured a high percentage of marks and fared well at the interview; in other words, if she has come out successful in the competition amongst the various candidates. It is not denied that she obtained 59 per cent of the marks in her optional subjects in the Intermediate Examination and that she satisfied the other conditions which would have enabled her to gain admittance into the College. But for the assurance contained in the notification making the reservation, *viz.*, that the Government of Andhra Pradesh reserved 10 per cent of the seats available on 1st November, 1956, in Osmania and Gandhi Medical Colleges for students coming from the Marathawada area pursuant to the Government of India's Notification No. 21-1-57 S.R. (R.) II , dated 9th June, 1957, she would have applied to the other College and in all probability might have secured admission. It is true that she was permitted to apply for a seat in the Medical College at Aurangabad and that time was extended but this was merely illusory, having regard to the press-note issued by the Bombay Government and also taking into account the subsequent events. It appears that the Bombay Government gave preference only to students of pre-professional course with the result the application of the petitioner was not even considered. In these circumstances, the principle of legal or equitable estoppel would apply to this case. It would have been a different matter, if a note was added when the applications were invited for the academic year that the reservation was only provisional and was subject to the final orders to be passed: A.I.R. 1959 Andh. Pra. 493: (1959) 1 An.W.R. 116.

It was contended that the University was estopped from refusing the petitioner permission to sit for the B.T. degree examination in view of her completing her course and in view of being given a hall ticket for sitting for the examination in April, 1957, causing immense injury to her by wasting her time, money, and energy. *Held*, that there cannot be any legal or equitable estoppel in such cases: (1958) 1 M.L.J. 214: A.I.R. 1958 Mad. 494.

Application "Provisionally accepted for admission to written test"—Acceptance not final or irrevocable—Can validly be recalled subsequently—There was no question of reviewing final decision—No principle of equitable estoppel comes into the picture: 1981 All.W.C. 700: 1982 Lab.I.C. 179 (D.B.).

In Muhammadan, as in Roman and English law, *nemo est heres viventis* —a living person has no heir; an heir apparent or presumptive has no reversionary interest so as to question any sale or gift made by the owner in possession. And the converse is

also true; renunciation by an expectant heir in the life time of his ancestor does not bind him when inheritance opens on the ancestor's death. But where the expectant heir receives consideration for the renunciation and conducts himself so as to mislead an owner into not making dispositions of his property *inter vivos*, the expectant heir could be debarred from setting up his right when it does unquestionably vest in him. The principle of equitable estoppel is not opposed to Muslim law but completely in consonance with it. [A.I.R. 1936 All. 573; A.I.R. 1956 Trav.-Co. 217, Approved; A.I.R. 1959 Mad. 131; A.I.R. 1964 Ker. 200, Overruled]: A.I.R. 1973 S.C. 554: (1973) 1 S.C.C. 1.

Where the Collector provisionally appointed fair-price shop dealers for sale of levy sugar requiring them to furnish deposits, execute agreements and complete other necessary formalities with the stipulation that the appointment was subject to Government approval and liable to cancellation for furnishing incorrect information and the Government did not accord approval on the grounds of public interest, *held*, the doctrine of equitable estoppel was not attracted; the Collector, besides not being the final authority, had made no clear and unambiguous representation; the dealers had suffered no detriment as a natural consequence thereof: (1973) 2 An.W.R. 157 (D.B.).

Where the petitioners-builders of high-rise buildings completed the construction of buildings in question in accordance with the plans sanctioned by the Commissioner under the provisions of Karnataka Municipal Corporation Act, 1976 and having obtained either the occupancy certificate or a conditional occupancy certificate, parted with their rights in the impugned premises by selling the same to the various third parties but 3-4 years after grant of occupancy certificate, the Corporation directed them to demolish flats in upper floors, *held*, the delay on the part of the Corporation in taking action against the petitioners either during the course of construction of impugned buildings or after its construction would attract the rule of equitable estoppel: A.I.R. 1990 Karn. 56: I.L.R. (1989) Karn. 1430.

18. Issue estoppel.—In order to invoke the rule of issue estoppel not only the parties in the two trials must be the same but also the fact-in-issue proved or not in the earlier trial must be identical with what is sought to be re-agitated in the subsequent trial. Thus, where in the separate trial of the co-accused, though he was acquitted, the approver was not held to be unreliable in that case, *held*, when in the trial of the main accused that approver's evidence was found to be amply corroborated in material particulars against him, there was no inconsistency between the finding that the approver's statement in the other case was not materially corroborated by other evidence against the co-accused and the contrary finding in the affirmative in the case of main accused: A.I.R. 1975 S.C. 856: (1975) 3 S.C.C. 742: 1975 Cr.L.J. 765. *See* also 1981 Cr.L.J. (N.O.C.) 225 (Del.). Where the High Court in criminal revision petition had directed that the sentences imposed on the accused for different offences shall run consecutively but subsequently, the accused, without making reference to the said decision, moved a criminal miscellaneous complaint praying that the sentences passed against him should be directed to run concurrently, and a single Judge of the High Court, so directed, *held*, merely because the prosecution, at the time of hearing of criminal miscellaneous complaint, did not place the earlier judgment of the High Court before the single Judge and sought to have the complaint dismissed, the prosecution cannot be deemed to have waived its right based on the principles of *res judicata*. [A.I.R. 1975 S.C. 856, Rel. on] : (1994) 2 Ker.L.J. 277 (D.B.).

Principle of issue estoppel—Applicability: A.I.R. 1968 S.C. 1281; 1969 Cr.L.J. 1435.

Where the previous order was passed on the ground of jurisdiction, it operates as issue estoppel to a subsequent petition: 1971 Cr.L.J. 1784 (Cal.).

General Clauses Act (1897) permitting double punishment—Void being repugnant to Art. 20(2) of the Constitution—Principle of issue estoppel is different from that of double jeopardy: 1983 Cr.L.J. 1542 (Cal.).

"Issue estoppel" or "*res judicata*" applies to issues of fact and also of law which have been raised and settled once and for all between the parties even if the judgment is pronounced in criminal proceedings. [A.I.R. 1965 S.C. 87, Rel. on]: A.I.R. 1980 Andh. Pra. 219 (F.B.).

Where in a criminal trial an issue of fact was tried by a competent Court on an earlier

occasion, *held*, a finding given by that Court would constitute an estoppel or *res judicata*: (1985) 1 Crimes 253 (All.).

Estoppel by record in criminal trials—Fact in issue same in subsequent trial—Finding recorded in first trial is binding: (1965) 1 Cr.L.J. 169: A.I.R. 1965 Him. Pra. 11.

Finding in earlier trial constitute estoppel nor as bar to trial and conviction of accused for a different or distinct offence but as precluding reception of evidence contrary to the finding of fact arrived at in the earlier trial: 1982 Cr.L.J. (N.O.C.) 31: 1982 Ker.L.T. 372.

There is an issue estoppel, if it appears by record itself or as an explained by proper evidence, that the point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner. There must be a prior proceeding determined against the State necessarily involving an issue which again arises in a subsequent proceeding by the State against the same prisoner. Issue estoppel does not prevent the trial of an offence as does *autrefois acquit* but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial before a Court of competent jurisdiction: 1975 Cr.L.J. 765 (P.&H.); (1976) 2 A.P.L.J. (H.C.) 346.

The basic principle underlying the rule of issue estoppel is that the same issue of fact and law must have been determined in the previous litigation. Finding recorded in the acquittal of a person charged with defalcation that he was not in charge of cash will not operate as issue estoppel in a subsequent charge of defalcation in his capacity as cashier for a subsequent period: A.I.R. 1971 S.C. 458: 1971 Cr.L.J. 420.

The rule of issue of estoppel is that when an issue of fact has been tried by a competent Court on a former occasion and finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence, which might be permitted by the terms of S. 203(2) of the Cr.P.Code. The rule of issue estoppel is not the same as the rule against double jeopardy. The rule, however, does not prevent the trial of any offence, but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial before a Court of competent jurisdiction: 1969 All.W.R. (H.C.) 31: 1969 All.Cr. R. 30.

The only estoppel that could be pleaded in criminal trial is issue estoppel. It is really a well known doctrine which prohibits fresh litigation on issues of fact or law which were already decided between parties in a previous litigation. Such settlement of issues need not necessarily be on the same set of facts. Even in a trial on different act of facts between the same parties, a decision on an issue of fact or law in a previous litigation could operate as estoppel if the matter is concluded on that point by the previous litigation. That principle is based on public policy. But parties must have joined issue on that particular point or points in a trial and the issue or issues must have been decided on evidence in a trial. What is decided in a preliminary inquiry and the consequent dismissal of the complaint under S. 203 of the Criminal Procedure Code cannot operate as issue estoppel for the simple reason that there was no trial, there was no joining of issue between a complainant and an accused and no decision on evidence by the Court: (1986) 1 Hindu L.R. 251 (Ker.).

Where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution not as a bar to the trial and conviction of the accused for a different and a distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law. The principle of issue estoppel is applicable when both the proceedings, *i.e.*, the earlier and the subsequent one are criminal proceedings. Thus, where the petitioner who had earlier been prosecuted under the Foreigners Act, 1946 and was acquitted contended that the question whether he was or not a foreigner could not be raised in subsequent proceeding under Foreigners (Internment) Order, 1962, *held*, the earlier decision

did not operate as issue estoppel for the reason that subsequent action against petitioner, *i.e.*, proceedings under the Foreigners (Internment) Order, were not criminal proceedings. [A.I.R. 1956 S.C. 415; A.I.R. 1965 S.C. 87; A.I.R. 1969 S.C. 961, Rel. on]: A.I.R. 1974 S.C. 28: (1974) 3 S.C.C. 469.

Where one of the accused in a murder trial was simultaneously but separately tried under the Arms Act, 1959 for possession of gun, and was acquitted and no appeal was filed by the State against that order of acquittal, which in consequence became final, and the accused contended that on the principle of issue estoppel, the Court trying murder case was precluded from convicting him and holding that he was in possession of that gun, *held*, as the murder case was decided first, and that under the Arms Act was decided subsequently the doctrine of issue estoppel was not applicable. [A.I.R. 1956 S.C. 415, Dist.]: A.I.R. 1974 S.C. 1256: 1974 Cr.L.J. 929: (1974) 4 S.C.C. 754.

Where the accused, tried and acquitted in petty cases by a competent Court on issue of facts, *held*, they cannot be tried on those very facts afterwards in a murder case; the previous decision on the same allegations clearly operate as a bar of *res judicata* and estoppel if the accused are tried on the same facts in a subsequent murder case. [(1965) 1 Cr.L.J. 120 (S.C.); 1969 Cr.L.J. 1435 (S.C.), Foll.]: 1994 Cr.L.J. 1134 (Cal.).

Where the accused convicted for murder of the deceased by use of firearms, were also tried for illegal possession of firearms under the Arms Act, 1959 but acquitted for want of sanction by the District Magistrate, *held*, the State was not estopped from prosecuting them for murder; the two offences are different despite there being common set of facts; neither the principle of *res judicata* nor of double jeopardy is attracted. [Case law discussed]: (1989-2) 37 B.L.J.R. 458 (D.B.).

Appeal against order under S. 446, of the Cr.P.Code—Dismissed—Matter remanded for show-cause notice to owner and surities against penalty—Point as to leniency not taken in the appeal—Point cannot be raised on principle of issue estoppel: 1981 Cr.L.J. (N.O.C.) 181 (Andh. Pra.).

Case of rioting—Both parties acquitted on the basis of complaint lodged by one party—Fresh trial based on the complaint of other party involving the same incident is barred by principle of issue estoppel: 48 Cut.L.T. 28: 1979 Cut.L.R. (Cr.) 152: I.L.R. (1979) 1 Cut 669: 1979 Cr.L.J. (N.O.C.) 213.

Where an earlier application under S. 337 of the Cr.P.Code, was rejected by the High Court on the ground of limitation, a subsequent application of the identical type purporting to be under S. 337(1), Cr.P.Code, is ruled out by the principles of issue estoppel: 1973 Cr.L.J. 968.

Where on the tenant's objection based on certain High Court decisions to the maintainability of a civil suit for his eviction, the landlord withdrew the suit and instituted eviction proceedings under the Rent Control Act during the pendency whereof the Supreme Court over-ruled the High Court view, *held*, the tenant's objection to the jurisdiction of the Rent Controller could not be brushed aside on the ground of *res judicata* or estoppel; they do not operate in matters of jurisdiction: (1971) 2 M.L.J. 22.

Small cause suit transferred to original side—Question of title being raised—Issue of title deleted but suit tried on original side without objection by plaintiff—Plaintiff not raising that objection in grounds of his appeal to High Court—He will not be allowed to do so at later stage: A.I.R. 1929 Mad. 525. *See* A.I.R. 1929 Pat. 717: 10 Pat.L.T. 669.

19. No estoppel when truth is known.—It is well settled that when the truth is known to a party, he cannot plead estoppel against his opponent: 1953 All.L.J. 355: A.I.R. 1953 All. 485, followed in A.I.R. 1957 Tripura 13; A.I.R. 1954 Cal. 179 [Party acting as principal to the knowledge of other party]; 28 Pat.L.T. 213: A.I.R. 1942 Pat. 317.

Where both the parties to a suit are all along fully aware of the true nature of the transaction of sale between them and their respective stand in regard to the land, the subject of sale, then in such a case the principle of estoppel by acquiescence does not apply: A.I.R. 1958 Pat. 133.

S. 115 does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement and there can be no estoppel where the truth of the matter is known to both the parties: (1972) 1 M.L.J. 141: (1972) 85 Mad.L.W. 857; (1986) 99 Mad.L.W. 916 (D.B.), affirming (1981) 94 Mad.L.W. 66.

In order to operate as an estoppel, it ought to be established that the person had by his declaration, act or mission intentionally caused or permitted another to believe a thing to be true. Further, it is also necessary for the plaintiff to show that he was not aware of the true state of things, for if he had means of knowledge of the real state of affairs there could be no estoppel: I.L.R. (1955) Hyd. 256: A.I.R. 1955 Hyd. 61; (1959-60) 64 Cal.W.N. 60.

Under S. 115, the knowledge of the person who acts on the representation of the real truth has a bearing on the question of estoppel. If he knew the truth, he cannot be said to have been led "to believe a thing to be true" within the meaning of S. 115 and, therefore, the doctrine of estoppel as embodied in this section is not available to such a person. The same is the English law: A.I.R. 1956 All. 225: 1956 All.L.J. 1 (F.B.).

There can be no estoppel when both parties are equally conversant with true facts: I.L.R. 23 Bom. 182; I.L.R. 35 Bom. 182 (188); I.L.R. 48 Bom. 38; I.L.R. 2 Pat. 585; A.I.R. 1942 Pat. 317; I.L.R. 27 Cal. 107 (P.C.); 46 P.R. 1912; 13 M.I.A. 585; 47 M.L.J. 622; I.L.R. 2 Lah. 88: A.I.R. 1921 Lah. 47; 122 I.C. 871; 14 Pat.L.T. 189: A.I.R. 1933 Pat. 210 (2); 15 Pat.L.T. 596; 191 I.C. 830; 11 O.W.N. 1097: A.I.R. 1934 Oudh 460; A.I.R. 1940 Lah. 254; A.I.R. 1960 Pat. 30; (1972) 85 Mad.L.W. 857: (1972) 1 M.L.J. 141 (D.B); or presumed in law to be conversant with true facts: A.I.R. 1926 Oudh 330; 146 I.C. 873: A.I.R. 1933 All. 641; 147 I.C. 715: A.I.R. 1934 All. 75.

Any act done under misapprehension of legal right does not create estoppel, nor does the knowledge of the parties about their correct positions: 37 Comp. Cas. 773: (1968) 1 Comp. L.J. 31: A.I.R. 1967 All. 405.

Where the truth of the matter is known to both parties, there can be no estoppel, and the principles of S. 115 do not apply to such a case: A.I.R. 1960 Pat. 30.

The section does not apply to a case where the statement relied upon, is made to a person, who knows the real facts, and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both the parties. Therefore, there can be no estoppel where the truth of the matter appears, on the face of the proceedings. A certain plot of .79 acres in area was included in the property mortgaged to the plaintiff. In a suit on the mortgage, the plaintiff obtained a decree and in execution proceedings the plot was sold and purchased by the plaintiff. By mistake, in execution petition, sale proclamation, sale certificate and the writ of delivery of possession the area of the said plot was mentioned as .39 acres only, instead of .79 acres although in all these four documents, the boundaries mentioned were the boundaries of the entire plot and not portion of it only. The plaintiff, thereafter on the strength of the delivery of possession, got himself recorded in the landlord's sherista in respect of .39 acres only. When the above mistake was discovered, the plaintiff brought a suit to correct the area of plot from .39 acres to .79 acres on the ground that the area was wrongly written by the scribe. It was contended that the plaintiff accepted and acquiesced in the position and as such he was estopped by the principle of acquiescence from claiming a greater area. *Held*, that the plaintiff acquired title to the entire area of plot by his purchase at the auction sale. For some mistake or other he got delivery of possession of .39 acres only, and got himself mutated in the landlord's sherista in respect of .39 acres only, but the plaintiff made no representation to the judgment-debtors which led them to act in a particular way on the face of those representations. The judgment-debtors knew very well—that the boundary related to the plot in its entirety and there was an obvious mistake in the description of area of the plot. It was not, therefore, a question of estoppel, but of fact and the defendants were not deceived as to any fact or prevented by any mis-statement of the plaintiff, from asserting any rights they may have conceived themselves to possess. These facts did not at all attract the doctrine of estoppel or acquiescence: 1956 B.L.J.R. 745: A.I.R. 1957 Pat. 174.

If both sides have laboured under a mistake however *bona fide* or genuine it may be, the plea of estoppel may not be available. Where, however, the mistake was within the knowledge of only one of the parties and the other on the basis of the representation acted and shifted his position to his prejudice, estoppel is certainly available. Thus, where the University Authorities represented to the petitioner as also to the Principal of the College that petitioner had secured pass marks in the written papers of chemistry, *held*, the

University could not be permitted to plead by disclosing facts within its special knowledge that the mark-sheet was erroneous and petitioner as a fact had secured only 44 marks and not 56 as disclosed contemporaneously by the University. [A.I.R. 1971 Ori. 276; (1892) 19 Ind. App. 203 (P.C.); A.I.R. 1965 S.C. 1812; A.I.R. 1973 All. 442, Rel. on]: A.I.R. 1978 Ori. 65: (1977) 2 Cut.W.R. 658: I.L.R. (1978) Cut. 78 (D.B.).

Where a regulation of the University provided "if a candidate for the Bachelor's Degree fails in such examination obtaining pass marks in any subject or group of subjects for which separate pass marks are required and passes in the aggregate, he shall be exempted from appearing again in that subject or group of subjects for the next two occasions" and the petitioner claiming the exemption appeared compartmentally in third examination and passed it also but his result was withheld by University as it was in contravention of said regulation, *held*, the bar contained in the said regulation was statutory; in the absence of a positive representation that the University would waive the bar contained therein for the petitioner, there was no basis for the plea of estoppel. Furthermore, estoppel could not be pleaded by the petitioner to perpetuate his own fraud and to flout the Statute. [(1860) 3 H.L.C. 820; (1875) 10 C.P. 307; A.I.R. 1965 S.C. 1812; A.I.R. 1973 S.C. 814, Rel. on; A.I.R. 1976 S.C. 376; A.I.R. 1971 Ori. 276; A.I.R. 1977 N.O.C. 62 (Ori.); A.I.R. 1978 Ori. 65; A.I.R. 1973 Ori. 186; A.I.R. 1951 Mad. 403, Dist.]: A.I.R. 1978 Ori. 68: (1978) 45 Cut.L.T. 24: I.L.R. (1977) 2 Cut. 487 (D.B.).

Where on the marks secured, the petitioner could not be declared passed but as against the column meant for being notified as pass or fail on account of clerical mistake, the mark-sheet mentioned that he had passed the examination and on basis of said mark-sheet he got himself admitted in Intermediate Course and on losing original mark-sheet when the petitioner applied for duplicate mark-sheet it showed that the petitioner had failed in the High School Examination and the petitioner pleaded estoppel on the ground that the Board of High School and Inter-mediate Education having declared that the petitioner had passed the High School Examination, could not be permitted to resile from the representation made to the petitioner, *held*, the petitioner could not be declared successful in the examination even if he was allotted grace marks, the declaration, thus, made in the first mark-sheet, issued to the petitioner, was obviously wrong and the petitioner knew that he had not passed. Therefore, he could not plead estoppel. [A.I.R. 1976 S.C. 376; A.I.R. 1978 P.&H. 109, Disting.]: A.I.R. 1980 All. 32 (D.B.).

Estoppel presupposes equity in the representee. The further requirement is that he who raises an equitable estoppel must do equity himself. Further, he who wants to rely on the principle of estoppel on the basis that he acted upon the representation of the other side must come to the Court of law with clean hands. Thus, where though the petitioners were declared as failed in Part I examination but they appeared in Part II examination on the strength of fresh mark-sheets purportedly issued on revaluation which were obtained by them from Principal of their College on the basis of a forged letter of the University and to which the petitioners were a party and subsequently when the fraud was detected by the University, the petitioners were not allowed to appear in subsequent examination and the petitioners pleaded estoppel, *held*, the University had not issued the new mark-sheets declaring the petitioners as having passed in the Part I examination. Thus, there was no representation on behalf of the University or any assurance given on which promissory estoppel could be founded. Further, as the petitioners themselves were responsible for the fraud played upon the University, they were not entitled to any right having accrued to them on the basis of mark-sheets issued subsequently. [A.I.R. 1979 S.C. 1725, Rel. on]: A.I.R. 1981 All. 377.

Where a candidate, whose result was withheld for use of unfair means, obtained admission in the Law College on the basis of a provisional certificate granted to him after enquiry by the Disciplinary Committee announcing his result by having passed the examination, but thereafter the University cancelled his result by a notification on detecting its mistake, *held*, the mistake was not mutual; the University, a statutory body, functioning under a set of rules to which the presumption of correctness attaches, can resile from its own action if it establishes that its action had resulted from a mistake; merely calling it

an unfortunate mistake is of no avail; the candidate got admission and paid fees for the Law Degree and did not study for re-appearing in the Degree Examination on the assurance embodied in his result and the provisional certificate; he had undoubtedly changed his position to his detriment; the University was estopped from cancelling his result: A.I.R. 1976 Ori. 134 (D.B.).

Where the University supplied the petitioner's mark-sheet to the College which in its turn supplied it to the petitioner in which he was by mistake shown to have passed in the B.A. Examination on the basis of which the College also gave him College leaving certificate showing him passed and on the basis of said documents he got himself appointed as a Teacher in a School and continued so for five years and also pursued two more years in B.Ed Course, whereafter he was informed that he had in fact failed in the B.A. Examination, *held*, as the petitioner had no likelihood of coming to know the actual position, the rule of estoppel would apply and the University was estopped from taking the plea that the petitioner had, in fact, failed: A.I.R. 1990 Ori. 10: (1989) 67 Cut.L.T. 199 (D.B.).

The question whether the principle of estoppel applies to a particular case depends on the facts of that case. It may be that on similar facts in two cases, in one, in the absence of any material to show that the petitioner claiming the benefit of estoppel had knowledge or means of knowledge to know the real state of affairs, the principle will apply, whereas in the other case, where materials to this effect are present, the doctrine of estoppel will not apply. Thus, where the petitioner securing less than minimum passing marks in practical examination was declared as successful by mistake by the University in contravention of Regulations of the University, but the University Authorities cancelled his result subsequently and the petitioner pleaded, estoppel, *held*, the declaration that the petitioner passed in the examination was clearly erroneous as it was in contravention of Regulations of University. Further, the petitioner could not have been misled by the representation of the University Authorities since the mark-sheet sent to the College admittedly showed that he failed to secure minimum marks in particular examination. Therefore, the petitioner could not invoke doctrine of promissory estoppel against the University. [A.I.R. 1982 S.C. 121; A.I.R. 1978 Ori. 68; A.I.R. 1980 All. 32, Rel. on; A.I.R. 1985 Ori. 37, Disting.]: A.I.R. 1987 Ori. 38 (D.B.).

Where the petitioner had ample opportunity of knowing the real position from the mark-sheet issued to him, *i.e.*, he had failed to secure qualifying marks in theory papers to secure honours, even though the mark-sheet and the provisional certificate erroneously stated that he had passed B.A. Examination with second class honours in statistics, *held*, the University was not estopped from revising the petitioner's result subsequently since it could not be said that the petitioner was misled by the erroneous statement in the mark-sheet and the provisional certificate that he had passed B.A. Examination, moreover it is well settled that there can be no estoppel against law which in the present case is the University Regulations: A.I.R. 1992 Ori. 83 (D.B.).

Father purchasing and recording property in son's name, is not estopped from pleading that it is not the son's, if the party pleading estoppel knew or would on inquiries, have known that it was acquired with the father's money: I.L.R. (1936) Nag. 65: A.I.R. 1936 Nag. 185.

A sold certain item of property to *B* and later on executed a mortgage of property which included that item also. *A* then sold the mortgaged property to *C*. In a suit for redemption *C* raised plea of estoppel by mistake on the part of *B* in allowing the item to be included in the mortgage. *C*, however, had admitted that he knew that *B* was in possession of the property but that he thought that *B* was in possession as a possessory mortgage. He made no further enquiries and did not have a search made in the office of the Sub-Registrar to ascertain if there was any other encumbrance regarding that item, or any other transaction evidenced by a registered document. *Held*, that *C*'s omission in not having made such enquiries must be held to be wilful, or as grossly negligent, and in that view, could not claim any right to redeem the item: (1958) 1 M.L.J. 188.

Where colonisation licence was granted to the petitioner society after it fulfilled certain conditions but after two years, said licence was cancelled on the ground that the petitioner had suppressed the fact that the

exemption was granted under the Urban Ceiling Act of the disputed land as an agricultural land but it was evident that the Collector was aware while granting the licence that exemption from the Urban Ceiling Act was granted for the disputed land as agricultural land and not for colonisation, *held*, as the Collector knowing full facts had given the colonisation licence and permitted establishment of the colony, it was not open to him to say after two years that there was suppression of material facts by the petitioner. The society having got the licence and permission having been granted for establishment of a colony and having incurred huge expenses, the principle of promissory estoppel would apply and the Collector was estopped from issuing the show cause notice for cancellation of the coloniser's licence and suspending the same pending enquiry: A.I.R. 1987 Madh. Pra. 271: 1987 M.P.L.J. 456: 1987 Jab.L.J. 638 (D.B.).

Where a landlord let out his premises, built on a lease hold plot allotted to him for raising a residential building by the Improvement Trust, to a tenant for commercial purposes, both of them knowing it to be not a permitted use, *held*, the landlord is not estopped from seeking the tenant's eviction under S. 14(1)(*k*) of the Delhi Rent Control Act, 1958. [1972 Ren.C.R. 362, Reversed]: A.I.R. 1973 S.C. 921: (1973) 1 S.C.C. 572.

Failure to mention encumbrances in sale proclamation—Effect—Auction purchaser had full knowledge of mortgage bond—He cannot invoke principles of estoppel: (1979) 2 Cal.L.J. 504.

Where a person purports to sell his property to another but without intending that his title in the property should pass to the other which continues to vest in the transferor, *held*, S. 115 is not attracted; the transferee knows that the representation embodied in the transaction of transfer is not true and there is no question of his acting upon it; it is well settled where truth is known to both parties, there can be no estoppel: A.I.R. 1984 Pat. 80: 1984·B.B.C.J. (H.C.) 66.

During management of Talukdar's estate under Tripura Indebted Landlords Estates Administration Act (1 of 1332, T.E.)—*A* obtaining settlement and investing money knowing all facts and without being induced by Talukdar to invest money—After satisfaction of debts estate revesting in Talukdar—He is not estopped from denying *A*'s ryoti rights.

When the truth is known to a party, he cannot plead estoppel against his opponent: A.I.R. 1957 Tripura 13.

Estoppel by conduct—Person concerned knowing true position relating to title in property in his possession—He cannot plead that he was induced to hold erroneous belief by reason of conduct of real owner of that property: (1965) 2 S.C.W.R. 644: A.I.R. 1965 S.C. 1812.

Permission to fell trees granted by Government to petitioner upon petitioner's affidavit that he was the owner of the plots—Petitioner felling trees—Petitioner found not to be owner—Government is not estopped from demanding price of felled trees—Even if the Government is held to have made a representation of fact there would be no estoppel as the petitioner was also saying that he was the owner of the aforesaid plots—There is no estoppel when both parties are equally acquainted with the facts: A.I.R. 1964 Him. Pra. 19.

20. No estoppel when both parties are labouring under a mistake.—No question of estoppel can ever arise where both the parties are labouring under a mistake of law and one party is not more to blame than the other. Estoppel arises only when the plaintiff by his act or conduct makes a representation to the defendant of a certain state of facts which is acted upon by the defendant to his detriment; it is only then that the plaintiff is estopped from setting up a different state of facts. Even if this position can be availed of where the representation is in regard to a position in law, no such occasion arises when the mistake of law is common to both the parties. The other circumstances would be such as would entitle a Court of equity to refuse the relief claimed by the plaintiff because on the facts and circumstances of the case it would be inequitable for the Court to award the relief to the plaintiff. These are, however, equitable considerations and could scarcely be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claimed by him: (1959) 1 M.L.J. 35: A.I.R. 1959 S.C. 35.

Both parties acting under common misapprehension—Until position was cleared up there could be no estoppel against a party:

A.I.R. 1963 Cal. 198. Where the petitioners who were working as work Assistants, though called Technical Assistants as per re-designation in 1971, were fitted in pay scale to which they were eligible but on 23-12-1981 under a misapprehension of law they were fitted in the pay scale of Technical Assistants with retrospective effect and when the mistake was discovered, the Authorities ordered recovery of the excess amount and the petitioners pleaded estoppel, *held*, both the Authority and the petitioners suffered under a misapprehension and misconception of the correct legal position. What the petitioners were not eligible in law, they got it under a mutual mistake and misapprehension. Thus, no question of estoppel arose: (1984) 97 Mad.L.W. (S.N.) 144.

There can be no estoppel where a man misconceived the legal effect of an order which was of no legal force: 27 M.L.J. 465.

No estoppel arises where a statement is due to a mistake, *e.g.*, a policy began by stating that *A* had paid the company a certain sum by way of premium. *Held*, that the existence of these words in the policy does not prevent the company from asserting that the premium was not in fact paid: A.I.R. 1934 Rang. 343. *See* also 1938 All.W.R. 16: 1938 R.D. 4.

21. No estoppel against statute.—A.I.R. 1937 P.C. 114; (1935-36) 40 Cal.W.N. 341; 146 I.C. 482: A.I.R. 1933 Oudh 542 (F.B.); 15 Pat.L.T. 661: A.I.R. 1934 Pat. 666 (F.B.); 52 I.A. 126: I.L.R. 52 Cal. 408: 49 M.L.J. 136 (P.C.); I.L.R. 49 Cal. 507; I.L.R. 19 Mad. 200; I.L.R. 44 Mad. 187: A.I.R. 1921 Mad. 382; I.L.R. 2 Rang. 459; I.L.R. 38 Mad. 519; I.L.R. 38 Bom. 709; (1917-18) 22 Cal.W.N. 894; I.L.R. 36 Cal. 920; A.I.R. 1930 Nag. 191; A.I.R. 1929 Mad. 622; I.L.R. 56 Cal. 252: A.I.R. 1929 Cal. 453; I.L.R. 53 Bom. 676: A.I.R. 1930 Bom. 135; 58 I.A. 58: I.L.R. 10 Pat. 481: 60 M.L.J. 441 (P.C.); I.L.R. 58 Cal. 1453: A.I.R. 1931 Cal. 791; A.I.R. 1946 Lah. 73; 5 D.L.R. (Cal.) 13; A.I.R. 1947 Cal. 273; I.L.R. 12 Lah. 367; 27 All.L.J. 889: A.I.R. 1924 All. 549; I.L.R. 21 Bom. 300; 7 S.L.R. 58. But *see* I.L.R. 15 Pat. 589: A.I.R. 1936 Pat. 417 (S.B.); A.I.R. 1937 P.C. 114; A.I.R. 1938 Oudh 110;I.L.R. (1954) 4 Raj. 920: A.I.R. 1955 Raj. 129; I.L.R. (1953) Madh. Bh. 265; A.I.R. 1954 Madh. Bh. 89; A.I.R. 1957 Cal. 98; A.I.R. 1957 Pat. 633: 1958 Cr.L.J. 169 (2) (Cal.); A.I.R. 1958 Guj. 280; A.I.R. 1959 All. 192: A.I.R. 1960 Raj. 152; A.I.R. 1963 Cal. 198; (1968) 70 Bom.L.R. 445; 60 I.T.R. 117 (Andh. Pra.);1976 B.B.C.J. 649: 1977 Pat.L.J.R. 371; 1980 Jab.L.J 465; 1981 Punj.L.J. 298; (1982) 1 An.W.R. 289: 1982 Lab. I.C. 979.

Doctrine of estoppel is not attracted in case of violation of statutory provisions: 1995 Cr.L.J. 1685 (Bom.) (D.B.).

There can be no estoppel against law—No amount of admission contrary to law could create such estoppel: (1968)-69) 73 Cal.W.N. 928: A.I.R. 1969 Cal. 565; A.I.R. 1960 Madh. Pra. 217: 1960 M.P.L.J. 180.

The plea of waiver or acquiescence cannot stand before the mandate of the statute: A.I.R. 1982 P.&H. 402: 1982 Punj.L.J. 415.

Ignorance of law, plea of: 1963 Ker.L.T. 1022.

Every body is supposed to know the law or at least to have as much opportunity of knowing the law as another so that a wrong belief on a point of law cannot strictly be said to be caused by a misrepresentation on the part of another: 1938 O.W.N. 355: A.I.R. 1938 Oudh 110. *See* also 1943 R.D. 359; A.I.R. 1943 Mad. 22: (1942) 2 M.L.J. 97.

It is well settled that there is no estoppel against law or Governments and Municipal Corporations (and other bodies akin thereto) exercising their Governmental powers or discharging duties to the public; if the rule of estoppel is allowed to control their future conduct a violation of law once made would become the law *qua* the promises; that would be highly prejudicial to the public interest: 1982 Lab.I.C. 401 (Karn.).

S. 115 of the Evidence Act which embodies the doctrine of estoppel cannot override S. 17 of the Registration Act. There can be no estoppel against statutes. This plea which is only a rule of evidence is unavailable as against statutory requirements: 1956 An. W.R. 547. A promise not to eject against the express provisions of law cannot operate as an estoppel: 1940 R.D. 239: 1940 All.W.R. (B.R.) 144.

Two main pillars of the rule of estoppel, either under the Evidence Act or under the general law, are (*1*) the representation must be a representation of fact and (2) the other must have a belief in the truth of it and act on the representation. Where on his own showing a person had parted with his interests and was not a proprietor during the relevant period nor was there any evidence that he had belief in the truth of the representation, it must be held that he was not misled into thinking that the State still regarded him as a

proprietor. Further, when he was fully aware of the real state of affairs he cannot plead estoppel. Secondly, according to the plaintiff, notwithstanding the fact that the State had acquired indefeasible title to his estates and tenures, the State represented that he was still a proprietor. What the State is alleged to have represented was a representation of law as to the effect of the notification issued under S. 3 or S. 3-A of the Act and not of fact. It is an estoppel against the statute itself. Accordingly, the plaintiff could not set up an estoppel to prevent its operation. There is no estoppel against a statute and accordingly the State is not estopped from denying the plaintiff's title: 1961 Pat.L.R. 89: (1961) 11 B.L.J.R. 446.

An *ultra vires* statute cannot be validated by acquiescence but an acquiescing party may be estopped from questioning it: A.I.R. 1939 Nag. 44: 1939 Nag.L.J. 439: I.L.R. (1939) Nag. 143.

In a dispute between a citizen and a public authority, elements of public interest intervene. A public authority is not just some other party; it is the custodian of public interests or public good also. It is often said that estoppel cannot operate against a statute, all that it means is that where a law imposes a duty, a plea of estoppel cannot prevent the performance of that duty. It is trite law that statutory obligations prevail over contractual or similar obligations. The concept of public law estoppel is a developing one, and its contours are still ill-defined. Broadly stated, it may be applied in cases where the public authority is acting purely in exercise of executive or administrative discretion. Where the discretion is granted by a statute, or even by subordinate legislation, other considerations will arise. Even in the matter of executive discretion pure and simple, similar considerations may not be altogether alien. It will certainly be no easy task for any Court to decide whether the power exercised in a given case involves a duty to act for the public good, because public good itself is an elusive concept. To strike a balance between public benefit and fairness to the individual, will be still more difficult. [(1977) 2 All E.R. 182; 1983 Ker.L.T. 1083, Rel. on]: 1984 Ker. L:T. 793.

There can be no estoppel against a statute but if a statute confers any benefit on a party, it is open to a party to give up that benefit unless the giving up of that benefit is contrary to public policy: A.I.R. 1972 P.&H. 333: 1971 Punj.L.J. 746: 1972 All.L.R. 72 (D.B.).

The principle that there cannot be an estoppel against the statute does not apply where a particular provision of law is for the benefit of the State and it is clear from its conduct that it has chosen not to insist on performance of such provision: 1972 All.W.R. 265.

Where a statute imposes a duty by a positive action, estoppel cannot prevent it. Estoppel is only a rule of evidence which can be invoked under special circumstances but is not available to release a party from the obligation to obey the statute. The duty of each party is to obey law. Where the suit was based upon a supplementary agreement which modified the original agreement to pay enhanced rate for electricity consumed, the plaintiff cannot base his claim upon estoppel, when the suit is found barred by limitation: 1964 Jab.L.J. 57:1964 M.P.L.J. 579: A.I.R. 1964 Madh. Pra. 101.

S. 3 of the Limitation Act, 1963 enjoins upon the Court a duty to dismiss time-barred proceedings even if no plea of limitation is set up in defence; a defendant not raising such defence is not estopped from pleading limitation; there is no estoppel against statute: A.I.R. 1977 N.O.C. 120-B: 1976 B.B.C.J. 649: 1977 Pat.L.J.R. 371 (D.B.).

No person can be precluded from pleading that certain orders are illegal or invalid, because the question as to whether orders are illegal or invalid is a pure question of law, and there can be no estoppel against law: (1951) 53 Bom.L.R. 229: A.I.R. 1951 Bom. 72.

It is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has on grounds of general public policy, enacted shall be invalid. [A.I.R. 1937 P.C. 114, Foll.]: 1957 B.L.J.R. 319: A.I.R. 1957 Pat. 456.

Where in the previous suit the plaintiff admitted that the suit was bad for partial partition and therefore he withdrew the same but in the subsequent suit he contended that said suit was not bad for partial partition and the defendant pleaded estoppel, *held*, whether a particular suit is bad for partial partition or not is a question of law and there cannot be any question of estoppel

against law. So the plaintiff was not estopped from asserting that the suit was not bad for partial partition: A.I.R. 1971 P.&H. 241.

There could be no estoppel against a statute. It is settled law that the doctrine of estoppel could not be applied against an act of Legislature. The principle of estoppel could not be invoked to evade the plain provisions of a statute; nor could the Court enforce an alleged right based on the doctrine of estoppel opposed to the provisions of a statute. Moreover, estoppel under S. 115 of the Indian Evidence Act, which merely is a rule of evidence based on equitable principles, would come into play only when it has been shown that by the declaration or representation of one person the other was induced to act to his prejudice. The principle on which the law of estoppel rests is that it would be most inequitable and unjust to allow a person to repudiate the fact of his former admission to cause loss and injury to the person who acted on it. It is for the plaintiff to establish that there had been a change in her position and she had suffered or would suffer damage or injury if a plea of estoppel is not unheld. [I.L.R. 34 All. 398; A.I.R. 1927 Mad. 777; (1963) 76 Mad.L.W. 952, Disting.]: 1983 Ker.L.T. 160.

The Government policy statement of procuring 70 percent of the sugar produced by sugar factories and leaving the balance 30 per cent for free market sale is only a declaration of its intention; it cannot be enforceable in a Court; it is enforced by the instrumentality of the Essential Commodities Act, 1955; no person can found a right on any statement of policy; there can be no estoppel against any such statement made in exercise of sovereign or executive functions of the State: A.I.R. 1979 Mad. 207 (D.B.).

Where a private company and the State Government entered into an agreement whereby the Company set up a rayon weaving mill and the Government bound itself to supply the raw materials and later on in consideration of the Company having purchased, with permission, 30,000 acres of private forest for growing bamboos with *pro tanto* reduction of the Government's liability for supply of raw materials, the Government undertook to keep the forests purchased by the Company immune subject to conditions from acquisition for 60 years under the then proposed legislation for acquisition of private forests (the Court could not but raise its eye brows on what it termed to be a surrender of legislative power), *held*, that the latter agreement could not be of any avail to the Company; it does not create any estoppel against acquisition of the forests under statute; the plea of estoppel must fail: A.I.R. 1973 Ker. 36: 1972 Ker.L.T. 628: 1972 Ker.L.J. 628 (F.B.).

Where the licence of a wholesale dealer of grains and sugar was suspended and sought to be revoked by the Special Officer Incharge Rationing under S. 7 of the Essential Commodities Act, 1955 and the dealer impugned his competence on the ground that he was not the licensing authority under law in respect of wholesale trade when, as discovered later on, the dealer's wholesale licence had been granted by that very Officer, *held*, the dealer was not estopped from challenging that Officer's jurisdiction; there can be no estoppel against statute: (1992-1) 40 B.L.J.R. 225 (F.B.).

It is well settled that there is no estoppel against a statute. Where the petitioner, a licensed dealer of food grains purchased the stock of wheat at a higher rate than the scheduled price on the express understanding that it would be utilised for preparing wheat products but subsequently the State Government issued U.P. Wheat (Levy) Order, 1974 which required every licensed dealer to part with 50 percent of stock in his possession in favour of the Food Corporation of India, *held*, the Government might have induced the petitioner to purchase wheat in the open market for utilisation in the preparation of wheat products but when subsequently law enacted that every licensed dealer in food grains had to part with 50 per cent of the stock of wheat in favour of the Government, the dealer concerned could not plead estoppel. [A.I.R. 1968 S.C. 718, Disting.]: A.I.R. 1976 All. 397: 1976 All.W.C. 232.

Where a Government memo fixing the price payable to the millers for the subsequent year's crop sales is in violation of statutory requirements of S. 3(3-B) of the Essential Commodities Act, 1955, *held*, the Government cannot be bound by it; there can be no estoppel against the Government and its agencies; if the Courts were to compel the Government to abide by the memo, they would in effect be granting legal sanctity to

what is a patently illegal and *ultra vires* act of the executive Government: (1981) 2 An.W.R. 228 (D.B.).

Admission of a party does not affect construction of statute: A.I.R. 1955 S.C. 62.

Where the plaintiff filed a suit for partition and on the allegation that during the pendency of the suit the disputed land came within the consolidation area, he filed an application for abatement of the suit under S. 4(4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 and though publication of a notification in Official Gazette bringing the disputed land within consolidation area was a must, no such notification was issued, *held*, non-traverse by the plaintiff would not lead to the irresistible conclusion that there was no notification and even the admission by the plaintiff would not act as an estoppel if in fact there was no notification as required under law: A.I.R. 1987 Ori. 122: (1987) 63 Cut.L.T. 31.

The doctrine of estoppel cannot be invoked to render valid a transaction which the Legislature has on grounds of general public policy, enacted shall be invalid, or to give the Court a jurisdiction which is denied to it by statute, or to oust the statutory jurisdiction of the Court under an enactment which precludes the parties contracting out of its provisions. Where a statute, enacted for the benefit of a section of public, imposes a duty of a positive kind, the person charged with the performance of such duty cannot, by estoppel, be prevented from exercising his statutory powers: (1971) 1 Cut.W.R. 297.

No question of estoppel can arise against the express provision of Statutory Rules. In case of a statute enacted for the benefit of a section of the public, where the statute imposes a duty of a positive kind not avoidable by the performance of any formality, it is not open to the opposite party to set-up an estoppel to prevent it. An estoppel is only a rule of evidence which, under certain special circumstances, can be invoked by a party to an action; but, it cannot be availed of to release a party from an obligation or to escape from a statutory obligation. The duty of each party is to obey the law: (1975) 25 B.L.J.R. 30.

Where Government is given powers to frame rules, they are generally framed by some officers of the Government and if they go beyond the authority conferred upon the Government for the purposes of framing rules, those rules cannot bind the Government. In such cases there can be no estoppel, because the rules framed are against the statutory powers conferred upon the rule making body and there can never be estoppel against statute: A.I.R. 1977 Pat. 32: 1977 Pat.L.J.R. 97 (D.B.).

Merely because in an earlier writ petition by another employee, the Court had wrongly assumed that G.O. Ms. No. 2155, dated 16-10-1964, was a statutory rule, *held*, the State is not precluded from contending in another writ petition that it was not a statutory force and could not attract the proviso to Art. 309 of the Constitution of India; the State's failure to appeal against the decision in the earlier writ petition cannot have the effect of providing to an administrative rule a constitutional source of power which it plainly did not possess: (1985) 2 M.L.J. 70: A.I.R. 1986 Mad. 188: (1985) 98 Mad.L.W. 17 (F.B.).

Where a deed of agreement executed by the Secretary, Urban Improvement Trust permitted allottee to improve disputed land and after dividing it into plots, to sell the plots in market and as the State Government refused to honour said commitment the allottee pleaded estoppel, *held*, what the Secretary, Urban Improvement, Jaipur did by signing the deed of agreement was something which he was prohibited by law from doing as only the Chairman of the Trust had the power to sign the deed. Therefore, the Government could not be compelled by invoking the doctrine of promissory estoppel to do something which the law prohibited it from doing. [A.I.R. 1980 S.C. 1285, Foll.; A.I.R. 1979 S.C. 621, Disting.]: A.I.R. 1983 N.O.C. 157 (Raj.).

Where the rights granted under a *sanad* were liable to revocation on breach of its terms but were taken away under regulations framed by the Governor, *held*, there could be no estoppel against legislation; it is only if the regulations are beyond the Governor's legislative competence that the cancellation of the *sanad* could be challenged: A.I.R. 1973 Andh. Pra. 236: (1973) 2 An.W.R. 266: (1972) 2 A.P.L.J. 281 (D.B.).

It is quite true that there can be no estoppel against a statute but this well-recognised rule does not imply that there can be no estoppel even against plea of a fact which has to be established before the application of the

statute can be invoked. A man may not estop himself by any conduct of his from pleading that an alienation made by him is in contravention of a provision of the Punjab Alienation of Land Act. He may, however, estop himself by such conduct from pleading that he is a member of a tribe to which protection is afforded by the Act: (1945) 47 Punj.L.R. 385: A.I.R. 1946 Lah. 73.

Where Para 21 of the Schedule IV of Part III of the Land Acquisition Manual, provided for interest at the rate of 6 percent per annum in cases of acquisition of land for the purposes of Central Government though for the land acquired for purposes of State Government this rate was 4 percent but subsequently, the Land Acquisition (Madras Amendment) Act, 1953 reduced the said rate of 6 percent to 4 percent, *held*, in view of subsequent amendment the Government cannot be estopped from pleading that only 4 percent interest will have to be awarded: A.I.R. 1981 Andh. Pra. 232.

Where though the members of the Deshi Tripura (Laskar) community were treated as to have been included within the Tripura tribe and, thus, Scheduled tribes certificates were issued and other benefits were conferred on them, but that would not estop the Government of Tripura from taking the correct constitutional stand if the Laskar community did not belong to Scheduled Tribes, inasmuch as there could be no estoppel against a statute much less against constitutional provisions. [A.I.R. 1981 S.C. 1829, Rel. on]: A.I.R. 1987 Gau. 24: (1985) 2 Gau.L.R. 117 (D.B.).

Waiver of constitutional rights—No presumption from silent record: A.I.R. 1970 U.S.S.C. 10.

Where certain payments by way of bazaar dues are made by the defendants in ignorance of their legal position, they are not estopped from questioning the right to recover such dues. Further, there can be no estoppel against a statutory provision: 1940 O.W.N. 782: A.I.R. 1940 Oudh 409.

Payment of pay and allowances of notice period not made simultaneously with the order of retirement but paid subsequently—It does not affect the right of the petitioners as there can be no estoppel against a statute: (1983) 1 Serv.L.J. 45.

In the absence of a provision for appeal against the stoppage of increments with cumulative effect, the aggrieved employee cannot contend that since an enquiry was held against him under the Punjab Civil Services (Punishment and Appeal) Rules, 1970, he is entitled to impugn the punishment by way of appeal under those Rules; the employer is entitled to challenge the competency or maintainability of the appeal despite having held the enquiry; there is no estoppel against statute, statutory rules or bye-laws: (1983) 2 Serv.L.J. 355.

No Government can bind a law-making authority by its representation. It is a basic principle of constitutional law that no contract or grant can curtail the legislative power granted by the Constitution. Hence, even assuming that there had been some representation on the part of the State Government, both the State Government and the officials concerned are bound by the impugned amendment reducing the age of retirement which is the result of a legislative action. [A.I.R. 1943 F.C. 29 and A.I.R. 1946 P.C. 127 and A.I.R. 1955 S.C. 540, Rel. on].

Further, as a general rule, the doctrine of estoppel will not be applied against the State in its Governmental, public or sovereign capacity. But an exception arises where it is necessary to prevent fraud or manifest injustice. [1973 Lab.I.C. 1593 (S.C.), Rel. on]: 1975 Lab.I.C. 799: (1974) 2 Karn.L.J. 275: I.L.R. (1974) Karn. 852.

Where in a writ petition impugning his premature compulsory retirement, an employee of the High Court had impleaded, amongst others, the Chief Justice as well as the High Court through its Registrar after serving the Chief Justice and the Government Pleader under R. 5 of the A.P. High Court (Original Side) Rules and at its preliminary hearing the Government Pleader contended on behalf of the respondents without instructions from the Chief Justice or the High Court that the petition was not maintainable in view of Art. 371-D of the Constitution of India, the employees' remedy being only to move the A.P. Administrative Tribunal which, when moved, gave a finding in favour of the employees and the Chief Justice impugned the Tribunal's jurisdiction in a writ petition, *held*, the point involved interpretation of Art. 371-D and there being no estoppel against statute, much less the Constitution, the earlier judgment *in limine* did not bind him; at any rate, the

Government Pleader had no instructions from the Chief Justice: A.I.R. 1979 S.C. 193: 1978 Lab.I.C. 1672.

Where Air Hostesses were under regulations permitted to marry after four years of service but they were made liable to be retired from service on getting pregnant which latter provision in Regn. 46(*i*)(*c*) of the Air India Employees Service Regulation was struck down as violative of Art. 14 of the Constitution, *held*, no party could be estopped to challenge an award or agreement based on the unconstitutional provision; there is no estoppel against statute, much less against a constitutional provision: A.I.R. 1981 S.C. 1829: (1981) 4 S.C.C. 335.

Where petitioners failed to remit the provident fund contributions deducted from the wages of the employees alongwith matching contributions but subsequent to the launching of prosecution, they entered into an arrangement with the Provident Fund Commissioner and pursuant to the arrangement, entire amount of contributions and other dues were remitted, *held*, payment could not have absolved them of their original guilt but it would have snapped the recurrence. [(1980) 56 F.J.R. 456 (Cal.), Dissent.; A.I.R. 1979 S.C. 1725, Foll.]: 1992 Cr.L.J. 303 (Mad.).

There cannot be any estoppel on a question of law or against a statute. Whether a particular payment is embraced within the term "wages" as denied by S. 2(22) of the Employees' State Insurance Act or not, is a matter of statutory interpretation. There may be cases, where it is not free from ambiguity, to infer the exact nature of the payment. In such cases the principle of *contemporanea exposito est optima et fortissima in lege* may be attracted. Therein the admissions and conduct of the parties will be relevant for determining such ambiguous matters. But where the matters are clear from the record and the question is as to whether or not a particular statutory provision is applicable to them, no amount of admission of any party can act as an estoppel, so as to preclude him from asking that in law he cannot be fastened with a liability unwarranted by law. [A.I.R. 1956 S.C. 593, Foll.]: 1976 Lab.I.C. 12 (Pat.) (D.B.).

There cannot be any estoppel against a statute, particularly when the non-compliance with the statute goes to root of the thing. Where the workmen have received the sums paid by the employer on acknowledgement of receipt in final settlement, they are not prevented from demanding any further payment or from urging that S. 25-F(*b*) of the Industrial Disputes Act has not been duly complied with. The rule of estoppel or waiver cannot be applied against retrenched workmen who have no freedom to refuse payment in view of their financial position caused by retrenchment: (1965) 2 Lab. L.J. 324: A.I.R. 1965 Cal. 166.

There can be no estoppel against statute; thus where voting through machines was permitted by the Election Commission there was no provision therefor either in the Conduct or Election Rules, 1961 nor in the Representation of the People Act, 1951, *held*, the State was not estopped from challenging the Election Commission's decision: A.I.R. 1984 S.C. 921: (1984) 2 S.C.C. 656: 1984 U.J. (S.C.) 558.

Recruitment of some Officers for training as Tahsildars under Tahsildar and B.D.O. (Recruitment) Rules—Completion of probation and appointment of Tahsildars in due course—Seniority of such Officers—Appointment being under special rules, rules as to probation and seniority held not applicable to them—Seniority list upheld—Estopped against statute: A.I.R. 1965 Mys. 47.

Even if assurance not to resume an estate had been given, it would certainly not have been binding on the Government because its powers of resumption are regulated by the statute, and must be exercised in accordance with its provisions.

The Act VI of 1952 confers no authority on the Government to grant exemption from resumption and an undertaking not to resume will be invalid, and there can be no estoppel against a statue: (1955) 2 S.C.R. 303: A.I.R. 1955 S.C. 504.

The principle of estoppel cannot be invoked by a party to an agreement which in law falls within the mischief of S. 6(*a*), T.P. Act: A.I.R. 1950 Pat. 488.

There can be no estoppel against a statute, nor can the principle of *res judicata* be invoked when there is a change of law: I.L.R. (1962) 1 Punj. 524: A.I.R. 1963 Punj. 225.

A compromise in contravention of provisions of law cannot operate as estoppel: 1936 R.D. 565. But where in a deed, the term which is in contravention of the statute is

separable, the deed is void in respect of that part only, and the rest being severable, estoppel may arise in respect of the parts which are good: 63 Cal.L.J. 52: A.I.R. 1936 Cal. 774.

If an agreement is found to be in contravention of a statute or against public policy a party cannot be held estopped from pleading or proving facts which would render the agreement void *ab initio*. The fact that a party may thereby be enabled to take advantage of his own wrong cannot be allowed to militate against the mischief which would otherwise follow. There can be no estoppel against pleading or relying upon a statute: A.I.R. 1943 Lah. 268 (F.B.); I.L.R. 22 Pat. 554; I.L.R. (1943) Kar. 227: A.I.R. 1943 Sind 177.

Company assessed to company's tax by Municipality—Letter by company's agent to Municipal Council assuming validity of the assessment—Suit questioning the legality of the assessment—Maintainable—No estoppel: A.I.R. 1929 Mad. 146 at 152: 108 I.C. 216.

Where a contract is not drawn up and executed in the manner provided by S. 47, Punjab Municipal Act, there can be no question of the Municipality being estopped by its admissions. There can be no estoppel against a statute. If the position of the occupier and the payment of rent by him do not give him the status of a tenant, the Municipal Committee in accepting rent does not estop itself from denying the status of occupier: A.I.R. 1956 Punj. 181.

When a mortgage is void under the law, there is no rule of estoppel which prevents the mortgagor from pleading and proving the fact of the mortgage being void: I.L.R. 10 Luck. 261: A.I.R. 1935 Oudh 121; I.L.R. 13 Luck. 178: A.I.R. 1937 Oudh 431; I.L.R. (1938) All. 714: A.I.R. 1938 All. 418 (F.B.).

(Different allegations as to nature of same mortgage—Simple or usufructuary). *See* also (1933-34) 38 Cal.W.N. 459: A.I.R. 1934 Cal. 537. (Co-operative Societies Act); A.I.R. 1929 Mad. 622 (the mandatory provisions of S. 36, Stamp Act); I.L.R. 12 Lah. 367: A.I.R. 1930 Lah. 1034 (Punjab Land Alienation Act).

Where a sale deed is void *ab initio* there would be no question of estoppel as against the transferor: I.L.R. (1953) Cut. 508: A.I.R. 1953 Ori. 333.

Son joining in sale deed by father in ignorance of legal rights whether estopped. *See* 25 All.L.J. 878: A.I.R. 1927 All. 838.

Estoppel is not available against provision of a statute. The mere recital of the factum of exchange in a power-of-attorney cannot in effect operate as an exchange when the requisites required for a valid exchange like registration of document is absent. In such a case, attestation with knowledge of contents of document and consenting to transaction, will not amount to estoppel. Such a document though it contained more specific and detailed recitals will not prevail over subsequent power-of-attorney with a general statement of authorisation: (1979) 1 Cal.L.J. 423.

The plaintiffs conveyed the suit lands to the defendants by a registered deed of sale and put them in possession. A few days before the expiry of the period of limitation, the plaintiffs brought the suit for possession of the lands after establishment of their title thereto. Their case was that the disputed lands formed part of their lakhiraj raiyati holding of 23 bighas and odd and that the sale contravened the provisions of S. 27 of the Santhal Parganas Settlement Regulation which forbade transfer of raiyati lands and was, therefore, void *ab initio* and conferred no title on the defendants. They contended that the defendants were mere trespassers and they were entitled to recover possession of the disputed land. *Held* (*i*) An estoppel can arise only when what was put forward is different from actuality. In the instant case, the plaintiffs stated what was a fact and what was evidenced by the record. They did not present either by word or deed that the lands constituted their tenure and were transferable. Under S. 115, a person shall not be allowed to say one thing at one time and the opposite of it at another time to the detriment of another. Putting the defendant's case at the highest, the expressions used in the sale deed were susceptible of two interpretations because "lakhiraj jote" was consistent with both tenure and raiyati holding. That being so, no estoppel was created against the plaintiffs. Further, the statements of the plaintiffs were not absolutely unqualified. They purported to be qualified by the record-of-rights. Hence, there was no estoppel against the plaintiffs. (*ii*) In normal circumstances a vendor is bound by his deed and is estopped from contending that the land which he has stated as transferable is in fact not transferable. This principle, however, does not apply to the present case, because the statute says

that the lands are inalienable. S. 27 of the Regulation prohibits altogether transfer by a raiyati of his right in his holding or any portion thereof by sale, gift, mortgage, lease or any other contract or agreement. It declares that all such transfers shall be void unless the right to transfer has been recorded in the record-of-rights. In the instant case, the raiyati holding is not described in the record-of-rights as transferable. There cannot be estoppel against statute. Hence, it must be held on the facts of this case that no estoppel is created against the plaintiffs: 1957 Pat.L.R. 288.

Where a property sold and confirmed under S. 40 of the Administration of Evacuee Property Act, 1950 was sold again under the Displaced Persons (Compensation and Rehabilitation) Act, 1954 and the vendees under the confirmed sale impugned the second sale by way of revision under S. 24, thereof, *held*, it could not be said that by resorting to S. 24 of the Displaced Persons (Compensation and Rehabilitation) Act the vendees had disentitled themselves from denying that the property was not a pool property under that Act; since resort to civil Courts was barred under S. 36 thereof, the only remedy left to them was that of revision under the Act; the doctrine of estoppel was not attracted: A.I.R. 1980 All. 231 (D.B.).

No estoppel against operation of S. 17(4), Land Acquisition Act, 1894: A.I.R. 1967 Goa 169.

Statute imposing positive duty upon public officer in the general interest of public—Exemption from duty cannot be claimed by pleading estoppel: A.I.R. 1966 Cal. 348.

There can be no estoppel against a statute. If the law requires that a certain tax be collected, it cannot be given up, and any assurance that it would not be collected would not bind the State Government, whenever it chose to collect it: (1962) 1 (Supp.) S.C.R. 913: (1962) 13 S.T.C. 180: A.I.R. 1962 S.C. 745.

Clarifications/Circulars issued by the Central Government and or State Government regarding taxability of certain items to tax do not prevent the State from recovering the tax which is leviable according to law. There can be no estoppel against the statute: A.I.R. 1993 S.C. 2414.

Where a Municipality owing to some mistake failed to recover a particular tax, it cannot be pleaded that they are estopped from recovering it, when they later on make attempts to collect it. The plea cannot enable a defendant to escape from a statutory obligation: 1939 Nag.L.J. 265: A.I.R. 1939 Nag. 195.

Where in answer to a letter from an owner of certain premises, the Calcutta Corporation informed him that a certain amount was due on account of the arrears of the municipal consolidated rates, and the amount mentioned by it was by a mistake less than the amount that was actually due. *Held*, (*i*) that the Corporation was not estopped from recovering the sum actually due. It is an elementary principle that there is no estoppel against the law, under the provisions of the Calcutta Municipal Act there is a statutory obligation imposed respectively on the corporation and the rate payer to collect and pay the rates—these rates being secured by a first charge on the premises and there being no power to remit the taxes unless they appear to be irrecoverable; (*ii*) that a purchaser of the premises from the owner was in no better position than his vendor and could not, therefore, defeat his statutory liabilities by a plea of estoppel: (1945-46) 50 Cal.W.N. 263: 81 Cal.L.J. 155: A.I.R. 1947 Cal. 273.

There can be no estoppel in the matter of a statutory levy. Hence, the conduct of the Government in accepting the tax for September, 1950, and for the subsequent periods does not estop them from demanding a tax in respect of August, 1950: 1955 Ker.L.T. 946: A.I.R. 1956 Trav.-Co. 85: I.L.R. (1955) Trav.-Co. 889.

Even if it be assumed that the petitioner had the necessary knowledge of the proposals for the imposition of water tax, this does not take away his constitutional right of challenging the validity of the new taxation measure—there is no such thing as estoppel applying to a matter like this: 1958 All.L.J. 857: 1959 All. W.R. (H.C.) 99: A.I.R. 1959 All. 192.

It is true that a person cannot approbate and reprobate the same transaction and when he accepts a benefit under an agreement he must conform to all the provisions of the agreement and renounce all rights that are inconsistent with it. But when the compromise between the assessee and the Income-tax Department was to the effect that the assessee would file a voluntary return and the Department would drop the proceedings against the firm under S. 34 of the

1922 Act, and there was nothing to indicate that the return that was being filed would be a valid return under S. 139 of the Income-tax Act, 1961, then in spite of the compromise it would be open to the assessee to take up the position that the return filed by her was barred by time. It would be equally open to her to urge before the High Court that the assessment order was also barred by time: (1970) 75 I.T.R. 625 (All.). (*See* also Note 49, *supra*).

Application under S. 25(2)(*b*), Bihar Sales Tax Act made by State of Bihar admitted by High Court *ex parte* without notice to assessee—Assessee is not estopped from raising objection that application under S. 25(2)(*b*) is incompetent even at the stage when High Court is hearing reference under S. 25(5). *See* A.I.R. 1957 Pat. 182 (D.B.).

The liability to pay tax arises under the charging section of the statue and it does not require any prior notice about such a liability having been incurred. The fact that the assessee has not for one reason or the other, collected the tax from purchasers is of no consequence at all. The doctrine of promissory estoppel cannot be applied in the teeth of an obligation or liability imposed by law, and neither the Government nor a private party can be compelled under this doctrine to do an act prohibited by law. (Case under Sales Tax Act): (1981) 29 B.L.J.R. 688.

Where the High Court in another case had rightly concluded that weights and measures were not covered by the notification, dated 31-7-1967, under S. 3-A of the U.P. Sales Tax Act, 1948 and therefore not eligible for single point sales tax which was followed by the Sales Tax Appellate Authority which was impugned by the aggrieved assessee on the basis of several letters and clarificatory orders, some of them even quoting the State Government's authority as their basis, *held*, such representations could not create estoppel being against the statute. [A.I.R. 1985 S.C. 746; A.I.R. 1986 S.C. 806, Rel. on; 1972 Tax.L.R. 1889 (All.) (F.B.), Approved]: A.I.R. 1987 S.C. 1576: (1987) 1 U.J. (S.C.) 705.

Since there is no estoppel against statute, the fact that the manufacturer himself had fixed the wholesale price at which he sells to wholesale dealers, would not prevent him from contending what the wholesale price is as under Central Excise Act: (1976) 1 Kam.L.J. 320.

Where the Haryana Tourism Corporation challenged the demand of the authorities to pay cess under the Water (Prevention and Control of Pollution) Cess Act, 1977, *held*, when it is found that the Corporation was not liable to pay cess under the said Act, merely because on some earlier occasion it had submitted to the jurisdiction of the authorities under that Act and complied with certain demands, it was not estopped from challenging their jurisdiction subsequently: 1993 Punj. L.J. 243 (D.B.).

A notification under S. 25(1) of the Customs Act, 1962 is legislative in nature; no estoppel can be pleaded against such notification as there can be no estoppel against statute: 1984 Tax. L.R. (N.O.C.) 26 (Del.): (1983) 3 Comp.L.J. 129: 1983 E.L.T. 1688: I.L.R. (1983) 2 Del. 327.

There is no estoppel in law against a party in a taxation matter. Thus, where in order to clear the goods for the customs, the Importer's Agents gave the classification of the impugned goods in accordance with the wishes of the Customs Authorities or under some misapprehension, *held*, they were not estopped from claiming refund when law allowed them such right and which they actually applied for: A.I.R. 1977 S.C. 597: (1976) 2 S.C.C. 241: (1976) 2 S.C.R. 98.

The Sea Customs Act is concerned with one of the principal sources of the public revenues of the country and it directs the Customs officials to determine the value of imported goods in a certain manner and to levy duty on such value. Neither the Government of India nor any subordinate Department of it has any right to modify the provisions of the statute and to recover less on the basis of such modification to the detriment of the public treasury. If it does introduce such modification, even acts on it in a given case and then cancels the modification and demands the statutory amount of duty, it cannot be met by a plea of estoppel: (1953-54) 58 Cal.W.N. 20: A.I.R. 1954 Cal. 151.

There cannot be an estoppel in the exercise of the sovereign power and/or against the statute or valid notification. Therefore, the contention that at the time of importation of the goods, a Customs Officer had given "Nil" certificate to the petitioner and, therefore, the Customs Authorities were estopped from contending otherwise and the principle of estoppel and the laws analogous should

be applied debarring the Authorities from imposing the duty, *held*, cannot be accepted: (1989) 43 E.L.T. 44.

Where a contract of life insurance with enemy company frustrated and became unlawful and void by reason of the outbreak of war, and by virtue of R. 113-A, Defence of India Rules the contract cannot be revived or continued by the insured writing to the firm, which has taken over the management of the enemy company for a loan from the company or by asking it to reduce the insurance by making part of the policy as paid up, specially when the letters are written "without prejudice to the rights of the parties due to the outbreak of war" There is no estoppel against law. Moreover under the notification issued under R. 113-A, giving the management of the enemy company to another firm the latter were forbidden to enter into any new contract. Hence, this new firm could not enter into a new contract with the insured. So the suit by the insured for the return of the premium paid so far on the policy on the ground that the contract has become unlawful and unenforceable, is not barred by waiver, acquiescence or estoppel: A.I.R. 1954 Pat. 596.

Where the Central Government by virtue of its powers conferred by S. 23 of the Prevention of Food Adulteration Act, 1954, brought in an amendment to item A-14 of Appendix-B of the Rules framed under the Act and extended the prohibition to the addition of flavouring matter to tea, *held*, there being no prohibition for export to foreign market but the prohibition was only with regard to indigenous market, it was the resultant of a function under the delegated legislation and thus, there could not be any estoppel against the Government in exercise of its sovereign, legislative or executive function: 1990 Cr.L.J. 155 (Andh. Pra.) (D.B.).

A plaintiff's failure to rely specifically on S. 96, Motor Vehicles Act, cannot enable the insurers to invoke the principle of estoppel. It is well established that there can be no estoppel against a statute. A plea not open to the defendants under a statute cannot become available to them under the principles of estoppel. Obviously, no estoppel can be pleaded against the prohibitions enacted by the statute: I.L.R. (1959) Punj. 714: (1959) 61 Punj.L.R. 683: A.I.R. 1959 Punj. 297.

Motor Vehicles Act, 1939, S. 57 (3)—Provisions are mandatory—Non-publication of application for permit—Authorities cannot proceed with application—Petitioner conceding claim of respondent *bona fide* believing publication of his application—Application in fact not published—Concession not binding—No estoppel against statute: A.I.R. 1963 All. 38.

Where the States of Haryana and Himachal Pradesh agreed to grant inter-State permits to public carriers on the condition that they would neither pick up nor set down any goods between two points in the same State which is clearly against S. 56 of the Motor Vehicles Act, 1939 and *ultra vires*, *held*, the permit holders are not estopped from assailing the condition merely because they had obtained the permits on that condition: A.I.R. 1977 Him. Pra. 46: 1976 Sim.L.C. 18 (D.B.).

Since it is well settled (*vide* A.I.R. 1986 S.C. 319) that a private operator having a permit to ply a stage carriage over a route a part whereof overlaps a nationalised route cannot ply over the overlapping common portion, even with corridor restrictions, *held*, renewals of such permit of the private operator by the Authorities even for a long period of 29 years will not constitute an estoppel against the Authorities; they could validly decline to renew the permit: A.I.R. 1995 Karn. 103 (D.B.).

There can be no estoppel against a statute. Therefore, a party who has gone to arbitration under the contract which was void under some Act, in this case, Raw Jute (Central Jute Board and Miscellaneous Provisions) Act (VI of 1951), cannot plead that his opponent having taken part in arbitration proceedings could not later on repudiate the award as void: A.I.R 1953 Cal. 458: (1947-48) 52 Cal.W.N. 541 (S.B.).

Filing of award—Award can be filed only in Court in which suit would lie with regard to subject-matter of reference—An agreement between parties to file it in a different Court is against the statute and cannot be given effect to—Fact that there is such an agreement and that the parties had also acted upon it can be of no avail since there can be no estoppel against statutes: A.I.R. 1966 Andh. Pra. 134.

Contract with arbitration clause between companies *A* and *B*—Reference made by companies *C* as proprietor of *B*—*A* challenging award of arbitrator on ground that *B* was not a legal entity and therefore contract was void—*Held*, that *A* had a legal right to challenge the contract or its validity—There could not be any estoppel against statute: (1966) 36 Comp. Cas. 53: (1966) 1 Comp. L.J. 6: (1965-66) 70 Cal.W.N. 110.

Where in a probate proceeding a dispute as to genuineness of the Will was referred to arbitration and no objection as to the award was taken but in appeal the points as to illegality of the reference to arbitration was raised, *held*, that the point could be raised and the doctrine of estoppel was not applicable: 1930 All.L.J. 1584: A.I.R. 1930 All. 840. In case of a statute enacted for the benefit of section of the public, that is, on grounds of public policy, where the statute imposes a duty of a positive kind, not avoidable by the performance of any formality for the doing of the very act which the party suing seeks to do it, is not open to the opposite party to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence by a party to an action; it cannot, therefore, avail in such a case to release the party suing from an obligation to obey such a statute nor can it enable the opposite party to escape from a statutory obligation of such kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey law: 1937 Mad.W.N. 633: A.I.R. 1937 P.C. 114 (P.C.).

There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it. In this case, there was nothing to show that the petitioners were aware at the time of the auction that the procedure adopted by the Commissioner in conducting the auction was contrary to the Rules and with the knowledge of such illegality, they waived their rights. Further, it is well-settled that there cannot be any acquiescence or estoppel against a statute. [A.I.R. 1974 S.C. 2177 and A.I.R. 1979 S.C. 621, Rel. on]: 1982 Tax.L.R. 2831: (1981) 1 An.W.R. 364 (D.B.).

Where the parties in case of an agreed award had consented to attachment of the judgment-debtor's salary in excess of what is permitted under S. 60 of the Code of Civil Procedure, *held*, the judgment-debtor is not barred from challenging the attachment of the extra amount; there can be neither an estoppel nor an agreement against the statute itself: A.I.R. 1982 All. 489: 1982 All.W.C. 390: (1982) 8 All.L.R. 391.

The rule of estoppel cannot be invoked in a case where the claim is founded upon a document which is not enforceable under the statute: A.I.R. 1957 Assam 10. Where a lease was executed by the Nawab in contravention of the Murshidabad Act, *held*, that he was not estopped from denying the validity of the lease: I.L.R. 56 Cal. 252: A.I.R. 1929 Cal. 433. Lease contrary to B.T. Act—Lessor's plea of invalidity—Maintainability: 105 I.C. 290; A.I.R. 1928 Cal. 156.

Where the Headmasters' Association, having its representatives in the Syllabus Committee had participated therein without demur, subsequently joined other petitioner's in impugning the revised syllabus as being in breach of the fundamental rights guaranteed under Art. 19(1)(*a*) of the Constitution and in violation of the West Bengal Secondary Education Act, 1963, *held*, they were not estopped from doing so merely because of the Association's participation in the revision of the syllabus; it is well settled that there can be no estoppel against statute: A.I.R. 1982 Cal. 467: (1981-82) 86 Cal.W.N. 908: (1982) 2 Cal.L.J. 148 (D.B.).

Where an Army Officer on having taken premature retirement was offered appointment in CRPF on temporary basis as a Commandant and even though to such category of officers benefit of absorption was not applicable under R. 107(2) of the CRPF Rules, 1955, still the Officer was asked by the Department to opt for absorption and when he opted for the same his representation was rejected and the Officer pleaded estoppel, *held*, even though the Departmental Authorities called for the option of the Army Officer for absorption but as such a step was contrary to the statutory rules, it would not operate as an estoppel nor confer any right to claim absorption: A.I.R. 1987 S.C. 1172: 1987 Lab.I.C. 896: (1987) 2 S.C.C. 211: (1987) 1 Lab.L.J. 507: (1987) 1 Lab.L.N. 774: (1987) 2 U.J. (S.C.) 13.

S. 5(2) of the A.P. (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act, 1948, on a fair reading, places no time

limit and the Director may exercise the power thereunder at any time; it cannot, thus, be contended that not having earlier exercised the power, he was estopped from doing so; he is not a "party" contemplated under S. 115; there can be no estoppel against statute; the doctrine of estoppel is not available against the State's activities based on its judicial or quasi-judicial powers: (1978) 2 An.W.R. 11.

Person opting to be governed by certain Service Rules, is not barred by principle of approbate and reprobate from urging invalidity of the Rules. There can be no estoppel against a statutory requirement: (1970) 2 Mys.L.J. 197.

The doctrine of "approbate and reprobate" is only a species of estoppel, it applies to the conduct of parties. As in the case of estoppel, it cannot operate against the provisions of a statute. Thus, where in an eviction proceedings initiated under S. 13 of the East Punjab Urban Rent Restriction Act, 1949 in the Court of Rent Controller, the tenant denied the landlord's title and in the light of said stand the landlord believing that the tenant had forfeited whatever right of tenancy the tenant might be having, withdrew said proceedings and then filed a civil suit asserting that the tenant having forfeited his right of tenancy on account of said plea was a trespasser and was, thus liable to be evicted, to which the tenant replied that the plea of disclaimer or denial of relationship of landlord and tenant was due to stress and confusion as the landlord failed to disclose the details of the transaction between the landlord and his predecessor-in-interest, *held*, even if the tenant was bound by his admissions, still he could not be deprived of the protection of S. 13 of the East Punjab Urban Rent Restriction Act, 1949 or disentitled to plead that the provisions of the Act protect his possession. [A.I.R. 1965 S.C. 1216, Rel. on]: A.I.R. 1984 P.&H. 229: (1984) 86 Punj.L.R. 350.

Landlord letting out premises—There is implied representation that he has subsisting interest in premises let out—Landlord is estopped subsequently from contending that he was not legally competent to let out the premises—No legal bar to invoking doctrine of estoppel for limited purpose of assessing weight of argument against lawful tenancy—No question of estoppel against statute or on a point of jurisdiction arises in such case—Delhi Rent Control Act (LIX of 1958). S. 26—Landlord and tenant: (1964) 66 Punj.L.R. 12.

Where landlord issued a telegraphic quit notice to the tenant which could not be said to be valid as it did not contain his signature and was, thus, not in conformity with S. 106 of the Transfer of Property Act, 1882, *held*, the fact that tenant received it and even sent a reply would not estop him from challenging the validity of said notice subsequently as there can be no estoppel against the statute. [(1976) 1 M.L.J. 358; A.I.R. 1974 S.C. 1868; A.I.R. 1976 Andh. Pra. 205, Foll.]: A.I.R. 1990 Andh. Pra. 169: (1989) 2 A.P.L.J. (H.C.) 327: (1989) 3 An.L.T. 625.

Where after passing of an eviction decree in a civil suit, the town where the property was situate was constituted as a Municipality and the T.N. Buildings (Lease and Rent Control) Act, 1960 was automatically extended there and the judgment-debtor sought a declaration under that Act that the eviction decree was inexecutable, *held*, since S. 10(1) of that Act unambiguously applied to the case, the rule of estoppel could not be invoked against the judgment-debtor; he was entitled to the declaration that so long as that Act was in force, the eviction decree would remain inexecutable; there is no estoppel against law: (1980) 93 Mad.L.W. 378.

There is no statutory bar against the two individuals owning lease-hold rights treating the lease-hold rights to be the assets of the partnership firm, of which they are themselves the partners. No question of estoppel against statute arises in such a case: A.I.R. 1987 Bom. 143.

Where a sub-lessee with a view to avoid losing land entered into an agreement purchase it at a rate higher than the rate payable by him under law, *held*, the sub-lessee was not estopped from contending that the Trust be directed to refund the excess: A.I.R. 1972 P.&H. 296.

Merely because the petitioners, who were permitted to export the cattle by way of road prior to the passing of the Gujarat Milch and Draught Cattle (Control of Government) Order, 1983, had purchased the trucks for that purpose, *held*, the State Government cannot be estopped from enacting and/or implementing the impugned provisions against the petitioners as there cannot be

estoppel against any statutory provision: A.I.R. 1984 N.O.C. 233: (1984-1) 25 Guj.L.R. 659 (D.B.).

Where the tenant-at will sold his rights together with a brick built and tiled house with residential and tenure rights and all appurtenances of the house, and the landlord perused the transfer deeds and recognised the transfer, and he mutated the names of the transferees in his sherista, and when the transferee built a double-storeyed pucca house on the land, the landlord did not object to the construction, *held*, that the landlord was estopped from ascertaining any title to the land on which the transferee expended money on the supposition that he had a tenure right, *i.e.*, a permanent tenancy, in the land. *Held*, also that it was not a case of an estoppel being pleaded against a statute, namely, T.P Act, S. 107 which requires a registered deed for the creation of a permanent tenancy. The plaintiff landlord was merely estopped from proving that the defendant was a mere tenant-at will. The statute came into operation only when the defendant was proved to be tenant-at will. Before that stage arrived, the estoppel operated: 1960 Pat.L.R. 65: A.I.R. 1960 Pat. 289.

Exceptions to the bar of statute—Fixation of fair rent by consent of parties—Second application for the same relief, is, barred—Previous order operates as estoppel by conduct—Plea that estoppel could not lie against a statute, *held*, would not apply: A.I.R. 1970 J.&K. 26 (F.B.).

Estoppel under S. 115 consists not in putting forward a particular view of the law, but in making a particular representation on a point of fact. In a suit for arrears of rent in a revenue Court, the defendants pleaded that, on the allegations in the plaint, the plaintiff had not established that the property formed part of an estate, and, therefore, no suit lay in the revenue Court. This plea was upheld by the Court which returned the plaint for presentation to the proper Court. The plaintiff then filed the suit in the civil Court and the defendants now contended that the civil Court had no jurisdiction to entertain the suit on the ground that the plaintiff had not made out that the land on which the rent was due was a portion of an estate. *Held*, that there was no question of estoppel in the case at all and the defendants were not estopped from contending that the civil Court has no jurisdiction: A.I.R. 1943 Mad. 22: (1942) 22 M.L.J. 97.

Will in contravention of statute—Devise acting upon it—Dispute between co-devisees—Invalidity of will—Bar in pleading. *See* 1938 Nag.L.J. 181. *See* also (1939) 41 Bom.L.R. 170: A.I.R. 1939 Bom. 114.

Cement Control Order, 1961 fixing different ex-factory prices—Cement Control Order, 1967 also having different prices—Non-challenge of previous order does not estop person challenging subsequent order: A.I.R. 1969 Raj. 281.

If the terms of a statute are absolute and do not admit of any relaxation or exemption, then anything done contrary to the terms of such a statute will be *ultra vires* and will be void and no person can be estopped from putting forward the contention that what he did was illegal or void. On the other hand, if a statute having prescribed certain conditions or qualifications for the doing of a certain thing itself provides for exemption therefrom under certain circumstances or authorises somebody to exercise the power of exemption than anything done not in terms of those conditions or qualifications will not be *ultra vires* and will be said to be merely irregular and to such an Act, the proposition that there can be no estoppel against a statute will have no application. A student was admitted in violation or breach of Cl. 1 of Ordinance I issued by the University, Ordinance I prescribed as to who were eligible for admission to the University but Ordinance X-A in widest terms also enabled the Academic Council to grant exemption from the operation of any of the Ordinances governing the admission of the students. *Held*, existence of Ordinance X-A made the admission of students contrary to Ordinance I, not a *ultra vires* act, but only an irregular act, and therefore, the doctrine that there could be estoppel against a statute had no application to the case: A.I.R. 1968 Del. 131.

No question of estoppel arises where in a form prescribed for admission to a College it was expressly stated that the applicant should acquaint himself with all matters pertaining to the students of the faculty and that no plea will be entertained that the student was ignorant of Ordinances, Regulations, Rules or other provisions: (1960) 62 Punj.L.R. 79: A.I.R. 1960 Punj. 150.

Candidate taking his examination on faith of certain regulations in force at the time of examination—University has no power to alter or substitute regulations with retrospective effect to candidates disadvantage—Writ—Candidate entitled to benefit under old regulation—Fact that he took supplementary examination under new regulation cannot disentitle him to such benefit—No estoppel against statute: I.L.R. (1964) 14 Raj. 463; A.I.R. 1964 Raj. 161 (F.B.).

Provisions of Bihar Tenancy Act (VIII of 1855) expressly prohibiting protected tenant from transferring land without Collector's permission—Receipt of consideration and delivery of possession by him—Does not amount to estoppel against him in setting aside transfer—It is well settled that there is no estoppel against statute: 1968 B.L.J.R. 342: 1968 Pat.L.J.R. 52.

Order under S. 12 of M.P. Public Security Act—Petition for setting aside order taking aid of S. 12 (5) of the Act—It is not open to him to challenge the validity of S. 12—M.P. Public Security Act, 1959, S. 12: 1963 M.P.L.J. 489: 1963 Jab.L.J. 499: A.I.R. 1963 Madh. Pra. 301.

Right to apply under Art. 226 of the Constitution of India—Estoppel. *See* A.I.R. 1957 Ker. 85. There can be no estoppel against an act of the Legislature. When, therefore, the Legislature has declared that no adoption would be valid without a registered adoption deed the plaintiff is not estopped by her conduct from disputing the validity of defendant's adoption for want of a registered deed: 1939 M.L.R. 60 (Civ.). *See* also A.I.R. 1941 Rang. 234.

There can be no estoppel against law. Therefore, when an adoption is not legally valid no conduct can estop an interested person from challenging the validity of the adoption. Moreover, mere participation in the ceremonies of adoption in the absence of evidence showing consent to such adoption, or acts subsequent to such adoption not leading to the adoption, cannot estop a person from challenging the validity of the adoption: I.L.R. (1963) 2 All. 102: A.I.R. 1963 All. 509.

Employee of statutory corporation—Wrong reference to Art. 311 of the Constitution in order of dismissal—Corporation not debarred from pleading non-applicability of article subsequently: (1964) 66 Punj.L.R. 1040.

Binding and final decision of Board under S. 84 (2) of Madras Act (II of 1927) that institution is outside purview of Act is binding on Board—Application by trustee asking Board to interfere with management of institution on ground that it is Math—Estoppel on part of trustee does not confer power on Board which it did not possess under the Act—Moreover institution is estopped by the act or conduct of trustee: A.I.R. 1965 S.C. 1570.

It is true that if an act of Legislature alter or abridges the rights of the parties that must prevail and there can be no estoppel against a statute. But the Madras Act (XXVI of 1948) authorising the Government to take over estates does not authorise the Government to repudiate a lease created by them, and does not free them from estoppels to which they are subject as lessors: (1953) 2 M.L.J. 478: A.I.R. 1954 Mad. 161.

There cannot be an estoppel against statute. A bidder at an auction of liquor shop held under the Punjab Excise Act is not estopped from challenging the legality of the conditions of sale announced at the time of the auction, if they are at variance with the conditions laid down by the statutory rules: (1951) 53 Punj.L.R. 424: A.I.R. 1953 Punj. 274.

Madras Agriculturists' Relief Act (IV of 1938), S. 13—Decree-holder filing execution petition for recovery of amount in terms of compromise decree—Judgment-debtor contending that he, being an agriculturist, was entitled to scaling down of debt under S. 13—*Held*, as compromise was not fresh contract but only revival of old debts under new garb, debt was liable to be scaled down—Contention that judgment-debtor having derived benefit under compromise was estopped from putting claim for scaling down of debt was untenable as there could be no estoppel against statute: (1966) 2 An.W.R. 329.

Where a Judicial Member of the Board of Revenue on retirement enrolled himself as an Advocate and started practising as such in the Board itself in violation of R. 7, Ch. III, Part 6 of the Rules framed by the Bar Council of India and, on disciplinary action being initiated against him, contended that at the time of his enrolment there was no such bar in the

Rule which was subsequently amended and the Bar Council was estopped from enforcing the amended rule, *held*, R. 7, being a statutory rule, there could be no estoppel against it; besides, the rule was framed by the Bar Council of India and not by the Bar Council of Uttar Pradesh: A.I.R. 1986 All. 56 (D.B.).

Rr. 28 (1-A) and 57 (2) of the Mineral Concession Rules, 1949 being statutory rules, requirement of these rules cannot be waived by State Governments: (1970) 2 S.C.C. 13: A.I.R. 1970 S.C. 1354.

An excess of statutory power cannot be validated by acquiescence in or by the operation of an estoppel. The Court declines to interfere for the assistance of persons who seek its aid to relieve them against express statutory provision. Thus, where the Municipal Council, by a resolution, sanctioned plan for conversion of building into a cinema in violation of the Town Planning Scheme, but the High Court refused to quash said resolution on the ground that money was spent by the licensee, *held*, as said resolution had no legal foundation, principle of estoppel could not be invoked by licensee for giving effect to said resolution: A.I.R. 1974 S.C. 2177: (1974) 2 S.C.C. 506.

Under S. 4(*c*) read with S. 24 of the Special Marriage Act, under-age of a party renders the marriage null and void; no amount of estoppel for the party's false representation as to its age could make it valid: A.I.R. 1989 Cal. 120: (1988-89) 93 Cal.W.N. 102: (1989) 1 Hindu L.R. 228 (D.B.).

Where while granting permission under S. 5(1) (*a*), Foreign Exchange Regulation Act, to sell shares held by a foreign company, Reserve Bank of India imposed a condition that applications for purchase of shares from larger industrial houses and persons connected therewith would not be considered and the respondent was allotted shares as he had claimed in writing that he was not connected with a large industrial house but subsequently respondent challenged the validity of said condition, *held*, respondent was not estopped from challenging the condition as Reserve Bank of India had no authority under the provisions of the Act to impose said condition and there is no estoppel against illegality or legal unenforceability. [A.I.R. 1951 Bom. 72, Rel. on]: A.I.R. 1978 Cal. 65: (1977) 2 Cal.L.J. 483: (1977-78) 82 Cal.W.N. 61 (D.B.).

Since statutory rules are framed for the purpose, Councillors who attended a meeting which was not legally convened are not debarred from challenging the election held at the meeting on the ground of acquiescence: (1970) 2 Mys.L.J. 415.

Where Municipal Council resolved to nominate the petitioner as its representative to the Planning Authority for a period of one year and the petitioner filed a writ petition for quashing that portion of the resolution restricting his term to one year and the Municipal Council contended that as the petitioner was a party to the resolution and as he had taken advantage of that resolution he was estopped from saying that the said resolution was bad, *held*, the portion of the said resolution was illegal being contrary to S. 4-D (2) of the Karnataka Town and Country Planning Act, 1961 and as there could not be any estoppel against law, the petitioner was not estopped from challenging the Resolution to which he was a party and from which he had been benefited: A.I.R. 1988 Karn. 168: (1987) 1 Karn.L.J. 356.

Application for appointment by existing employee of Wakf Board pursuant to Committee's notification—Does not estop him from challenging Committee's decision: A.I.R. 1967 Andh. Pra. 291.

Petitioners agreeing to arrangement embodied in Government order—Legality of order—If can be questioned. *See* A.I.R. 1957 Ker. 22.

22. Estoppel in case of statement or concession on point of law.—There can be no estoppel on a point of law: I.L.R. 21 All. 285; 20 Nag.L.R. 162: A.I.R. 1924 Nag. 125; I.L.R. 30 Cal. 883: I.L.R. 35 Mad. 75; I.L.R. 44 Mad. 421 (P.C.); A.I.R. 1929 Pat. 32; 140 I.C. 687: A.I.R. 1932 Pat. 267 (D.B.). *See* also 178 I.C. 288: A.I.R. 1938 Lah. 368 (D.B.). It is well established that a representation on a question of law does not amount to an estoppel: 195 I.C. 428: A.I.R. 1941 Pat. 276.

There is no estoppel on a statement of law: (1938-39) 43 Cal.W.N. 1037: A.I.R. 1939 P.C. 201 (P.C.). *See* also A.I.R. 1940 Oudh 409; 1941 Rang.L.R. 309: A.I.R. 1941 Rang. 234; 1940 All.W.R. (B.R.) 144: A.I.R. 1962 Pat. 140; 1978 B.B.C.J. 70.

A party is not bound by his lawyer's admission on a point of law: (1906-7) 11 Cal.W.N. 341; I.L.R. 24 Bom. 363; A.I.R. 1938 Rang. 376; A.I.R. 1938 Lah. 368; A.I.R. 1939 Lah. 303.

The concession made by a Counsel on a pure question of law, will not estop him or his client from withdrawing from such concession at a later stage of the same proceedings or in an appeal or revision therefrom: 1965 M.L.J. (Cr.) 35: (1965) 2 Cr.L.J. 379: A.I.R. 1965 Mys. 253.

Admission of erroneous opinion on question of law by party's Counsel in lower Court—Not binding on that party while seeking relief in appeal: I.L.R. (1968) 1 All. 877: 1968 All.L.J. 402: A.I.R 1969 All. 14.

When the facts are fully set out and admitted, a party's opinion about the legal effect of those facts is of no consequence in construing it; no estoppel arises by reason of admission of the party as to such effect; a Counsel's admission of a point of law cannot be binding upon a Court; and Court is not precluded from deciding the rights of the parties on a true view of the law: A.I.R. 1962 Ori. 202.

It is well settled that there cannot be estoppel against statute or law and any concession made by a Counsel of a party will not estop the latter from withdrawing from such concession at a latter stage or in a latter proceeding when the concession is on pure question of law.

When, there is total lack of jurisdiction in the authorities under an Act, no amount of concession by parties' Counsel can confer any jurisdiction on them and if any such concession has been made under an erroneous impression of law, it is open to the party on whose behalf such concession or admission was made to show that such concession or admission was wrong: (1972) 2 Cut.W.R. 1252 (D.B.).

Though an admission on a question of fact made by a party or its Counsel binds them but a concession by a Counsel on behalf of his party on a question of law will not estop him or his party from withdrawing the concession: A.I.R. 1976 Karn. 13: (1975) 2 Karn.L.J. 241; 1981 Hindu L.R. 445 (J.&K.).

Concession by Counsel in the nature of opinion not binding on Court—Only opinion of Court counts—Concession by Counsel on point of law not binding on client: 1970 Ren. C.R. 332: 1970 Raj.L.W. 79.

There cannot be any estoppel on a point of law going to the jurisdiction of the Court: A.I.R. 1928 Lah. 802.

The question of the proper construction to be placed on a deed is one of law and there can be no estoppel by a pleading of law: 77 I.C. 310: A.I.R. 1923 Oudh 123.

Where the Advocate-General in an earlier proceeding had conceded, under the State Government's instructions, that a certain Government order stood superseded by a subsequent rule and the proceeding was accordingly decided and was acted upon and followed by the State, *held*, it was not a concession purely on a point of law; the State Government could not be allowed to resile and contend that the previous Government order still prevailed: A.I.R. 1993 Andh. Pra. 338: (1993) 3 An.L.T. 294 (F.B.).

Counsel waiving objection as to limitation does not estop his client from raising the same: 178 I.C. 288: A.I.R. 1938 Lah. 368.

There is no estoppel on a point of law. Admission on matter of law, or any ignorance of legal right does not constitute any basis for estoppel. Where on a writ petition the High Court directed the Government to pass an order under fundamental rule 54 in favour of the petitioner and the Government accordingly passed an order under that rule is no estoppel against the petitioner from denying the applicability of the rule to his case and the order of the High Court in the writ petition will not operate as a bar to the High Court going into the validity of the order: A.I.R. 1965 Assam 109.

Where a party through Counsel admitted before the authorities appointed under the Administration of Evacuee Property Act, 1950 that he staked no claim of adverse possession against a particular property which he admitted to be an evacuee property, *held*, he was estopped from contending in the writ Court that his representation arose out of his mistake; *certiorari* is meant to correct errors of law apparent on the record and the parties' mistakes: (1975) 88 Mad.L.W. 262 (D.B.).

No estoppel on a question of law—*Held*, State was not estopped from urging before District Judge that reference under S. 18(1), Rajasthan Land Acquisition Act, XXIV of 1953, was made on time-barred application:

1965 Raj.L.W. 495: I.L.R. (1965) 15 Raj. 1192: A.I.R. 1966 Raj. 118.

Registration of dealer—Validity—It is question of law—Principle of estoppel not applicable: I.L.R. (1964) Cut. 575: A.I.R. 1965 Ori. 44.

Where a person who has not been appointed executor of a Will either expressly or by implication, describes himself as an executor under a mistake about his legal position, this would not make him an executor or raise an estoppel against him: I.L.R. 12 Rang. 78: A.I.R. 1939 P.C. 238 (P.C.).

23. Estoppel when benefit of legislation has been taken.—Plaintiff taking advantage of an Act cannot challenge it: A.I.R. 1960 Mys. 59.

Though a person who wants to take benefit of the legislation cannot, at the same time, challenge it, but it is equally true that there cannot be estoppel against the statutes and, if the provisions of law are *ultra vires*, a citizen can, by challenging a particular provision, insist for striking down that part of it, which infringes his legal rights and retaining other part of it which gives benefit to him: A.I.R. 1983 Raj. 39: 1982 Raj.L.W. 575.

A person who has derived the advantage under a statute cannot be permitted to assert its invalidity when it has been decided against him. A person accepting the benefit under a statute by submitting to the jurisdiction of an authority cannot be permitted to contend that the authority had no jurisdiction. Thus, where a reciprocal agreement in regard to various inter-State routes was arrived at between the representatives of two States and appellant made an application to State Transport Authority for grant of one non-temporary stage carriage permit on a notified route and on grant of same he sought counter-signatures on his permit of State Transport Authority of other State but the existing operators including the respondent who had themselves obtained renewal of their permit in respect of their routes after the coming into force of the reciprocal agreement contended that the State Transport Authority had no jurisdiction to grant counter-signature, *held*, the respondent could not approbate the jurisdiction of the State Transport Authority when it suited him for taking renewal and take objection to its jurisdiction when it was to the advantage of the appellant. [A.I.R. 1958 Andh. Pra. 322; A.I.R. 1960 Ker. 186; A.I.R. 1967 S.C. 1450; A.I.R. 1957 S.C. 227, Rel. on]: A.I.R. 1974 Raj 104: 1973 W.L.N. 813 (D.B.).

When a party submitted himself to the rules and conditions set out in the notifications and took a chance of purchasing and getting a license under the said terms and conditions, he cannot later on turn and say that the rules are *ultra vires*: (1968) 16 L.R. 285 (Mys.).

A person claiming benefit under the Punjab State Co-Operative Agricultural Development Bank Bye-laws, *held*, could not be permitted to say that the Bye-laws had no statutory force: 1994 Punj.L.J. 162 (D.B.).

Where petitioners accepted the compensation under the Rajasthan Cash Jagirs Abolition Act, 1958 for a full period of twelve years and thereafter challenged the constitutional validity of said Act, *held*, the petitioners cannot be allowed to blow hot and cold in the same breath. The petitioners were estopped from challenging the validity of the impugned Act after enjoying full benefit under the Act. [A.I.R. 1968 S.C. 1053, Disting.]: A.I.R. 1975 S.C. 1058.

Accepting benefit under transaction—Person voluntarily contracting liability to pay rental by bidding for privilege to vend liquor—Further agreeing to the recovery of amount of rental outstanding under Revenue Recovery Act—He cannot challenge validity of provisions of Act under which he got privilege—Nor can he contend that recovery of amount under Revenue Recovery Act is discriminatory. [Case-law discussed]: 1969 Ker.L.J. 289: I.L.R. (1969) 2 Ker. 71.

24. Approbate and reprobate.—*See* A.I.R. 1955 Pat. 198; A.I.R. 1954 Trav.-Co. 289; (1991) 2 Cal.L.J. 188: (1991) 2 Cal.H.N. 234. The doctrine of estoppel takes in its compass also cases where people are not allowed to behave inconsistently: 1957 Ker.L.T. 944: 1957 Ker.L.J. 757.

The rule that a party to a litigation cannot both approbate and reprobate is a rule essentially of logic rather than of law, based on the principle that, where a party to a litigation has deliberately taken a particular position (without being induced so to take it by the opposite party), he must act consistently with it. The rule is different from estoppel. In the case of an estoppel, the representee

should have altered his position to his detriment; for the rule of approbate and reprobate to apply, the representor must have obtained an advantage by the representation made or the stand taken by him. The principle variously known as approbate and reprobate, is an application of the doctrine of election. A mere erroneous statement at one stage of a litigation cannot be held to prejudice a statutory or other right of a party. The two essential elements of an election are (*1*) that the person who is electing should have a choice between the two alternative course and (2) he should derive an advantage of such choice. A defendant adopting the valuation made by the plaintiff for the purpose of filing an appeal cannot be said to have a choice in the matter as he is generally bound to adopt the valuation made by the opposite party: I.L.R. (1961) Mad. 1143: (1962) 1 M.L.J. 65: A.I.R. 1961 Mad. 511 (F.B.).

Attractive as they are the maxims, "blowing hot and cold", "playing fast and loose", sometimes tend to induce somewhat loose conceptions which may affect even judicial decisions. That mischief has to be carefully guarded against. Strictly speaking no formal legal concept is inherent or necessarily implied or involved in the maxims quoted or in the familiar cognate phrases "to approbate and reprobate", to "affirm and dis-affirm". At the most they may broadly be described in legal parlance as picturesque synonymous of certain aspects of the law of waiver, estoppel or acquiescence and of the allied legal doctrine of *res judicata* or election. That however, is, the limit and their application should not be extended beyond it. To preclude a party from "blowing hot and cold" or "playing fast and loose" or, to use a more common expression, from "approbating and reprobating" one must establish a case of estoppel, waiver or acquiescence or invoke the well-known principles, underlying *res judicata* or *election*. In the application of these maxims it is unsafe to go beyond the limits, set by the above principles of law. It is not in every case that a man is precluded by law from "blowing hot and cold" or "playing fast and loose" but to prevent him from so doing the bar of the legal principles, referred to above, must be established. Generally speaking also, in the true application of those maxims in the field of law some change of positions is contemplated and some sort of estoppel in the broader sense of that term eventually interferes: I.L.R. (1956) 1 Cal. 150.

Party litigant cannot be permitted to assume inconsistent positions in Court approbate and reprobate to detriment of his opponent—Doctrine applies to successive stages of same suit and also to another suit than one wherein position was taken up provided that second suit grows out of judgment in first: 1968 All.W.R. (H.C.) 500.

It is true that party litigant cannot be permitted to assume inconsistent positions in Court, to blow hot and cold, to approbate, and reprobate to the detriment of his opponent; and that this wholesome doctrine applies not only to the successive stages of the same suit but also to another suit other than the one on which the position was taken up, provided the second suit grows out of the judgment in the first. But to substantiate the stand of estoppel by taking inconsistent positions it is necessary to file and prove the copies of the plaint and written statement of the previous suit to ascertain what was alleged by the plaintiff and what position was taken by the defendant in that suit and what position has now been taken in the instant suit: 1962 Jab.L.J. 931: 1962 M.P.L.J. 203.

It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court to approbate and reprobate to the detriment of his opponent and this doctrine applies to the successive stages of the same suit. Thus, when both parties to a litigation agree to take out a second commission for obvious reasons, the evidentiary value of the first report is automatically detached and one of the contesting parties, who had agreed to the appointment of the second Commissioner, cannot subsequently, contend at a later stage of the proceedings that the second report was without jurisdiction since the first report was not set aside: A.I.R. 1993 Ker. 218: (1993) 1 Ker.L.J. 44.

Approbate and reprobate—Party inviting decision—Effect: A.I.R. 1961 Cal. 422.

Inconsistent pleas—Change of stand—Permissibility: A.I.R. 1968 J.&K. 2.

Parties choosing to describe their relationship in a particular manner—It is not open to say that their intention was different: (1984) 4 Guj.L.H. 960.

A party cannot be allowed to approbate and reprobate. Where a person with full knowledge of the facts in unmistakable terms admitted the waqf nature of a house he cannot subsequently be allowed to resile from the position: 183 I.C. 645: (1939) 41 Punj.L.R. 242: A.I.R. 1939 Lah. 63.

Where the delivery of possession was admitted by a party in earlier proceedings and concluded by the Court's decision, *held*, that party is estopped in subsequent proceedings from contending to the contrary: A.I.R. 1977 N.O.C. 134 (Gau.).

If a party adopts an order of a Court and takes a benefit thereunder he cannot be allowed to challenge the correctness of that order. Where the order passed was a conditional order that on deposit of certain amounts into Court the review petition will be allowed and the appeal restored to file, and the amount is deposited and withdrawn by the plaintiff, it must be *held* that the plaintiff adopted the order and received the benefit thereunder and, having elected to treat the order as valid, he cannot be allowed to challenge the order in appeal: I.L.R. (1956) 1 Cal. 77: A.I.R. 1959 Cal. 19 (D.B.).

Applicant taking benefit under order cannot complain against it. *See* A.I.R. 1954 Sau. 90: 6 Sau. L.R. 534.

A party taking the benefit under a decree, cannot turn round and prevent the other party from taking the corresponding benefit accruing to him under the decree. Thus, a party to a compromise decree who enjoyed a benefit thereunder, cannot, when the other party seeks to put it in execution, plead that the decree is a nullity: 1966 Cur.L.J. 110: (1966) 68 Punj.L.R. 288.

As between the same litigants one party cannot defeat the claim of the other by a plea negativing a contention advanced by him successfully in a former suit. A party who has obtained an order of the Court and has succeeded under it cannot after he has enjoyed a benefit under that order say that it was valid for one purpose and invalid for another: 144 I.C. 50: A.I.R. 1933 Sind 119. *See* also 14 L.R. 281 (Rev.): 17 R.D. 404.

Where the decree-holder himself takes a stand in the lower Courts that the judgment-debtor, a person belonging to Bothra Community, is a member of the Scheduled Tribes, he is estopped from raising the plea in appeal to the contrary. It cannot be said that if in fact judgment-debtor is not a member of the Scheduled Tribe any wrong admission made by the decree-holders does not amount to estoppel against them in view of the constitutional provision.

Whether a Bhothra comes within any of the sub-groups of Scheduled Tribes enumerated in Part IX is a pure question of fact in view of paragraph II of the Order. If any objection had been raised that he was not a member of the Scheduled Tribe the other party could have pleaded and proved that they belonged to one of the sub-groups of the Scheduled Tribes. Therefore, on a bare comparison of the various classes of Scheduled Tribes in Part IX of the Order, it is not possible for the Court to come to a conclusion that judgment-debtor was not a member of the Scheduled Tribe: (1969) 35 Cut.L.T. 139.

The doctrine of approbate and reprobate is not attracted where on the dismissal of his suit for specific performance of his contract to purchase immovable property, the trial Court granted him refund of purchase money and during the pendency of his appeal, he sought to execute the decree for realising the refund: A.I.R. 1971 S.C. 1238: 1971 U.J. (S.C.) 35.

Where a plaintiff abandons her case at any stage and practically accepts her opponent's case and practically claims the relief based on the facts pleaded and proved by her opponent, *held*, she cannot approbate and reprobate; she cannot allege one set of facts and on finding them unsustainable, to stage a *volte face* and seek for relief on the basis of inconsistent set of facts: A.I.R. 1978 Mad. 361: (1977) 2 M.L.J. 179 (D.B.).

One suit combining several causes of action against several defendants—Suit tho-ugh wrong at its inception was tried as a one suit and evidence recorded—Plaintiff cannot later on object to admissibility of evidence or its user—He cannot take advantage of his own irregularity in filing a single suit: 34 Cut.L.T. 1131: I.L.R. (1968) Cut. 673.

Where a judgment-debtor claiming to be a non-agriculturist debtor had obtained relief under the T.N. Debt Relief Act, 1972, *held*, he was estopped from claiming relief under the T.N. Indebted Agriculturists Act, 1975 by professing to be an agriculturist: (1978) 91 Mad.L.W. 651.

Person not included in the cause-title but claiming to be party, taking steps for securing some relief to himself. He is estopped from contending that he was not made a party: 1928 Mad.W.N. 634: A.I.R. 1928 Mad. 690.

Departmental proceedings against petitioners by Road Transport Department of Government—Writ petitions by petitioner to the High Court—During pendency of writ petition proceedings, petitioners filing petitions to bring on record Road Transport Corporation—Such petitions duly ordered by High Court—However, by some inadvertence this fact not brought to the notice of the High Court when the writ petitions were allowed and High Court observed that Government could proceed with the departmental enquiry against the petitioners afresh according to law—*Held*, that it was not open to the petitioners on the basis of the eventual order passed by the High Court to contend that it was the Government that was empowered to initiate fresh departmental proceedings and not the Corporation because it was they who had sought the substitution of the Corporation in the place of the Government—The acceptance of the salaries and subsistence allowances by the petitioners from the Corporation would debar them from turning round and claiming that all along they were employees of the Government and that the Corporation had no jurisdiction to take disciplinary action against them: I.L.R. (1963) Andh. Pra. 778: A.I.R. 1964 Andh. Pra. 407.

A person filing appeal or revision against order of Court and losing, *held*, cannot at the time of execution of the order contend that as he was not party at the original stage the order is not binding on him; having taken a chance of a favourable decision he cannot be allowed to approbate and reprobate when defeated: 1979 M.P.L.J. 244.

Pleading in the first suit to the effect that properties were wakf properties—Contrary plea barred in subsequent suit between the person and the wakf—Principle of *res judicata* or principle of estoppel attracted—Public Authorities may, however, record the properties in the name of beneficiaries and not in wakf's nama: 1969 All.L.J. 923: 1969 All.W.R. (H.C.) 602.

Person taking possession of property as muttawalli—Wakf discovered to be void—Person estopped from saying property was his: A.I.R. 1928 Cal. 130. *See* also A.I.R. 1939 Lah. 63.

Approbation and reprobation—Party finding decision adverse, claiming status of third party in execution proceedings—Admissibility—Restoration of order of lower Court—Effect: 1967 M.P.L.J. 165.

Having accepted the validity of a gift-deed, and a subsequent deed of assignment, it is not open to a person to say that either the one or the other of the documents is invalid: A.I.R. 1956 Mad. 514: (1956) 1 M.L.J. 195.

Where gift of properties to his 3 sons by the donor was sought to be sustained on the ground that it was governed by the customary Hindu law as prevailing in Pondicherry in 1876 but assailed the recital pertaining to the sons' consent to the disposal of other properties by the father on the ground that it violated French Civil Code which was claimed to be inapplicable, *held*, it amounted to blowing hot and cold; the sons relying upon the deed were estopped from impugning the deed: (1993-2) 112 Mad.L.W. 387 (D.B.).

A Hindu, governed by the Benaras School of Hindu Law, has no right elsewhere than in Bombay and Madras to alienate his undivided interest in the coparcenery property except with the consent of his other coparcener but where the father executed a *tamleeknama* in favour of his son, his only coparcener whose consent was therefore implied, by representing himself to be the property's sole owner, *held*, he was precluded from resiling from the deed on the ground that he had no right to execute it: A.I.R. 1977 All. 509.

Where defendant representing himself to be owner of impugned property executed an agreement to sell said property in favour of plaintiff but subsequently in a suit for specific performance and possession by plaintiff he contended that said property belonged to HUF of which he was only a *karta* though no evidence was adduced by defendant supporting that contention, *held*, he was estopped from showing that representation of title made in the agreement was mistaken and in truth property belonged to HUF: A.I.R. 1987 Del. 194.

A party who acquiesces in the procedure of the trial Court and takes part in the

proceedings without any protest cannot afterwards be permitted to turn round and attack it in the event of the decision having gone against him: 1960 All.L.J. 314: A.I.R. 1960 All. 573.

Accused pleading in previous trial that it was invalid for want of proper sanction—Plea accepted and accused acquitted—Prosecution on fresh sanction—Accused estopped from pleading double jeopardy on ground that previous trial was valid—Approbate and reprobate: 1959 Cr.L.J. 1390: A.I.R. 1959 All. 783.

A person, who adopts a sale with full knowledge that nothing was purchased by him at the sale by reason of the judgment-debtor having ceased to have any interest therein and derive some benefit thereby, is precluded from subsequently contending that the sale was void and that he should get a refund of the purchase-money. To such a person, the doctrine that a person cannot approbate and reprobate is applicable: (1952) 2 M.L.J. 827: A.I.R. 1953 Mad. 671.

Properties of Shebait—Trustees can be appointed—Person acting as trustee cannot challenge trust—Estoppel: I.L.R. (1963) 1 Punj. 320: A.I.R. 1963 Punj. 187.

Merely because a person makes a wrong statement before some Authority that does not mean that the person is estopped from saying that the statement was an erroneous one. Thus, where the plaintiff-trust having not title to the suit land filed an application to the Tenancy Authorities for grant of an exemption certificate under S. 88-B of the Bombay Tenancy and Agricultural Lands Act, 1948 and in those proceedings tenant made a statement that he had no objection to grant of said certificate whereafter certificate was issued, *held*, as the Collector had no jurisdiction to issue exemption certificate as trust had no title to suit land, the tenant was not estopped from challenging the validity of grant of exemption certificate even though he had earlier not objected to its grant: A.I.R. 1981 Bom. 33: 1981 Mah.L.J. 338.

Decree obtained on basis of tenancy—Estoppel against decree-holder pleading that judgment-debtor was not a tenant in execution proceedings. *See* A.I.R. 1953 Trav.-Co. 581. Agreement disowned by party—Plea under agreement is not open to that party: A.I.R. 1955 (N.U.C.) Cal. 2912 (D.B.).

Where a judgment-debtor whose tenancy right has been lost by a rent sale does not object to the claim put forward as subordinate tenant by an applicant for setting aside the sale under S. 174, Bengal Tenancy Act, and get the fullest advantage of the result of the proceedings initiated by him, he is estopped from disputing the subordinate tenancy in a subsequent suit. The judgment-debtor has by his conduct induced the applicant under S. 174, Bengal Tenancy Act, to proceed on the basis of a particular position deliberately taken up in that proceeding and he cannot be allowed to approbate and reprobate. This conduct on his part may be taken to be a species of estoppel which may be described to be an intermediate one between estoppel by record and estoppel in pais. This doctrine applies not only to successive stages of the same suit but also to suits other than the one in which the position had been taken up. A party must not be heard to allege things contradictory to each other. The doctrine of approbate and reprobate is not applicable in a case where there are clear provisions of a statute but applies only to the conduct of parties: 85 Cal.L.J. 149: A.I.R. 1950 Cal. 351.

Application under S. 14(4), West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950)—Tenant contesting on footing that he was tenant—Order under S. 14(4), passed—Tenant submitting to it by making payment of rent month by month—Tenant committing default in payment—Tenant cannot turn round and avoid result of his default by setting up plea that S. 14(4) does not apply to his case as he was not tenant: A.I.R. 1953 Cal. 409.

Where in a suit for eviction and arrears of rent the tenant challenged the validity of the notice terminating the tenancy w.e.f. 8-11-1975 on the ground that in accordance with the rent deed dated 8-10-1974 the tenancy should be determined by the end of the 7th day and that the vacant possession of the building was to be given on the next date (8-11-1975) which was accepted by the Court and it was held that there was no valid notice terminating the tenancy but in the subsequent eviction suit, the tenant contended that termination should be on the 8th and that he could be asked to vacate only on 9-11-1975, *held*, the tenant having obtained an advantage in the earlier suit on the basis of his representation could not turn round

and take up an inconsistent position that he could be asked to vacate only on 9-11-1975. [A.I.R. 1933 P.C. 167, Rel. on]: A.I.R. 1984 Ker. 164: 1983 Ker.L.T. 504.

Where the landholders were granted possession against the tenant in proceedings under S. 38 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 which was not challenged in appeal or in revision and subsequently they moved an application under S. 8(3) of that Act disputing the tenant's entry in the list of tenants made thereunder, *held*, having themselves secured an order under S. 38 of that Act on the hypothesis that the other party was a tenant, the landholders could not subsequently contend to the contrary; the previous order in their favour would constitute a sort of estoppel against them: A.I.R. 1978 Bom. 290: 1978 Mah.L.J. 85.

Suit filed for declaration of ownership of land by adverse possession—Defendants pleading that plaintiffs were tenants and hence there was no question of ownership by adverse possession—No issue framed in such suit whether plaintiffs were tenants of defendants—Suit dismissed—Subsequently, such defendants filing suit for possession on the ground that those plaintiffs were trespassers—Admission by such defendants in earlier suit that those plaintiffs were tenants held to be erroneous—Such admission also fully explained in the subsequent suit and successfully withdrawn—Effect—Before the doctrine of approbate and reprobate will apply, there has to be estoppel in one form or the other—In the earlier suit, nothing that was done by such defendants made those plaintiffs alter their position in any manner and both in the earlier and subsequent suits, those plaintiffs claimed ownership of the land—Therefore, it is incorrect to say that such defendants derived any benefit by the previous litigation—As such, the doctrine does not apply—Such admission, having been held erroneous and also successfully withdrawn, is not binding on such defendants—Those plaintiffs having claimed ownership by adverse possession in the earlier suit cannot now plead that they are the tenants of such defendants on the basis of such admission and if at all, the rule of estoppel will surely apply to those plaintiffs: (1966) 68 Punj.L.R. 866: A.I.R. 1967 Punj. 328.

Where tenant was inducted into the premises by virtue of lease-deeds executed by landlady's father as general attorney on her behalf and thereafter tenant challenged the eviction petitions signed by landlady's father on the ground that he had no authority to sign the eviction petitions and institute the same, *held*, as the tenant accepting the landlady's father as her attorney, took the advantage of having the premises on lease, he was estopped from pleading that landlady's father was not her duly constituted attorney: A.I.R. 1989 Del. 144: (1988) 2 Ren.C.J. 698: (1989) 1 Ren.L.R. 39: (1989) 37 Del.L.T. 88.

Where an application for eviction under S. 7 of the Madras Buildings (Lease and Rent Control) Act, 1946, was rejected on the tenant's plea that as the premises did not fall within the definition of a building he was not a tenant within the meaning of the Act, it is not open to the tenant to turn round and contend in the subsequent civil suit for eviction that the lease relates to a building within the meaning of the Act and that the civil Court has no jurisdiction to entertain the suit. It is well settled that "estoppels" in the sense in which the term is used in English legal phraseology are matters of infinite variety, and are by no means confined to the subjects which are dealt with in Chapter VIII of the Evidence Act. It is wrong to say that the requirements of S. 115, Evidence Act, have to be complied with before founding an estoppel: (1958) 2 An.W.R. 447: A.I.R. 1959 Andh. Pra. 9: I.L.R. (1958) Andh. Pra. 509.

The respondent had earlier objected to the jurisdiction of the civil Court and pleaded that the House Rent Controller had such jurisdiction. The appellant had accepted that position. *Held*, that it did not lie in the mouth of the respondent in appeal to turn round and say that the House Rent Controller had no such jurisdiction and that the appellant should have again sought relief in the civil Court: I.L.R. (1952) Mys. 368: A.I.R. 1953 Mys. 62.

A party litigant cannot be permitted to assume inconsistent positions in Court to the detriment of his opponent. However, upon a given set of facts, a plaintiff may rely upon several different rights in the alternative even though they may be inconsistent. Similarly, a defendant may raise as many

distinct and separate and, therefore, inconsistent defences as he may think, proper.

Where the fact that the cinema building equipped with fixtures and furnitures was leased out, is not in controversy, there is no alteration of position to the detriment of any party as a consequence of representation as to a state of facts, merely because the lessor, who has taken the plea under S. 12(1)(*f*) of the M.P. Accommodation Control Act, that he requires the accommodation *bona fide*, subsequently takes the plea that the demised premises do not fall within the definition of "accommodation" under S. 2 of the Act. No question of estoppel can arise merely because one or both the parties were labouring under mistake of law in regard to the true nature of the transaction: 1969 Jab.L.J. 639: 1969 M.P.L.J. 622: 1969 M.P.W.R. 946.

Unregistered lease deed—Lessee could not blow hot and cold—Lessee as per term of contract not entitled to compensation for trees or if it was inadmissible in evidence , he could not claim compensation for improvement effected: A.I.R. 1967 Mad. 257.

Approbate and reprobate—Mortgagor obtaining possession of property by denying execution of mortgage—Suit for money by mortgage—Mortgagor estopped from raising plea on basis of usufructuary mortgage: A.I.R. 1961 Punj. 477.

A applied under S. 38, Bengal Money-Lenders Act for statutorily taking of accounts of a mortgage executed by him on the ground that the alleged sale and the agreement of re-sale was in fact a mortgage; the Court held that they were two independent transactions of sale in favour of *B* and an agreement of re-sale and the application was dismissed. *B* collusively sold the property to *C*. In a suit by *A* for specific performance of agreement to re-sale, *held*, that *B* had contended that the transaction was sale and agreement to re-sale in S. 38 proceedings. That contention was upheld. *C* could not, because of his collusive transaction have any say in the matter. *B* could not now plead that the transaction was mortgage, since he was bound by his election, founded on the law of estoppel. The suit was based upon the decision in the earlier Money-Lenders Act proceeding and indeed, it grew out of the judgment of the same. There, in that earlier proceeding *B* succeeded on this above representation and it was certainly not open to him/her to change front, and take up an entirely inconsistent plea to defeat *A*'s present action. *Held*, further, that against *A*, however, there would be no estoppel and no legal bar of any kind whatsoever. He no doubt alleged in the proceeding under S. 38 of the Bengal Money-Lenders Act that the sale and the agreement of re-sale of 1940 were parts of a single mortgage transaction. But that allegation was not accepted and his application was dismissed. The principle of election or estoppel could therefore, have no application as against *A*: I.L.R. (1956) 1 Cal. 150.

(*Per Majority: Sarkar J.*, contra).—A vendee who has filed an appeal by special leave to the Supreme Court against a pre-emption decree passed against him is not precluded from proceeding with appeal merely because he has withdrawn the pre-emption price deposited by the pre-emptor in the Court below after the grant of special leave to appeal. In the absence of some statutory provision or of a well-recognised principle of equity, no one can be deprived of his legal rights including a statutory right of appeal. A statutory right of appeal cannot be presumed to have come to an end because the appellant has in the meantime abided by or taken advantage of something done by the opponent under the decree. When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. Upon this principle a person who takes benefit under an order *de hors* the claim on merits cannot repudiate that part of the order which is detrimental to him because the order is to take effect in its entirety. This principle, however, can have no application to the present case where the appellant by withdrawing the pre-emption price has not taken a benefit *de hors* the merits: (1962) 1 S.C.R. 358: A.I.R. 1961 S.C. 1327.

The defendant who possessed a saw-machine entered into a partnership with the plaintiffs and executed a partnership deed to carry on the business of sawing of wood on the plot of the plaintiffs. When the defendant started the business on this plot, the Managing Officer issued a notice to the plaintiffs as to why the allotment of the plot in their favour be not cancelled and the defendant be not dispossessed on the ground that the

plaintiffs had sub-let it to the defendant. In these proceedings, the defendant had sworn an affidavit and made a statement before the Managing Officer that there was no relationship of landlord and tenant between him and the plaintiffs and that they were partners. In a suit by the plaintiffs for dissolution of partnership and rendition of accounts, the defendant pleaded that the relationship between the parties was that of landlord and tenant and the partnership deed had been executed merely to avoid the cancellation of the allotment of the plot made in favour of the plaintiffs. *Held*, that by the statement made before the Managing Officer the defendant had definitely accepted the partnership deed to be correct and admitted, that it represented the true state of affairs. By taking up this position, he had secured an advantage, because otherwise he would have been dispossessed from the plot in dispute. After doing so he could not be allowed to take up a different position and urge that the real relationship between the parties was that of landlord and tenant. The principle of estoppel did not apply. The rule of approbation and reprobation would apply to such a case: I.L.R. (1964) 2 Punj. 5.

Person registered in his personal name as Employer under Calcutta Dock Workers (Regulation of Employment) Scheme—Transfer by such person of his trade and also the registration for being used by the transferee as an authority to carry on trade—Transferor cannot contend that the transferee who has become the owner of the business cannot utilise the registration as it stood in his personal name and not in his trade name: (1963) 6 Fac.L.R. 449: (1963) 2 Lab.L.J. 179 (Cal.).

Approbate and reprobate—Party seeking amendment of Election petition and obtaining order in his favour from Tribunal—Right to turn round and say that amendment must be ignored—Estoppel: I.L.R (1960) Bom. 994: A.I.R. 1961 Bom. 29.

The doctrine of approbate and reprobate is only one application of the doctrine of election and its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto: A.I.R. 1958 Madh. Pra. 333: 1958 Jab.L.J. 427: I.L.R. (1957) Madh. Pra. 396.

Where the Pramukh of a Panchayat Samiti had convened a meeting wherein a no confidence motion was passed against him and the Up-Pramukh and thereafter they participated in the subsequent election for the said offices but were defeated, *held*, they were estopped from disputing the validity of the meeting and the business carried therein: A.I.R. 1983 Pat. 186: (1983) 32 B.L.J.R. 361.

Where the petitioner, a Village Pramukh, himself convened a special meeting on a holiday for considering a no-confidence motion against him and he was also present in the meeting, *held*, the petitioner was estopped from contending that as the meeting was held on a holiday in violation of R. 3 of Bihar Panchayat Samitis and Zilla Parishads (Conduct of Business) Rules, 1963, the entire proceedings must be deemed to be null and void. [A.I.R. 1983 Pat. 186, Rel. on; A.I.R. 1981 Pat. 264, Disting.]: A.I.R. 1984 Pat. 26: 1983 Pat.L.J.R. 656. (*See* also Note 69, *infra*).

By reason of the representation made on the 24th of November, 1946, that it was liable to excess profits tax in the United Kingdom, the company succeeded in inducing the Department to attract to its case the proviso to S. 10, sub-S. (1) of the Finance Act of 1942. When the question arose under S. 11(11) of the Finance Act, 1946 as to how the refund should be brought to tax, the assessee company completely changed its front and took up the attitude that its profits were not liable to excess profits tax in the United Kingdom and therefore, the case did not fall under the proviso to S. 11(11). *Held* that the assessee could not be permitted to deny the truth of the representation made by it on the 24th of November, 1946: (1957) 31 I.T.R. 959: (1957) 59 Bom.L.R. 518: A.I.R. 1958 Bom. 23.

Persons taking active part in matter of framing scheme—They cannot question validity of scheme. *See* A.I.R. 1957 Trav.-Co. 307.

Having taken advantage of the excise duty relief under the scheme by a party, it is precluded from challenging it. A party cannot approbate and reprobate: 1979 Tax.L.R. (N.O.C.) 134 (Del.).

Party taking benefit under contract—Whether can plead that consent was given under mistake: A.I.R. 1957 Madh. Pra. 169.

Transaction dividing family property entered into between father and son to settle family disputes—Mode of succession altered incidentally—Validity—Subsequent plea by

party to arrangement questioning legality thereof—Estoppel: A.I.R. 1958 Bom. 420.

Person submitting to jurisdiction of authority—Estopped from challenging it: A.I.R. 1969 Cal. 458.

Litigant in earlier proceeding putting particular position on basis of which Tribunal to his advantage disclaiming jurisdiction cannot in subsequent proceeding take contrary stand: 1976 Mah.L.J. 425.

The principle of estoppel would apply when a party seeks to take up inconsistent positions as to jurisdiction of civil Court.

Thus, where a lessee succeeds on the question of jurisdiction before the Tahsildar under the Andhra Tenancy Act and obtains an adjudication that no petition for fixation of fair rent lies against him on the footing that he is not a person governed by that Act, he cannot be allowed to question the jurisdiction of civil Court to entertain a suit for recovery of possession and profits filed by lessor only in view of the findings given by the Tahsildar in the previous proceedings under the Andhra Tenancy Act. [A.I.R. 1959 Andh. Pra. 9, Foll.]: (1970) 1 An.L.T. 154: A.I.R. 1970 Andh. Pra. 394.

A party cannot be allowed to approbate and reprobate. This principle is based on the maximum *"allegans contraria non est audiendus"*. It means he shall not be heard who says things contradictory to each other. The maxim applies to proceedings in Court. It creates a sort of estoppel. Where, therefore, the defendant in a case successfully contested the competency of execution proceedings started on the basis of a decree on the award on the ground that the decree contemplated enforcement of the claim by means of a separate suit, he cannot be allowed to say, when the plaintiff filed such a suit that the suit was not for appropriate remedy and it was barred under S. 47, C.P.Code. The suit is competent: 1963 M.P.L.J. 79: 1963 Jab.L.J. 181: A.I.R. 1964 Madh. Pra. 124.

Decree-holder creditors applying for rateable distribution of assets held by executing Court in respect of another decree passed by High Court cannot challenge the decree under which the assets were held, as invalid, on the ground that High Court had no territorial jurisdiction under Cl. 12 of Letters Patent to pass decree for sale of properties outside its local limits of its ordinary original jurisdiction: A.I.R. 1969 S.C. 1147.

Where S. 125 of the Kerala Land Reforms Act, 1964 excluded the jurisdiction of civil Courts in proceedings not pending at the commencement of the Kerala Land Reforms (Amendment) Act, 1969 and mandated that new proceedings covered under the Act would be determined by the Authorities under the Act and it was not clear, in view of the state of law then prevailing, whether an execution initiated after the commencement of the Amending Act was continuation of the suit decreed prior to the commencement or a new proceeding,. *held*, a mere non-raising of the objection of the civil Court's jurisdiction in execution would not amount to waiver: A.I.R. 1979 Ker. 1 (F.B.).

Petition to revenue Court for obtaining order with respect to redemption of mortgage under Hyderabad Land Alienation Act—Objection by opposite party that revenue Court had no jurisdiction to go into the matter and civil Court alone had the jurisdiction—Revenue Court accepting the objection—*Held*, opposite party was estopped from raising the plea in civil suit that civil Court had no jurisdiction: I.L.R. (1964) Andh. Pra. 740: (1964) 2 An.L.T. 245.

Estoppel by taking inconsistent positions—Suit for recovery of ijara money filed in revenue Court—Defendant's objection to jurisdiction of revenue Court to try it allowed and plaint returned—Plaint instituted in civil Court—Defendant is estopped from taking plea that civil Court has no jurisdiction to try the suit: 1963 Raj.L.W. 100: I.L.R. (1963) 13 Raj. 468.

A party cannot take up inconsistent positions, or approbate and reprobate, to the detriment of his opponent: (1910-11) 15 Cal.W.N. 725; (1911-12) 16 Cal.W.N. 736; A.I.R. 1929 Nag. 79; A.I.R. 1930 All. 15. *See* also A.I.R. 1950 Cal. 351: 85 Cal.L.J. 149. Suit filed in Small Cause Court—Defendant's contention as to jurisdiction—Suit represented on original side—Defendant estopped from pleading that suit is small cause: A.I.R. 1926 All. 664; A.I.R. 1930 All. 15 (Case of appeal). Defendant successfully contending that the revenue Court had no jurisdiction, cannot be allowed to challenge the jurisdiction of the civil Court on the ground that the plaintiff had his remedy in

the revenue Court: 1960 M.P.L.J. 405: A.I.R. 1960 Madh. Pra. 138. A party who successfully took a plea and got a judgment in his favour cannot be allowed to take an inconsistent position in any action arising out of the said judgment. This principle has been applied even to cases where a question of jurisdiction is involved. *Held*, on the facts of the case, that the petitioner-lessee who had successfully taken the plea in the eviction proceedings against his sub-lessee before the Rent Controller that he had jurisdiction in the matter, could not be allowed to deny the truth of the said plea in the subsequent proceeding for fixing reasonable and fair rent of the cinema house which the sub-lessee was obliged to resort to on account of the decision of the Rent Controller: 1957 An.L.T. 445: (1957) 1 An.W.R. 196.

A person submitting to exercise of power by the Revenue Officer cannot be permitted to turn round after having lost the cause and challenge the territorial jurisdiction of Revenue Officer: 1980 Punj.L.J. 219: 1980 Rev. L.R. 375.

Where a party sued for eviction in a revenue Court successfully challenges the suit on the ground that the plaintiff, not being a *bhumidar*, could not maintain the suit in that Court is not entitled to turn round and resist the suit for his eviction on the ground that the plaintiff, being a *bhumidar*, could not maintain the suit in the civil Court; he cannot be allowed to approbate and reprobate: A.I.R. 1972 Del. 1 (D.B.).

Suit filed in *T* Court on last day of limitation—On defendant's objection to jurisdiction, plaintiff requesting for return of plaint for representation to *N* Court, and obtaining it—Representation to *N* Court after some days—Both Courts having jurisdiction—Limitation—*Held*, plaintiff was not debarred from contending that trial Court had jurisdiction: (1969) 82 Mad.L.W. 195: (1969) 1 M.L.J. 415.

Where Union filed a complaint against the company under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, to which an objection under S. 59 of said Act was raised by the company that it was not maintainable since the conciliation proceeding under the Industrial Disputes Act, 1947 was pending, whereupon said complaint was withdrawn to which the company did not object, but subsequently in the reference proceedings the company contended that the proceedings under the Industrial Disputes Act were barred by S. 59 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, *held*, the company was estopped by its own conduct from raising such a contention: (1986) 1 Bom.C.R. 484 (D.B.).

The insurer made an application under S. 21(2) of Insurance Act in the Court of Madras. When the Controller of Insurance contended that the Court had no jurisdiction to entertain the application, the insurer filed a similar application before the District Court of Ambala. The Controller took the attitude in that Court that the Madras Court would alone be the Court of competent jurisdiction. The Court at Ambala ultimately dismissed the proceeding. A question of jurisdiction having been mooted in the Madras Court: *Held*, that the Controller of Insurance could not both approbate and reprobate. One of the two Courts would have the necessary jurisdiction, as a matter of logic, and the Controller could not be heard to contend in one Court that the other Court alone had the requisite jurisdiction and to contend precisely to the opposite effect in the other Court. In other words, there was a clear estoppel against this kind of pleading and the Controller was barred from raising the issue of jurisdiction. Territorial jurisdiction was not to proceed to the root of jurisdiction, and the C.P.Code recognises that a party could acquiesce in it. *Held* further, that the Madras Court had jurisdiction on the interpretation of the words the principal place of business of the insurer: (1966) 1 M.L.J. 196: (1966) 1 Comp.L.J. 85: A.I.R. 1966 Mad. 437.

Where the stand taken by the respondent in the proceedings under O. 21, R. 97 throughout was that he was not the judgment-debtor or a representative of the original judgment-debtors and that therefore, the executing Court could not proceed against him under R. 98, it was not open to him to contend later on that as he was in fact a representative of the judgment-debtors, and as such the only remedy open to the appellants lay in execution: (1958) 60 Bom.L.R. 829: I.L.R. (1959) Bom. 256: A.I.R. 1959 Bom. 269.

Inconsistent pleas—Execution proceeding—Nature of property—Prior statement of

judgment-debtor—Binding effect: 150 I.C. 141: A.I.R. 1934 All. 430.

Where a Commission of Inquiry was appointed by the Central Government to look into the improprieties and undue benefits allegedly obtained by the Birla Group of Companies in collusion with Authorities and the jurisdiction of the Commission was challenged after four years when the inquiry became oppressive and the Commission also suggested that the point be got clarified from the High Court, *held*, it is well-settled that by acquiescence no jurisdiction could be conferred where the Authority suffers from inherent lack of jurisdiction; the circumstances do not bear out that the petitioner was approbating and reprobating: A.I.R. 1979 Cal. 114.

Income-tax Act, 1922, Ss. 66-A(2) and 66 — Question of fact — Statements of case agreed statement—Findings of Appellate Tribunal not challenged before High Court but appearing conceded—At stage of appeal before Supreme Court, appellant cannot be permitted to go behind statements of case and to challenge findings contained therein—Evidence Act, 1972, S. 115: A.I.R. 1967 S.C. 417.

Grievance that Regional Transport Authority which heard application was not properly constituted—Objection not raised before Tribunal as to its constitution—One is precluded by one's own conduct from putting forward contention that Tribunal was not properly constituted: (1967) 12 Law Rep. 549 (Mys.).

Stage Carriage permit granted by imposing certain condition—Applicant accepting condition and claiming to have fulfilled it by producing clearance certificate—Validity of condition challenged in appeal or revision—Applicant could not be allowed to challenge validity of condition in writ petition challenging order in revision: A.I.R. 1968 Pat. 248.

Where petitioner applied for grant of a stage carriage permit and the respondent-transport authority asked the petitioner to complete all the formalities pursuant to which petitioner deposited the fees, renovated the bus but respondent without giving him an opportunity of being heard rejected his application, *held*, as respondent had made the petitioner to change its position after asking him to complete all the formalities, it could not deprive the petitioner of a reasonable opportunity of being heard while passing the order rejecting his application, said order was, thus, unsustainable in law: A.I.R. 1995 J.&K. 77.

Motor Vehicles Act, 1939, S. 60—Secretary of R.T.A. issuing notices to show cause why permits granted to it should not be cancelled—*P* appearing before R.T.A. through Counsel and participating in proceedings—Writ petition to quash proceeding—*Held*, since *P* had participated in proceedings it was precluded from contending that proceedings were commenced without issuing proper notices and, therefore, were *ab initio void*: (1968) 16 Law Rep. 492.

Where the States of Haryana and Himachal Pradesh agreed to grant inter-State permits to public carriers on the condition that they would neither pick up nor set down any goods between two points in the same State which is clearly against S. 56 of the Motor Vehicles Act, 1939 and *ultra vires*, *held*, merely because the permit holders desired to retain the permits but assail the condition they could not be said to approbate and reprobate at the same time: A.I.R. 1977 Him. Pra. 46: 1976 Sim.L.C. 18 (D.B.).

Where petitioner accepting conditions put forth by respondent-Doordarshan agreed to produce a serial based on certain novel in 13 episodes but subsequently he contended that the direction that the entire serial should be produced in 13 episodes was unjust and he be permitted to produce the serial in 26 episodes, *held*, the petitioner was estopped from putting forth said contention: A.I.R. 1995 Andh. Pra. 199.

The plaintiff who had migrated from Pakistan was allotted certain land by the Rehabilitation Authorities in lieu of land owned by him in Pakistan. On cancellation of allotment, the plaintiff took impugned land on lease from the Rehabilitation Authorities. The property was later auctioned but the auction was cancelled when plaintiff stated that he was ready to pay higher price. The plaintiff competed in re-auction but when he did not succeed in out-bidding the defendants he filed a suit challenging the order of cancellation of his allotment. *Held*, the plaintiff's participation in the auction and payment of lease money to the Rehabilitation Authorities went a long way to show that the defendants believed that no dispute had been left between the plaintiff and the Rehabilitation Authorities. If the plaintiff was considering the transaction void, he should not have either paid the lease money or taken part in the bid. That conduct of the plaintiff was such that a purchaser at the time of auction could take it that the plaintiff did not claim the property. Thus, the plaintiff was estopped from challenging the validity of

order of cancellation of allotment in his favour. [A.I.R. 1963 S.C. 827; A.I.R. 1971 P.&H. 259; A.I.R. 1974 S.C. 2325, Disting.]: A.I.R. 1984 P.&H. 51: 1983 Rev.L.R. 487.

Mother acting as guardian *ad litem* of minor in previous partition suit—Mother later on representing minor as guardian in sale of minor's property—No estoppel from raising objection to her incompetency to act, during sale: A.I.R. 1968 Pat. 318.

Where mother of deceased who was last male holder claimed succession to his estate in preference to his minor daughters though she had stated in the Court of Guardian Judge that in case she was appointed the guardian of the person and property of the minor daughters, she would not claim any right adverse to the minor daughters in the suit property, *held*, the mother of the deceased was estopped from filing a suit for possession on the basis of title of the suit property: A.I.R. 1987 P.&H. 138: 1987 Rev.L.R. 35: (1987) 91 Punj.L.R. 247: I.L.R. (1987) 2 P.&H. 322.

English case—Action by plaintiff for damages against defendant for injury suffered while working for defendant—Defendant is not estopped from contending that plaintiff was self-employed and not servant of defendant by reason of fact that defendant had given before Tribunal in claim for industrial injury by plaintiff, evidence showing that plaintiff was servant: 1968 Lab.I.C. 423 (Q.B.D.).

W.B. College Teachers (Security of Service) Rules (1977), R. 7—Petitioner, Principal of a Government sponsored College—Suspension of petitioner pending completion of disciplinary proceeding against him—Suspension is in accordance with S. 11 — Petitioner receiving subsistence allowance under the suspension order—He cannot challenge the same—Suspension order is not punishment under S. 9(1)(*iv*)—He cannot approbate or reprobate: (1982-83) 87 Cal.W.N. 340: (1982) 2 Cal.L.J. 46: (1982) 2 Lab.L.J. 427: 1983 Lab.I.C. 806; 1980 Lab.I.C. 466: (1979-80) 84 Cal.W.N. 545 (D.B.).

Where the appellant, a clerk in the Police Department, was selected for the post of Excise Sub-Inspector in the Excise Department and served on that post for some years but later when he was repatriated to his parent Department, he challenged the same and the Court allowed him to continue without interruption in the Excise Department itself but when subsequently the Excise Commissioner made an order compulsorily retiring him from service under R. 3(1)(*a*) and (*b*) of the Punjab Civil Services (Premature Retirement) Rules, 1975 he challenged it on the ground that Excise Commissioner was not competent to make that order since he belonged to Police Department, *held*, as the civil Court had already ruled that the appellant had a right to continue in his substantive appointment as Excise Sub-Inspector, after obtaining that decree from a Court of competent jurisdiction, he could not turn round and say that he still retained lien against his post in the parent Department. [A.I.R. 1976 S.C. 367, Foll.]: A.I.R. 1989 S.C. 1985: 1989 Lab.I.C. 2021.

Where the petitioner, the Head Master of a School, sought an order restraining the respondents from functioning as members of the Managing Committee of the said school contending that their term automatically came to an end on the expiry of the period of three years so limited by R. 17-A of the Bihar High Schools (Constitution, Powers and Functions of Managing Committee) Rules, 1964, *held*, mere participation of the petitioner in the meetings held after expiry of said period in which the respondents also happened to be present, could not create any estoppel in the way of the petitioner to ask for a writ restraining respondents from functioning as members of the Managing Committee, especially when the petitioner had not taken any undue advantage on account of the participation of respondents. [A.I.R. 1967 S.C. 856; A.I.R. 1969 S.C. 329; 1970 Pat.L.J. R. 169, Disting.]: A.I.R. 1976 Pat. 116: 1975 B.L.J.R. 638.

Where some of the books of the petitioner, a publisher, were selected by Selection Committee constituted for selection of books for School and College libraries but subsequently the petitioner raised objection about the constitution of the Committee by the State on the ground of bias on the part of some members of the Committee, *held*, merely by submitting books for selection of which some might have been selected, petitioner could not be said to have waived the objection which he might have to the constitution of the Committee which selected the books. [A.I.R. 1984 Ori. 16, Reversed]: A.I.R. 1984 S.C. 1572.

Plea that though the sale made by the Naib-Tehsildar is valid, but he has no jurisdiction to set aside the sale, *held*, cannot be taken: 1975 Punj.L.J. 254.

Where the benefit of commutation of periodic payments under Regn. 76-B of the Employees' State Insurance Regulations was not *de hors* his entitlement and could not

cause any loss or disadvantage to the Insurance Corporation, *held*, the Corporation could not contend that the employee having got the claim there under was estopped from prosecuting his appeal; he could not be said to be approbating and reprobating because what he was claiming in appeal was not alternative to his claim for commutation; one did not negative the other: (1983) 24 Guj.L.R. 1260.

In a previous writ petition under Art. 32 before the Supreme Court, the case of the petitioner was that he had purchased at auction the whole village *R* for cultivation under a sale deed which clearly stated that a small area of land had already been sold to another. The Supreme Court held that the village *R* fell within the inclusive part of the definition of "an estate" under Art. 31-A(2) (*a*) (*iii*) of the Constitution and therefore, the validity of the Daman Regulation of 1962 was protected from challenge under Arts. 14, 19 and 31 of the Constitution. In a subsequent writ petition before the High Court, between the same parties the petitioner's contention was that he was not the holder of the whole village *R* and as such was not a proprietor as defined in S. 2 (*h*) of the Regulation. *Held*, (*i*) that the doctrine of approbate and reprobate which is a species of estoppel applied to the conduct of the petitioner and he should not be permitted to depart from the unequivocal stand taken by him in the Supreme Court and contend that he is not the proprietor of the whole village; (*ii*) that apart from the doctrine of approbate and reprobate the principle of constructive *res judicata* would also apply. The petitioner might and ought to have raised the plea before the Supreme Court but having failed to do so he could not be permitted to raise the plea again: A.I.R. 1970 Goa 59.

Where the plaintiff had made a specific averment in the plaint that the impugned document was nothing but a Will, *held*, he could not, subsequently, plead that the said document was not a Will but a family arrangement: A.I.R. 1975 Madh. Pra. 136: 1975 M.P.L.J. 156.

Person taking under a Will and administering it—Cannot dispute authority of testator to make the Will—Administrator cannot be allowed to approbate and reprobate the Will: A.I.R. 1963 Cal. 520.

Where respondent claiming to be sole owner of impugned premises by virtue of a Will executed by his deceased father and a relinquishment deed executed in his favour by his brother sought eviction of petitioner-tenant and an eviction order was passed and tenant thereafter disputed validity of Will, *held*, as the tenant after being supplied with necessary documents regarding title of respondent-landlord in suit premises started paying rent to the respondent, he was estopped from challenging the validity of the Will executed by respondents father. [A.I.R. 1977 S.C. 1599, Foll.]: A.I.R. 1985 Del. 338.

Where an Indian Company in collaboration with a Foreign Corporation entered into an agreement permitting it to sell seeds under the specified trade mark of the Corporation but the Company having obtained all the benefits under the agreement committed its breach by selling sub-standard seeds, *held*, the Corporation could sue the Company for permanent injunction; it was on facts entitled to interim injunction; having obtained benefits under the agreement, the Company was estopped from impugning its validity: A.I.R. 1989 N.O.C. 120: (1988) 34 Del.L.T. 136.

Where permission to sell the allotted house, granted in routine, was allowed by the Chandigarh Administration on the condition of paying one-third unearned profit to the Administration prior to the formulation of the prospective R. 8-C of the Chandigarh (Sale of Sites and Buildings) Rules, 1960 and "No Objection Certificate" was issued under that apparent threat, *held*, merely because the owner had made that illegal payment, it could not be said that he was approbating and reprobating; S. 115 was not attracted: 1989 Punj.L.J. 562.

Where parties to a deed had described the land as *Jenmom* land, the redemption and recovery of possession whereof is barred under the Travancore Jenmi and Kudivan Act, 1071 M.E. and was dealt with by the parties on that basis, *held*, it is certainly not open to a party thereto to turn round and contend that it was not *Jenmom* land: A.I.R. 1973 Mad. 471: (1973) 86 Mad.L.W. 505: (1973) 1 M.L.J. 448.

Where in an earlier proceeding the plaintiff in the present case supported the title to the suit property to be adjudicated in favour of one 'G', but subsequently, contended that the sale in favour of 'G' was sham and nominal, *held*, the plaintiff was estopped from laying any claim by her own conduct in view of her failure to raise defence in the earlier case. After having stood by the title of 'G' it was not open to her now to say that G's purchase of property was sham and nominal. [A.I.R. 1973 S.C. 815 and (1973) 2 S.C.J. 538, Disting.]: (1982) 95 Mad.L.W. 359.

25. Promissory estoppel — Scope and applicability.—A "promissory estoppel" which is a recent development of an equitable estoppel operates to preclude perpetration of fraud or causing of injury, in a case, where the representation or promise has been made to induce an action on the part of the party setting up the estoppel. A promise in future has been held to create an estoppel both in England and in America, the principle being that if a promise is made in the expectation that it would be acted upon and it was in fact acted upon, the party making the promise will not be allowed to back out of it and the Courts should insist that the promise so made must be honoured. [(1956) 1 All E.R. 247, Rel. on]: I.L.R. (1961) 2 Punj. 391: (1961) 63 Punj.L.R. 302: A.I.R. 1961 Punj. 314.

The doctrine of promissory estoppel was first enunciated by Denning in 1947 K.B. 130 as flowing in equity when he found that the strict rule of estoppel could not be applied; the doctrine lays down, as explained in (1951) 2 K.B. 215, that when a promise which (*1*) is intended to create legal relations (*2*) to be acted upon by the promise and (*3*) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves repudiation of, or is inconsistent with, his promise: (1975) 88 Mad.L.W. 626 (D.B.).

Though "promissory estoppel" is of old origin, it is only in 1947 that it was rediscovered by Lord Denning; variously called equitable estoppel, *quasi* estoppel and new estoppel, it is evolved by equity to avoid injustice but it does not fall within the realm of contract or equity; its basis is the interposition of equity, which true to its form, stepped in to mitigate the rigours of strict law; it was then not spoken to as estoppel but "raising an equity" but it made only sporadic appearance in stray cases till 1947 and only facts represented but no promises made for future could estop; Lord Denning enunciated a promise intended to be binding, intended to be, and in fact, acted upon is binding so far as its terms properly apply. And there need not be any kind of legal relationship between the parties for invocation of the doctrine; the promise, however, creates such a relationship for future. And unlike in England or the United States, the doctrine of promissory estoppel has been adopted in fullness; it is not merely a defence, it may as well constitute a cause of action: A.I.R. 1979 S.C. 621.

Though the doctrine of promissory estoppel has been considerably watered down in England, the country of its origin and it is no longer available as a "sword" of attack but is only a "shield" of defence there, *held*, the doctrine in India continues to be in full force, as embodied in A.I.R. 1968 S.C. 718: A.I.R. 1979 Del. 122 (D.B.).

While the doctrine of estoppel at common law is founded on the representation as to an existing fact, the doctrine of promissory estoppel is founded on the representation or assurance as to future conduct; the promissory estoppel, thus, subsumes within its ambit both statements of fact as well as promises. The doctrine of promissory estoppel is susceptible of generating enforceable promises and binding contractual obligations even in the absence of consideration which would at common law support the promises and obligations. However, the representation sought to be enforced must be clear, unequivocal, unambiguous and sufficient to found the doctrine of promissory estoppel. Thus, where the State Government promised allotment of chemical fertilisers, an essential commodity, allotted to it by the Central Government if any balance was left after their distribution to District, *held*, as State Government's promise or representation was neither clear nor unequivocal, the rule of promissory estoppel was not attracted: A.I.R. 1975 Andh. Pra. 126: (1974) 2 An.W.R. 228: (1974) 1 An.L.T. 289 (D.B.); (1992-2) 33 Guj.L.R. 1232; (1988) 1 Cal.L.J. 493: (1987-88) 92 Cal.W.N. 999.

Estoppel is a rule of equity; it has gained a new dimension in recent years; a new class, that of promissory estoppel, has come to be recognised both in England and in India, though its full implication is yet to be spelt out; it has assumed importance in recent years though it was dimly noticed in earlier years. [Case law discussed]. [A.I.R. 1968 S.C. 718, Rel. on]: A.I.R. 1972 S.C. 1311: (1974) 87 Mad.L.W. 32.

The common law doctrine of estoppel contained in S. 115 is but a shadow of its modern self which is a recent advance in public law. Orthodox concepts have been discarded. Consideration is no longer necessary; an independent cause of action may now be founded upon promissory estoppel; it is not only a shield but may also be wielded as a sword; detriment no longer needs to be proved; alteration of position on the faith of the representation is quite enough; the desire to do justice through equitable possibilities is so strong that the old traditional concepts of private law are crumbling; a new estoppel

and a "new equity" are emerging: A.I.R. 1983 Del. 445 (F.B.).

The doctrine of promissory estoppel is now very firmly established. It requires only the existence of a possibility of the promises suffering a detriment in case the promisor, whether a private individual or a Government or a governmental agency goes back on his or its promise: (1992) 1 Cal.L.T. (H.C.) 58: (1990-91) 95 Cal.W.N. 873: (1991) 2 Cal.L.J. 255.

The "promissory estoppel" though providing cause of action in equity has to bend before law. "Equity follows the law" is one of the well known maxims of equity. And since "Equity imputes an intention to fulfil an obligation" is another well known maxim of equity, the plea of "promissory estoppel" can only be met by pleading a higher equity to over-shadow the equity arising from the "promissory estoppel": (1981) 83 Punj.L.R. 225.

The doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires, if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it: A.I.R. 1986 S.C. 806: (1985) 4 S.C.C. 369. *See* also (1983) 2 Bom.C.R. 390 (D.B.).

In order to found a plea of estoppel the representation or promise must be specific and unqualified. Secondly, the representation or promise must be made with the intention that it should be acted upon. In this respect promissory estoppel resembles estoppel proper. While the intention to affect legal relationship must be established, such an intention may be deduced objectively, namely, it may be shown that the promisor in his own mind intended to affect legal relationship or that he voluntarily so conducted himself that he cannot be heard to say that he did not intend this to be the result. The representation or the conduct of the representer must have been one reasonably capable of inducing the alteration of the position which the promisee says was its actual consequence and not merely a precursor in point of time. It must have been of such a nature and in that sense calculated or of which the tendency or the natural or probable result is to induce the promisee, in the circumstances of the case, to alter his position in the manner alleged. [A.I.R. 1968 S.C. 718; 1947 K.B. 130; (1956) 1 All E.R. 247; (1964) 3 All E.R. 556; (1891) 3 Ch.D. 82 at 106, Foll.]: 1971 Ker.L.T. 318 (D.B.).

The promissory estoppel being an equitable doctrine, the Government or public bodies are not immune from its operation; it applies only in the absence of a concluded contract; like where a promise is made by one party to the other with the intention of creating a legal relationship to arise in future and the other party has acted upon the promise and changed its position to its detriment; the main question, thus, to be seen is whether the promise was made in exercise of executive functions or otherwise and whether the promisee had acting upon the promise incurred some prejudice or not: A.I.R. 1987 Cal. 88.

In case of a concluded commercial contract between the private party on the one hand and the State on the other hand, the principles of promissory estoppel which are in the domain of legitimate expectation have no application: A.I.R. 1995 Pat. 50.

Doctrine of promissory estoppel ought to be applied against the Government or the Governmental agency where the interest of justice, morality and common fairness clearly dictate such a course. It is, however, also true that the word of caution ought not to be lost sight of that the doctrine of promissory estoppel is an equitable doctrine and it must yield when the equity so requires. But if it is fond by the Court that it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce a promise against the Government. Similarly, if the Government is able to show that the public interest would be prejudiced, the law Courts would have to balance the public interest and to determine which way the equity lies and to pronounce its verdict accordingly. But while claiming exemption from liability to carry out the promise it must be on some definite and disclosed ground of

necessity or expedience: A.I.R. 1987 Cal. 1: (1986) 1 Cal.L.J. 107: (1985-86) 90 Cal.W.N. 449: (1986) 1 Cal.H.N. 210; (1982) 2 Cal.H.N. 90.

Before the doctrine of promissory estoppel can be clamped on an authority or a public body, it must be clearly shown that there was an unambiguous promise. It should not be a matter for inference. The alleged representation must be clear and categorical. A mere hope or possibility is not enough: A.I.R. 1994 P.&H. 175.

When a governmental agency has made a representation to an ordinary individual of a particular set of facts or circumstances, by reason wherefor the individual concerned was wilfully induced to act upon that representation, the governmental agency is estopped as against that individual from contending otherwise. The Government like any other individual is bound by its promises knowing the intent that it would be acted upon by the promisee and if the promisee acts thereon and thereby alters his position and in that event the inescapable conclusion would be that the Government is to be bound by its promises and there cannot be any exception in regard thereto. [A.I.R. 1968 S.C. 718; A.I.R. 1979 S.C. 621; A.I.R. 1980 S.C. 1285 and A.I.R. 1987 Cal. 1, Rel. on]: A.I.R. 1992 Cal. 86: (1991) 1 Cal.L.J. 491. *See* also I.L.R. (1979) 2 Del. 686 (D.B.); 1992 Punj.L.J. 125: (1992) 1 Rev.L.R. 461 (D.B.) [The Government cannot claim immunity from acting as per its promise merely because it would fetter its future executive action.] The Government or the governmental agency has a duty to the public in general to act fairly and reasonably and, therefore, fair play and justice ought to be the basis on which a governmental agency should act: (1988) 1 Cal.L.J. 493: (1987-88) 92 Cal.W.N. 999.

If the Government or any authority on behalf of the Government has made a representation and acting on that representation a party has altered its situation, then it is not open to the Government to resile from that position and at the instance of the party who has altered its situation to its disadvantage, the Court is entitled to direct the Government or the authority to carry out its promises or its scheme. [A.I.R. 1980 S.C. 1285; A.I.R. 1980 S.C. 768, Rel. on]: A.I.R. 1982 Guj. 107 (D.B.).

The doctrine of promissory estoppel is guided by the principles of justice, fair play and good conscience. It was evolved by equity. Its aim is to prevent injustice and it neither falls in the realm of contract nor in the realm of estoppel proper. It debars one, who has made a clear promise intending to create legal relations knowing or intending that it would be acted upon, from receding or resiling from such promise, if the party to whom the promise was made had, in fact, acted on it, for such receding or resiling would be inequitable and unjust. Promissory estoppel is not also confined to the private relations of the citizens only. It applies as well to the Government actions, and the Government cannot claim to be exempted from the liability to carry out its promise: 1988 Mah.L.J. 807: (1989) 1 Bom.C.R. 68 (D.B.).

The doctrine of promissory estoppel, evolved from equity to avoid injustice, does not fall in the realms of contract or of estoppel; its object is, shorn of its form, to interpose equity so as to mitigate the rigour of strict law. It is also well settled that the promissory estoppel does not operate against the Government or public authority so as to compel it to act upon a representation or promise prohibited by law or outside the authority or power of the Government or public authority. Besides, being an equitable doctrine, estoppel must perforce yield to equity, where the larger public interest so requires or where on facts it would be inequitable to hold the Government or public authority to its promise or representation. Equally promissory estoppel should not be extended, even if founded on an express or implied promise, if it amounted to playing fraud on the Constitution and its enforcement would defeat or tend to defeat the constitutional goals: A.I.R. 1991 S.C. 14: (1991) 1 (Supp.) S.C.C. 68: (1991) 1 S.C.C. 761.

To invoke the doctrine of promissory estoppel the claimant must have relied and acted upon the representation made; that is, the party had changed or altered its position by relying on the assurance or representation; the alteration of position is, thus, the only indispensable requirement of the doctrine and no proof of damage, detriment or prejudice to it need be adduced by the party. The Court, however, would compel the other party to adhere to or abstain from acting upon the representation. It is, however, quite

fundamental that the promissory estoppel cannot be used to compel the Government or public bodies to carry out the representation or promise if it is contrary to law or outside their authority or power, and since it stems out from equity, the principle that he who seeks equity must do equity is also attracted and the promissory estoppel cannot be invoked if it results in inequity and injustice: A.I.R. 1987 S.C. 2414.

The rule of promissory estoppel stipulates that if a party, by words or conduct, has given a promise or assurance to another for creating or effecting a legal relationship and the other party has acted thereupon, the promising party cannot afterwards be allowed to back out from the promise or assurance; the rule is based on the principle that if the promising party was allowed to back out, it would promote to injustice: 1988 Punj.L.J. 123 (D.B.).

There is no need in public law as against private law to insist upon the contractual or other jural relationship before invoking the doctrine of promissory estoppel: the most obvious limitation on the doctrine of estoppel in public law is that it cannot be invoked to compel performance of an *ultra vires* act; it is also equally inapplicable where the discretion of the public authority is sought to be fettered for all time to come; it is, thus, desirable to develop in public law an independent doctrine, based on equity but without importing the full fledged doctrine of promissory estoppel; the growth of an independent concept of estoppel akin to the doctrines of natural justice or colourable exercise of power, or abuse of power, based on the general requirement of exercising constitutional or statutory powers by the authorities, is in the interest of administrative law; instead of resting it on the doctrine of promissory estoppel as in private law it must be tested on the independent administrative concepts of equity between State and citizen and be called administrative estoppel, to enforce the States' promises or to allow it to withdraw them on the touchstone of public interest: A.I.R. 1984 N.O.C. 312 (Andh. Pra.) (D.B.).

Before the doctrine of promissory estoppel can be invoked it must be proved: (*1*) that there was a representation or promise in regard to something to be done in the future; (*2*) that that representation or promise was, intended to affect the legal relations of the parties and to be acted upon according by; and (*3*) that it is one on which the other side has, in fact, acted to its prejudice. [A.I.R. 1968 S.C. 718, Rel. on]: A.I.R. 1971 Bom. 288: 1969 Mah.L.J. 914: (1969) 71 Bom.L.R. 707.

The fundamental requirement of estoppel by conduct is that it must concern an existing state of facts; there is no common law estoppel founded on a statement of future intention. The doctrine of promissory estoppel applies where a promiser is estopped from acting inconsistently with his promise to enforce an existing legal obligation; it differs from the estoppel properly so called in that the representation: (*i*) need not be of an existing fact; (*ii*) should be unambiguous; and (*iii*) should not be prohibited by law: A.I.R. 1975 S.C. 2065.

On scrutiny of various Supreme Court decisions the accepted principles regarding applicability of doctrine of promissory estoppel that emerge are: (*a*) Where one party has, by his words or conduct, made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is, in fact, so acted upon by the other party, the promise would be binding on the party making it, and he would not be entitled to go back upon it if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties and this would be so irrespective of whether there is any pre-existing relationship between the parties; (*b*) the doctrine of promissory estoppel need not be inhibited by the same limitation as estoppel in the strict sense of the term. It is an equitable principle evolved by the Courts for doing justice and there is no reason why it should be given only a limited application by way of defence; (*c*) the promiser should have altered his position in reliance on the promise; (*d*) the doctrine of promissory estoppel is also applicable against Government and the defence based on executive necessity has been categorically negatived; (*e*) if Government does not want its freedom of executive action to be hampered or restricted, it need not make a promise knowing or intending that it would be acted on by the promisee and the promise would alter his position relying upon it. But if Government makes such a promise and the promisee acts in reliance

upon it and alters his position there is no reason why Government should not be compelled to make good such promise like any other private individual; (*f*) since the doctrine of promissory estoppel is an equitable doctrine, it must yield when equity so requires. If it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold Government liable for the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against Government. But in such a case Government would have to place material before the Court that in the changed facts and circumstances or facts which have transpired since the making of the promise, public interest would be jeopardised if Government were required to carry out the promise. On the material to this effect, it would be for the Court to decide which way equity lies; (*g*) mere claim of change of policy would not be sufficient to exonerate Government from the liability; (*h*) "Promissory estoppel" has no application while exercising legislative power and cannot be invoked to compel Government to do an act prohibited by law; (*i*) Government cannot be compelled to abide by a promise made by an Officer or other authority not competent to make such promise: A.I.R. 1986 Ori. 163: (1986) 61 Cut.L.T. 369 (D.B.); A.I.R. 1983 Del. 445 (F.B.).

The well-recognised exceptions to the doctrine of estoppel are: (*1*) There is no promissory estoppel against the Legislature performing its legislative functions; (2) the Government or public authority cannot be estopped from enforcing a statutory prohibition; (3) the doctrine of promissory estoppel cannot bind the Government or a public authority to abide by a representation or promise contrary to law; (4) promissory estoppel is not attracted where the promise or representation is made by the Government Officer or the public authority outside its authority or power; (5) the doctrine of promissory estoppel, being an equitable doctrine, must yield when equity so requires. If the Government shows that having regard to the facts subsequently transpired holding the Government to its promise would result in equity, the Court would raise no equity in favour of the promisee and would not compel the Government to fulfil its promise: A.I.R. 1991 Raj. 45: (1989) 2 Raj.L.W. 386: (1989) 2 Raj.L.R. 662. The officer would be justified in changing the terms of the agreement to the prejudice of the other party on special considerations such as difficult foreign exchange position or other matters which have a bearing on general interest of the State: (1982) 1 S.L.J. 339 (P.&H.) (F.B.). Apart from these exceptions, the Law is now well-settled, the doctrine of promissory estoppel applies against the Government in exercise of its Governmental, public or executive functions: A.I.R. 1991 Raj. 45: (1989) 2 Raj.L.W. 386: (1989) 2 Raj. L.R. 662; A.I.R. 1982 N.O.C. 187: 1981 Raj.L.W. 652: 1981 W.L.N. 397; 1984 M.P.L.J. 251 (D.B.); A.I.R. 1991 Mad. 371 (D.B.).

The basic principles for invoking promissory estoppel are: (*1*) A Legislature cannot be estopped from exercising its power to legislate; (2) they can be invoked against the Government but (*i*) not to restrain it from discharging its duties or obligations imposed by law; (*ii*) no Government or public authority can be held to its promise or representation, an equitable relief, if on established facts and circumstances and in the larger public interest it is found to be inequitable; (*iii*) the doctrine is not attracted if the promise or representation made by the Government or the public officer is *ultra vires* their authority; and (*iv*) doctrine cannot be invoked if the promise or the representation is procured by fraud: A.I.R. 1993 Andh. Pra. 278: (1993) 1 An.L.T. 490: (1993) 1 An.W.R. 288 (F.B.).

The principles of estoppel *qua* their application to Government are: (*1*) estoppel can be made a basis of action against the Government to which the defence of executive necessity is of no avail; (2) though administrative instructions have no force of law but the Government cannot depart therefrom on its own sweet will without rational justification or valid reason for that would violate Arts. 14 and 16 of the Constitution of India; (3) the executive authority must scrupulously conform to the standards laid down in its administrative instructions (in this, prospectus of a Government Medical College) on the pain of invalidation of its action taken in violation of those actions: A.I.R. 1981 Goa 21.

There are some exceptions to the rule of promissory estoppel in its application to the Government: (*1*) Where from subsequently known facts it appears that binding the Government to its promise would occasion great injustice the rule will not be attracted; being an equitable doctrine, it should yield if

equity so desires; (2) where an order sought to be performed on the doctrine of estoppel is *ultra vires*; (3) where it would lend to compel the party to do an act prohibited by law; (4) where it would involve interference with legislative functions. However, though in certain circumstances interest of justice may prevail even over the notions of *ultra vires* as pointed out by *de Smith*, it is difficult to define those circumstances with precision: 1988 Punj.L.J. 123 (D.B.); (1978) 4 All.L.R. 49: 1978 All.L.J. 32 [There is no estoppel against executive act of the Government.] On invocation of promissory estoppel, the Court ought to ask whether the communication from the Government is legislative or executive in character; if it is legislative, the doctrine of promissory estoppel would not apply. A public authority created to exercise statutory powers in the public interest under the legislative authority is precluded from acting inconsistently or incompatibly with the purposes of the grant of statutory powers; estoppel, if attracted, would create contractual fetters in the exercise of statutory powers; it seems logical that the doctrine of estoppel should be excluded whenever its operation would fetter the powers of a public body: A.I.R. 1983 Del. 445 (F.B.).

Broadly speaking the principle that the administration is not estopped from denying the correctness of its prior advice, representation or assurance would apply: (1) When it would override the clear words of a statute, that is, equity should not be allowed to override law; (2) in criminal proceedings; (3) where it would lend *de facto* validity to *ultra vires* administrative acts; (4) to validate an act prohibited by statutory authority; (5) to enable a person to do a thing he is legally disabled from doing; (6) to fetter or barter statutory powers; (7) by the administrative agency's inertia or acquiescence: and (8) the ostensible authority of a Government servant having only limited statutory power: A.I.R. 1974 Andh. Pra. 55: (1973) 2 An.W.R. 157 (D.B.).

When no representation by the State Government has been made to the petitioner pursuant to which the petitioner changed his stance to is detriment, the question of promissory estoppel does not come in: (1985) 2 Cal.L.J. 60.

There is a clear distinction between an act done by an officer of Government and by Government. An officer of Government does not represent Government unless he is authorised to do so. Orders in mutation proceedings in which Government was not a party is not binding upon the Government and cannot form basis of a plea of estoppel against Government: A.I.R. 1964 Him. Pra. 19.

There being a clear distinction between an act or omission on the part of the Government and its officer, an officer having no authority to represent the Government, actual or ostensible, cannot bind the Government; no act or omission on his part can operate as estoppel against the Government: A.I.R. 1973 Raj. 223: 1973 W.L.N. 132: 1973 Raj.L.W. 339. *See* also 1980 B.B.C.J. 81; I.L.R. 46 Pat. 767.

The Government would not be bound by the act of its officers and agents who act beyond the scope of their authority and a person dealing with the agent or the Government must be held to have notice of the limitations of his authority. Thus, where Minister of State for health assured the residents of petitioners village that on a land being donated, a permanent primary health centre would be located there but he failed to fulfil his promise and the petitioner, a representative of residents of his village pleaded estoppel, *held*, even if Minister had given any assurance, the State being the final authority was not bound by such an assurance. [A.I.R. 1980 S.C. 1285, Foll.]: A.I.R. 1985 Madh. Pra. 70: 1984 M.P.L.J. 251 (D.B.).

Where the contractor knew that the Executive Engineer and the Assistant Engineer were the Government's agents deputed to look after the contract works and had no authority to give him assurance of payment at enhanced rates, *held*, no estoppel could arise against the Government on their assurances if at all given: A.I.R. 1973 Raj. 223: 1973 W.L.N. 132: 1973 Raj.L.W. 339.

Officer entering into an agreement within scope of his authority and making representation—Person acting on that representation putting himself in disadvantageous position—Government is estopped from going back on its commitments: I.L.R. (1980) 2 Del. 1450.

The true principle of promissory estoppel seems to be that whether one party has by his words or conduct made to the other a clear

and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it: (1991) 1 Cal.L.J. 194.

It is not necessary, in order to attract the applicability of the doctrine of promissory estoppel, that the promisee, acting in reliance on the promise, should suffer any detriment. What is necessary is only that the promisee should have altered his position in reliance on the promise. The detriment in such case is not some prejudice suffered by the promisee by acting on promise, but the prejudice which would be caused to the promisee, if the promisor were allowed to go back on the promise: (1990) 2 Bom.C.R. 108 (D.B.).

In order to succeed on the plea of estoppel, the burden lies on the claimant to place adequate and cogent material before the Court; it is not necessary indeed to consider the State's defence to the plea because the gist of the doctrine as universally recognised and adopted in India is the actual reliance of the party on the State's representation. Thus, where actual reliance on the Government's representation was not proved and it was found as a fact that the claimed representation was not made, *held*, the State could not be bound down to its "representation" or promise: 1992 M.P.L.J. 677 (D.B.).

For applying the principle of promissory estoppel, it is not necessary that the party claiming protection should suffer detriment or loss. It is sufficient that the aggrieved party has brought about a change in the original position acting upon the representations made by the other party. There must be a casual link between representations and the change in the position of the aggrieved party. [A.I.R. 1979 S.C. 621; A.I.R. 1979 Del. 122 and A.I.R. 1980 Del. 83, Rel. on]: I.L.R. (1981) 1 Del. 514.

The doctrine of promissory estoppel being an equitable doctrine, it must yield place to the equity if the larger public interest so requires: 1992 All.L.J. 1258: 1992 Lab.I.C. 2446.

The doctrine of promissory estoppel would apply for affording relief in cases of subordinate legislation, at least when such subordinate legislation is, so to speak, of the executive type, that is, where such legislation comes in almost from day to day, or where the same is concerned with levy or duty or imposition of the tax on commercial house or tradesman who are continuing with a wide variety and scope of business activity. Promissory estoppel will be applicable even against subordinate legislative function in the above areas, even though such subordinate legislation, in strict theory, is an exercise of sovereign legislative power through a delegated body: (1991-92) 96 Cal.W.N. 1052.

When acting upon the promise or assurance held out by one, the other party alters his position, the principle of promissory estoppel stands in. The aggrieved party may enforce compliance with the assurance or promise. But no one has any right to enforce the compliance when he is guilty of clandestine dealing: (1985) 2 Cal.L.J. 81.

The respondents by their conduct made a clear and unequivocal promise to the petitioner-firm intending to create legal relationship whereby the petitioner-firm had been authorised to hold the exhibition in one of the hotels of respondents and acting on such promise the petitioner-firm incurred considerable expenditure for bringing machinery and other necessary equipment for making proper arrangements for holding the said exhibition, *held*, in view of the fact that the petitioner-firm had acted on the promise given by the respondents, it would be inequitable to allow the respondents to retrace their steps to the disadvantage of the petitioner-firm thereby frustrating its promise to hold the exhibition on the basis of such promise on the proposed dates. [A.I.R. 1979 S.C. 621, Foll.]: A.I.R. 1995 P.&H. 134 (D.B.).

The principle of promissory estoppel cannot be pleaded against a wrong doer and a person who had violated the provision of law: (1992) 62 E.L.T. 501 (Cal.).

The plea of promissory estoppel is a mixed question of fact and law. For obtaining relief under such a plea, foundation is required to be laid down in the pleadings: A.I.R. 1981 Raj. 133: 1980 Raj.L.W. 611 (D.B.).

In view of (1987) 65 S.T.C. (Note) 430, the doctrine of promissory estoppel can be regarded as good law: A.I.R. 1988 S.C. 1247.

A contract with the Union or State Government made without complying with the formalities of S. 175 (3) of the Government of India Act, 1935, or Art. 299(1) of the Constitution of India is a void contract and not merely unenforceable. Such a void contract cannot be ratified at a subsequent stage by the Government. There is no question of estoppel also with regard to contract of this description : A.I.R. 1964 Pat. 555; I.L.R. 41 Pat. 292 : A.I.R. 1962 Pat. 336 (F.B.).

Where allegations in the plaint and the evidence adduced by the plaintiff itself showed that the forest contract was neither made in the name of the Governor nor was it executed by an officer authorised to do so on the Governor's behalf, and was clearly in violation of the mandatory requirements of Art. 299 (1) of the Constitution of India which being in the public interest could not be waived, *held*, the State could not be precluded from impugning the validity of the contract itself and repudiating its liability for the breach of contract; rule of estoppel could not operate against the State: A.I.R. 1972 Madh. Pra. 43: 1971 M.P.L.J. 898 (D.B.).

Execution of contracts by Government Officers — Strict compliance with law — Estoppel. *See* A.I.R. 1958 Cal. 203.

Where the relationship between the State and the building contractors is founded on non-statutory contracts, *held*, the doctrine of promissory estoppel or legitimate expectations *de hors* the terms of the contract is not available against the State's change of policy in public interest which resulted in the contract's termination; building contracts, besides, are not specifically enforceable: A.I.R. 1994 Karn. 77.

The principle of promissory estoppel applies with full force even to administrative actions of the State which strictly speaking do not give rise to contractual obligations between the parties and if a citizen has acted upon an administrative assurance to his disadvantage, the State can be pinned down to its promise: A.I.R. 1989 Ori. 120 (D.B,).

A plea of estoppel can be raised against Government by persons adversely affected. [A.I.R. 1968 S.C. 718, Foll.]: 1971 All.L.J. 796 (D.B.).

The doctrine of promissory estoppel is applicable against the Government in the exercise of its Governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel: A.I.R. 1987 S.C. 179: (1987) 3 S.C.C. 66.

It is well settled that a plea of estoppel must necessarily be based either on a promise or assurance intended to be, and is in fact, acted upon; and the promise or assurance must also pertain to an existing fact. Thus, where no particular Officer of the Bank or the Government was named as having extended the promise or assurance, no estoppel would arise against the Bank or the Government: A.I.R. 1972 Del. 59 (D.B.).

The Government owes a duty to the public to act differently, promissory estoppel cannot be invoked to prevent the Government from doing so. The doctrine of promissory estoppel cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The doctrine of promissory estoppel cannot be applied in teeth of an obligation or liability imposed by law, promissory estoppel cannot be invoked to compel the Government or even a private party to do an act prohibited by law. There can also be no promissory estoppel against the exercise of legislative powers. The Legislature can never be precluded from exercising its legislative functions by resort to the doctrine of promissory estoppel. Thus, where State Government extended the limits of a Municipality under Rajasthan Municipalities Act which was earlier exempted under an agreement and thereafter levied and recovered octroi duty from appellant company, *held*, it could not be said that the State Government was estopped from extending the limits of Municipality: A.I.R. 1981 Raj. 133: 1980 Raj.L.W. 611 (D.B.).

Acceptance of rent by Patel and Patwari as agents of Government under mistake of fact—No estoppel against Government in suit for declaration of occupancy right—Title of occupancy tenant is not created: 1963 Jab.L.J. 461 : 1963 M.P.L.J. 389.

Where the Government was sought to be evicted on the ground of being a tenant in a private building where no agreement of tenancy was executed in writing in terms of Art. 299 of the Constitution of India and what was relied upon as payment of rent was found to be only compensation for use and occupation and oral representation of tenancy relied upon was made by an Officer who had no authority to bind the Government, *held*, the rule of estoppel is not attracted; the Government is not bound by the Officer's promise or representation: A.I.R. 1972 Him. Pra. 1: (1971) 1 Sim.L.J. 40 (D.B.).

Though, it will be necessary for a person, who seeks to rely on the doctrine of promissory estoppel, to show that certain promises or representations were made to him, it is not necessary that these promises or representations must be made expressly only in a communication addressed to that particular individual. Thus, where the State Government offered incentives in a scheme contained in a resolution having general applicability, *held*, it would be no answer to a plea of promissory estoppel that no promise had been made to any particular individual person. [1983 Mah.L.R. (Bom.) 305, Overruled]: A.I.R. 1984 Bom. 161 (F.B.).

Functionaries of a State or the State itself cannot be allowed to say that a concession granted by the State itself was beyond the powers of the State: A.I.R. 1988 S.C. 1247.

Merely because the State Government in exercise of executive powers transferred land to the petitioner at one point of time, it does not mean that forever land has a protective umbrella from any subsequent legislation. The State having passed Ceiling law in exercise of its legislative functions, had duty and mandate to carry it out in exercise of its executive functions. Therefore, the Prescribed Authority, who is a statutory authority under the Ceiling law, has the power to examine and compute the holding of the petitioner and see if there is any surplus area with it: 1985 Punj.L.J. 423: 1985 Rev.L.R. 505: (1985-2) 88 Punj.L.R. 598.

In cases where the materials on record do not indicate that a case of promissory estoppel or infraction of any statutory provisions is made out, a writ may not be available so as to compel the authorities to remedy a breach of a non-statutory concluded contract, except in the rarest of rare cases: (1990-91) 95 Cal.W.N. 243: A.I.R. 1992 N.O.C. 29.

An independent action can be found on the principle of promissory estoppel and it is no longer a principle available only as a shield. It can be used as weapon of offence. Gradually the modern doctrine of promissory estoppel has developed to an extent that it is no longer necessary that the party seeking to enforce the said principle must have suffered a detriment. It is enough if the promisee has altered his position on the faith of the representation. But where no specific promise was being held out and the application forms made it clear that the whole scheme was tentative and without any legal commitment; and it was also on record that the petitioners were themselves clear about this, *held*, that the doctrine of promissory estoppel is not at all attracted. The doctrine is an equitable doctrine and the Court cannot be asked to apply the same to compel something which is inequitable. One who seeks equity must do equity: A.I.R. 1992 Del. 28.

Doctrine of promissory estoppel applies when there is a clear and unequivocal promise to do something on the part of the promisor. If the promisor retains the power of discretion of not being bound by the promise, the whole basis for invoking the doctrine of promissory estoppel goes. Where the scheme itself suggested that it was on an experimental basis and the experiment could be abandoned even at the earliest stage, *held*, this alone is sufficient to establish that there was no firm commitment from the Government: A.I.R. 1992 Del. 53.

Power of Central Government to grant exemption under S. 25(1), Customs Act—Withdrawal of exemption in public interest—Estoppel cannot be invoked against such withdrawal: 1983 E.L.T. 1688: I.L.R. (1983) 2 Del. 327. *See* also A.I.R. 1995 S.C. 874.

Promissory estoppel does not apply to a contract as to the range of quantum of remuneration—It cannot be said that, by the offer of the remuneration (bonus) by the employer, the employee concerned changed their position to their detriment as the offer is made in context which the employees are presumed to know: I.L.R. (1979) 1 Del. 525. In case of a concluded commercial contract between the private party on the one hand and the State on the other hand, the principles of promissory estoppel which are in the legitimate expectation have no application: A.I.R. 1995 Pat. 50.

(*a*). In case of export and import.—The doctrine of promissory or equitable estoppel has no application to the State when the State is acting in its public, Governmental or sovereign capacity except when it is necessary to apply the doctrine to prevent fraud or manifest injustice. Thus, where the Central Government formulated a scheme for providing incentives to registered exporters in walnut, kernel as well as in shell, with a view to increase export and to augment the foreign exchange earnings for the country, but it withdrew said scheme before the expiry of the period of operation of said scheme which was challenged by the petitioners on the ground of estoppel, *held*, the motive for promulgating the scheme appeared to be to promote the export of walnuts to earn foreign exchange, badly needed, and the desire to offset the loss which the exporters were likely to incur. No exporter could be expected to export walnuts only to incur losses and so it was deemed necessary to offset their losses so that they could export and earn the foreign exchange required for the benefit of the State generally. The scheme was not promulgated to be a source of extra profit for the exporters. At the time when the scheme was withdrawn by the Government there was no

scope of any loss to be suffered by the exporters of walnut. Therefore, the Government could not be held bound by a representation made by it, when the need for continuance of the representation was no longer there. [1975 Punj.L.R. 557, Dissent. from]: A.I.R. 1976 J.&K. 41.

Any changes in the Export Control Policy or the guidelines framed thereunder for the pre-ban period are made from time to time; the policy does not constitute an enforceable contract between the Government and the exporters; it is the Government's birth right to change the policy from time to time according to the needs of the developing economy; it is unfortunate that some exporters thereby suffer but estoppel cannot be allowed to hinder the formation of Government policy wherein so many matters like the position of foreign exchange, protection of domestic industries and the State's general interest are involved; that is certainly for the public good. A public body has a right, nay a duty, to exercise its discretion in the way it feels best for promoting the public interest: A.I.R. 1983 Del. 445 (F.B.).

Where a manufacturer was granted a licence to import capital goods on the condition, *inter alia*, that it would export 15 per cent of its product for which the manufacturer gave a written undertaking to the Government, and it was thereafter that the Government promised cash assistance to the manufacturer for such exports which promise was subsequently withdrawn, *held*, the Government was not estopped from withdrawing the cash assistance; the manufacturer could not be said to have effected exports on the promise of cash assistance: A.I.R. 1977 Cal. 459: (1976-77) 81 Cal.W.N. 573 (D.B.).

Where Central Government announced Export Assistant Scheme relying on which the petitioners entered into various contracts with foreign buyers at a price much lesser than the usual market price bearing in mind the cash assistance assured by the Government of India under the said Export Promotion Scheme but subsequently, the Government cancelled said scheme retrospectively, *held*, the Government was estopped from rescinding the said cash assistance scheme: A.I.R. 1991 Kam. 52; A.I.R. 1993 Del. 321: (1993) 51 Del.L.T. 19; (1994-2) 107 Punj.L.R. 8 (Del.): (1994) 54 Del.L.T. 71 (D.B.).

Where Government of India announced International price reimbursement scheme under which Exporter/Manufacturer of engineering goods made of indigenous steel was entitled to reimbursement of difference in domestic price and international price and the petitioner-company which had used indigenous steel on being advised by working committee for construction of steel bridges in Malaysia claimed reimbursement but Government refused to accede to said claim of the petitioner company, *held*, working group being an instrumentality of State, the Government was bound by its representation relying on which the petitioner-company used indigenous steel despite its higher price and incurred more expenditure than what they would have incurred by the use of imported steel for such purpose: A.I.R. 1994 Mad. 83.

Where an exporter acting pursuant to the export policy proclaimed for 3 years set up a plant for manufacture of musical instruments parts from red-sanders wood, acquired requisite skill and raised loans from financial institutions to his detriment and the new export policy barred their export, *held*, the rule of promissory estoppel would undoubtedly apply against the new policy; the uniform view of all Courts including the Supreme Court is that the doctrine is available against the Government if the impugned action is in exercise of statutory power; it is also available against subordinate and delegated legislations which are not at par with enactments of the Legislature. [A.I.R. 1994 Mad. 112, Affirmed]: A.I.R. 1993 Mad. 336: (1993) 1 M.L.J. 569 (D.B.).

Where under the policy in force during 1989-90 export and trading houses were entitled to import licences on the basis of their admissible exports during that year and a new policy was announced on 30 March, 1990, it was not explicitly stated that no imports would be permitted in public interest against those exports, *held*, the authorities were estopped from declining to grant import licences against the exports; the doctrine of promissory estoppel was clearly attracted: A.I.R. 1993 Andh. Pra. 62: (1991) 2 An.L.T. 255.

At the relevant time, there was free trade in the groundnut seeds and oil in the State of Andhra Pradesh. But in view of steep rising in their prices in that State subsequently, the Government instructed its authorities not to

allow export of said articles unless the oil millers and traders give an undertaking that a minimum quantity of groundnut oil would be made available by them at a specified price whenever asked to do so and they accordingly gave such undertaking and it was only then that they were given permits for export. However, subsequently, they challenged the validity of the directions issued by the State Government to deliver groundnut oil in accordance with the undertaking obtained earlier as not within the competence of the State Government. The State Government's contention was that as the scheme devised by it had express acquiescence of the industry, in the form of undertaking, they could have no grievance against the same. *Held*, the agreements, undertakings and other documents executed by the millers and traders were not voluntary and were executed to otherwise avoid catastrophic results to the millers and dealers and had to be necessarily regarded as opposed to public policy, and, thus, unenforceable. So those agreements and undertakings could not raise a plea of estoppel against the millers and traders: A.I.R. 1988 Andh. Pra. 317 (D.B.), affirmed in A.I.R. 1989 S.C. 989.

Where in response to a public notice issued by the Government mentioning therein the articles which could be imported under the scheme for import of spare parts of essential machinery and equipment from U.S.A., the petitioner applied for and granted a licence to import condensing units by the Deputy Chief Controller of Imports and Exports but when the shipment arrived at the Port, its clearance was refused by the Customs Authorities on the ground that the goods imported were not covered by the import licence issued to the petitioner, *held*, as the petitioner had not made any misrepresentation whatsoever and the import licence was granted to it with open eyes and after due consideration by the authority concerned and the petitioner acting upon the import licence had imported the items at a huge cost, the Union of India was under an obligation to permit the petitioner to import the condensing units as described in its application and it was bound to carry out that obligation. It could not avoid it merely because another officer or authority took a different view and considered that such an obligation should not have been undertaken. [A.I.R. 1971 S.C. 1021; A.I.R. 1968 S.C. 718, Rel. on]: A.I.R. 1974 All. 170.

In pursuance of an order of the Central Government permitting import of certain goods into India, the petitioners entered into a contract for the import of Crude drugs and an irrevocable and transferable letter of credit was opened and established on 6-10-86. On the same day a public notice reflecting change of policy was issued whereby a ban was imposed for the import of said commodities. Thereafter, the department prevented the petitioners from importing said drugs under the licence, which was already granted, by reason of change in policy. *Held*, as the petitioners acted on the representation made by the department and the rights and obligation were created between the parties on account of that action, it was impermissible for the department to withdraw and go back from that assurance. Further, mere claim by the Government that change in policy was in public interest was not enough. The Government must disclose to the Court all the necessary material on account of which the exemption from invoking doctrine of promissory estoppel was sought for. The Court would not act on the mere *ipse dixit* of the Government. [A.I.R. 1979 S.C. 621; (1987) 32 E.L.T. 40 (Bom.), Foll.]: A.I.R. 1990 Bom. 376: (1990) 2 Bom.C.R. 671.

Where the import policy was retrospectively amended by public notice and the exception was made only in respect of goods actually in transit, *held*, the bar validly covered the goods in respect whereof an irrevocable letter of credit had been opened in favour of foreign suppliers prior to the public notice; the amendment, based on reasonable classification as it is, does not attract the doctrine of estoppel. [(1987) 2 S.C.R. 989, Rel. on]: A.I.R. 1995 S.C. 370.

Where a letter written by the Government of India mentioned that the holders of additional licence issued for 1978-79 would be entitled to import only those goods which were included in an Appendix 6, Part II of AM 85-88 of Import policy but a letter written earlier by the Additional Secretary to the Government of India was not in consonance with the subsequent direction, *held*, the earlier letter would not in any way affect the position or create any estoppel: A.I.R. 1987 S.C. 179: (1986) 4 S.C.C. 246.

Where on the Food Minister's statement that the Government had abolished levy on imported rice, the petitioners imported rice from other States but they were required to pay levy on imported rice under the Bihar Rice and Paddy Procurement (Second) Order, 1981 and they pleaded estoppel, *held*, the Minister's statement did not tantamount to the Government's statement binding on it; there was no clear announcement that the levy-paid rice brought from outside would be exempt from procurement; it was not a clear and unequivocal promise—but only an oral statement; the Government's refusal to abide by it could not be said to be inequitable. [A.I.R. 1963 S.C. 395, Foll.]: A.I.R. 1982 Pat. 158: 1982 B.L.J.R. 321: 1982 Pat.L.J.R. 307 (D.B.).

Where on the basis of import policies pertaining to palm oil for manufacture of refined palm oil modified from time to time and imports were effected, future commitments were made, finances in foreign exchange were arranged for and huge investments made on the basis of freely available import licences, *held*, the State was estopped from unilaterally changing the import policy which may have adverse effect on the contracts already made and their execution. [A.I.R. 1968 S.C. 718, Rel. on]: A.I.R. 1979 Del. 122 (D.B.).

Where a licence to import heat resistant steel (HRS) was granted for manufacture of auto parts on the basis of consumption when there was no explicit provision therefor in the Import Trade Control Policy, *held*, it cannot be taken to be a representation to the importer that such import would be allowed in the succeeding years as well; the importer could not invoke estoppel against the import authorities on their refusal to allow import of such steel when a technically competent authority had opined against its necessity for manufacture of auto parts. [A.I.R. 1977 P.&H. 268, Rel. on]: A.I.R. 1979 Andh. Pra. 280 (D.B.).

Where petitioner relying upon a notification issued by Central Government under the Custom Act, 1962 which depicted exemption of certain goods from duty, imported goods but before the expiry of period of said notification another notification was issued which enhanced the additional rate of duty and the additional duty on basis of impugned second notification was levied on the petitioner's goods, *held*, a notification issued to grant, modify or withdraw an exemption from duty under the Customs Act being in the nature of piece of subordinate legislation, the doctrine of promissory estoppel could have no application to such notification since there could be no promissory estoppel against the exercise of legislative power. Therefore, the petitioner was required to pay duty on the basis of impugned subsequent notification only: A.I.R. 1988 Cal. 228; 1984 E.L.T. 281: 1984 Tax. L.R. 2606 (Bom.).

Importer indenting for stainless steel circles before amendment—Cannot claim that Government was estopped from recovering higher rate of duty in view of representation as to same being liable for lessor rate of duty: 1983 Tax.L.R. (N.O.C.) 28: 1982 E.L.T. 877: I.L.R. (1982) 2 Del. 1008.

The doctrine of promissory or equitable estoppel does not apply to representations and assurances made by the Government or Officers acting on its behalf. Thus, where the Joint Chief Controller of Imports issued a release order for a certain quantity of steel sheets but later on refused to re-issue it in the final form on the ground that the release order was issued in the first instance without ascertaining whether or not there was compliance of the conditions prescribed in the Red Book and the Hand Book embodying the policy and codified procedure for such allotment, *held*, in the absence of the plea, much less of the proof of the claimant having acted upon the "promise" in the first release order, no ground for invocation of the promissory estoppel was made out; besides, it is extremely doubtful whether the first release order could be regarded as a promise properly so-called. [A.I.R. 1974 S.C. 2325, Foll.]: A.I.R. 1976 Mad. 376: (1976) 89 Mad.L.W. 608.

(*b*). **In case of incentive schemes for setting up industries.**—If the Government wants to resile from a promise or an assurance given by it on the ground that undue advantage was being taken or misuse was being made of the concessions granted, the Court may permit the Government to do so but before allowing the Government to resile from the promise or go back on the assurance the Court would have to be satisfied that allegations by the Government about misuse being made or undue advantage being taken of the concessions given by it were

reasonably well established. Where Government announced certain incentives and concessions to the entrepreneurs for starting new industries and based on said representation, the respondent established a unit but by a subsequent order, the incentives announced earlier were withdrawn on the ground of their alleged misuse but the Government failed to show that any such misuse was being made or undue advantage was taken of the said concessions, *held*, the Government could not be allowed to go back from its promise: A.I.R. 1988 S.C. 1247.

Where the petitioners were invited by the State to set up industries by assuring them supply of the raw material and they changed their position on the basis of that representation but when the factories were ready and were in a position to utilise the raw material, the State Government enacted J.&K. Extraction of Resin Act, 1986 which obliterated the rights of the petitioners and enabled the State to get out of the commitments, *held*, though there is no estoppel against the Legislature but the circumstances of the present case gave rise to a fact situation of estoppel. Thus, the State Government was estopped from backing out from its commitments (*obiter*): A.I.R. 1989 S.C. 1629: (1989) 3 S.C.C. 115.

Where Government by a notification promised to remit electricity duties for industrial advancement of State, and this induced petitioners to establish industry in Rajasthan but the said concession was withdrawn subsequently, by another notification, *held*, the plea of financial distress and draught conditions could not be used by the Government to avoid the liability of doctrine of promissory estoppel, which was created by Government by issuing the previous notification, since no proper and adequate material had been placed by the Government which might show that overriding public interest required that the Government should not be held bound by the promise but should be free to act unfettered by it: A.I.R. 1992 Raj. 51.

Where the State Government with a view to help set up industries in the under-developed forest regions by resolution promised long term supply of timber for 20 years and revision of prices every three years but later on the State Government prescribed rules providing for annual revision of rates, *held*, no substantial prejudice was caused to the industries as the basic factor for determining the price, namely, the prevailing market price, remained unchanged; even assuming that it amounted to a promise, its change was made in public interest; besides, the change was made under law; no estoppel could arise against the Government: A.I.R. 1994 Bom. 155: 1994 Mah.L.J. 415 (D.B.).

Where the petitioner spent a huge amount in setting up of the cotton delinting plant relying on notifications issued by the Government which provided various benefits like exemption from sales tax and interest free sales tax loans for a period of five years from 1-11-1977 to certain specified industries but the State Government (during the period of operation of earlier notifications) issued another notification by which benefits provided earlier were withdrawn, *held*, the Government was estopped for a period of five years from 1-11-1977 from denying the benefit of the scheme for interest free sales tax loan to the petitioners. [A.I.R. 1980 S.C. 1285; A.I.R. 1980 S.C. 768, Foll.]: A.I.R. 1982 Guj. 107: (1982-1) 23 Guj.L.R. 20 (D.B.).

Where an incentive scheme envisaging sales tax benefits was announced by the Government for "large-scale industrial units going to a completely new location in a backward area" and such a unit was so set up for production of industrial alcohol, *held*, the Government was estopped from denying the benefit of the scheme to the new unit merely because its owner had a small scale *khandsari* unit in the same area which at any rate had closed down earlier in 1978; the new unit clearly satisfied the conditions set down in the scheme: (1990-1) 10 Guj.L.H. 65 (D.B.).

Where State Government in an Industrial Policy Resolution which was applicable for the period from 1979 to 1983 promised to grant exemption from levy of octroi and sales tax to new industrial units and the petitioners being lured by the concessions set up a new rolling flour mills and it went into production when the Industrial Policy Resolution for 1979-83 was still in vogue but a subsequent revision of policy was done and exemption to flour mills was withdrawn and the petitioners pleaded estoppel, *held*, the Government was bound to enforce its promise in respect of all units that were established and went into commercial production during the period said Industrial Policy Resolution was in force and the subsequent

revision of the policy denying the exemption to the flour mills was hit by promissory estoppel: A.I.R. 1986 Ori. 163: (1986) 61 Cut.L.T. 369 (D.B.).

Where in pursuance of a scheme announced by the State for providing cash subsidy for setting up and expansion of industries in backward areas, the petitioner-society invested huge money and applied for the same and after its application was duly processed, cash subsidy was sanctioned and a part payment was also made but subsequently, the State failed to pay remaining amount, *held*, the doctrine of promissory estoppel could certainly be invoked by the petitioner and the respondent-authorities could not refuse to release cash subsidy which had been sanctioned earlier: A.I.R. 1992 Guj. 89: (1991-2) 32 Guj.L.R. 852: (1991-2) 11 Guj.L.H. 339; A.I.R. 1991 Cal. 397: (1991) 2 Cal.H.N. 124: (1990-91) 95 Cal.W.N. 833.

The petitioner applied for grant of Central Subsidy under the Central Investment Subsidy Scheme while the scheme was in force. The State level Committee accorded the sanction when the scheme ceased to be in force. The petitioner acting on the promise of the Committee entered into various contracts but as the subsidy was withheld he pleaded estoppel. *Held*, the Committee automatically stood terminated on termination of scheme and, therefore, the "promise" or "sanction" was an assurance by a non-existent body. Further, even if the existence of State level Committee was assumed, the sanction being without authority of scheme was *ultra vires* of the authority of the Committee and, thus, no estoppel arose out of such a promise. [(1949) 1 K.B. 227, Not a good law]: A.I.R. 1994 Ker. 6.

Where the petitioners acting on the representations made in certain scheme of incentives for setting up industries incurred expenditure, set up a manufacturing unit in the hope that the State Government would abide by its words and act according to its representations, but later on the Government refused to grant eligibility certificate to the petitioners, *held*, as the State Government was acting in its executive capacity and not under any legislative powers, it could be compelled to abide by the representations made by it. [1983 Mah.L.R. (Bom.) 305, Overruled]: A.I.R. 1984 Bom. 161: 1984 Mah.L.J. 321: (1984) 1 Bom.C.R. 485 (F.B.).

Where an eligibility certificate was erroneously granted to a party not eligible thereto and on its basis incentives and investment subsidy was also sanctioned and disbursed to it and it was only discovery of the error that the Director of Industries cancelled the incentives and recalled the amounts disbursed, *held*, since the grant of certificate and the sanction and grant of subsidy were all without authority, the doctrine of promissory estoppel could not be invoked: A.I.R. 1994 Andh. Pra. 10.

Where petitioners set up their industry in the State in response to an order issued by Government under which certain concessions were granted to new units with a view to boost industrialisation but exemption was curtailed by a subsequent order issued by Government, and the petitioners which were denied benefits under first order pleaded estoppel, *held*, as the petitioners had set up their industries before passing of subsequent order by Government they were entitled to all the concessions mentioned in the first order: A.I.R. 1987 S.C. 590: (1987) 27 E.L.T. 594: (1987) 1 U.J. (S.C.) 249.

Government issued a notification granting exemptions to sugar industries which was applicable for setting up new industry and expansion of the existing industry. The new liberalised scheme envisaged that the undertaking should merely register itself with the Government without requirement of a licence. The Government issued a press note that the Directorate General of Technical Development would take the applications on record expeditiously. Petitioner applied for registration during the continuance of the scheme. Subsequently, the Government withdrew the exemption regarding requirement of a licence. Even after withdrawal of scheme the petitioner was informed that its application for registration was under consideration. After completing expansion the petitioner applied for incentives which were refused on the ground that policy was rescinded. *Held*, the petitioners had applied for registration before the scheme was rescinded. Respondents were requiring the petitioners to furnish information and assuring that the matter was under consideration. Moreover even when the liberalised licensing policy was withdrawn, the respondents were still assuring the petitioners that the application was under

consideration. The delay in granting the registration was totally unjustified. It was contrary to the assurances made to the Industry. To permit the respondents, after such an inordinate and unexplained delay, to withdraw registration on the ground that policy was rescinded would be contrary to equity and law. Further, the investment and the planning and labour that had gone in the expansion programme could not be ignored: A.I.R. 1985 Del. 344 (D.B.).

Where the Government introduced an incentive scheme in respect of sugar production for 5 years extending benefits to all sugar factories which completed their licensed expansion within those 5 years, *held*, the Government was estopped from denying the benefits to a sugar factory on the ground that it had started the expansion programme before the scheme was announced; the doctrine could be invoked on the ground of equity; the doctrine of executive necessity or freedom of future executive action could not defeat the promissory estoppel: A.I.R. 1989 N.O.C. 35 (Del.) (D.B.).

Where petitioners set up an industry in the backward area because of the representation of the Union and the State Governments that 25% subsidy would be available to the units but the subsidy was denied on the ground that before it could be sanctioned by the State level Committee, the scheme was withdrawn by the Government, *held*, principles of promissory estoppel were applicable as there was a definite promise held out by the respondents by declaring the Scheme that the entrepreneurs who fulfilled the eligibility qualifications under the scheme would be given subsidy. The promise did not come into being on sanction of subsidy by the State level Committee. Thus, the respondents had to consider the case of the petitioner on merits and could not have rejected the claim on the short ground that it was not sanctioned before the expiry of the scheme: A.I.R. 1993 Madh. Pra. 202 (D.B.).

Where the State Government announced its policy by means of a resolution for granting financial assistance and incentives for setting up film studios in the State which included guaranteeing bank advances upto Rs. 25 lac, exempting entertainment tax, giving price preference concession and relying on that policy, the petitioner invested Rs. 31 lacs, *held*, the Government could not be permitted to resile from its policy and curtail the concession; the doctrine of promissory estoppel would very much apply. [A.I.R. 1982 Guj. 198 which was affirmed in A.I.R. 1983 S.C. 848, Foll.]: (1986) 6 Guj.L.H. 60: (1986-1) 27 Guj.L.R. 263.

Merely because an industry is allowed to be set up in the State by grant of an industrial licence or other concessions it does not follow that it becomes entitled to a captive mine to cater to its needs. [*Obiter*]: A.I.R. 1991 S.C. 818.

Where no application for grant of licence for exhibition of cinematograph films in the cinema house of the petitioners could be made up to 31st March, 1990, which was *sine qua non* for availability of the benefit of the grant-in-aid as promised by Government, *held*, petitioners were not eligible for benefit of grant-in-aid promised by Government and, thus, they could not invoke doctrine of promissory estoppel: A.I.R. 1993 All. 30: 1992 All.L.J. 1241 (D.B.).

(*c*). In case of allotment of plots/flats, etc.—Where the petitioner was allotted a plot by the Rajasthan Improvement Trust but possession thereof could not be handed over as the same plot had been allotted to another person also, and thereafter the Improvement Trust promised to allot an alternate plot to petitioner, *held*, the Trust was estopped to wriggle out from the promise by taking recourse to S. 20 of the Contract Act: A.I.R. 1992 Raj. 153: (1991) 1 Raj.L.W. 443 (D.B.).

Where the Authorities with a view to shift printing presses scattered all over Chandigarh to the industrial area earmarked for the purpose invited applications for allotment of plots therein which scheme was subsequently revised so as to reduce the size of plots and enhance their number to accommodate more printing presses before any allotment under the pre-revision scheme had been made and some of the applicants sought to enforce their claim to allotment of larger plots on the ground of promissory estoppel, *held*, the Authorities in fact made no representation or promise to allot larger plots; even if it was made, it was against statutory rules; the rule of promissory estoppel was not attracted. [A.I.R. 1981 P.&H. 30, Affirmed]: A.I.R. 1988 S.C. 354: (1988) 1 S.C.C. 440: (1988) 1 U.J. (S.C.) 365.

Where the petitioner's request for change of category of flat allotment was accepted by

the Government Authorities and enhanced amount demanded by the Authorities was also paid by her but still she had not been handed over the flat in question even though formal letter of allotment had also been issued to her, *held*, the principles of promissory estoppel would be clearly applicable: (1991-2) 100 Punj.L.R. (Del.) 24: (1991) 43 Del.L.T. 111 (D.B.).

Where the petitioner, alongwith the application for allotment of plot, sent certain amount of money and he was informed that a plot had been earmarked and allotment letter would be issued after receipt of balance price due from him and though the petitioner paid balance amount no allotment letter was sent to him and he was informed that allotment letter could not be issued in view of revision of policy by the State Government, *held*, as the petitioner had paid the full price of the plot and there was a clear promise that on payment of balance amount allotment letter would be issued, he was entitled to allotment of plot and the handing over of the possession thereof. His rights could not be prejudiced or affected by any subsequent revision of policy: A.I.R. 1994 P.&H. 157.

Where in pursuance of an offer by the State Government, the petitioner deposited certain amount as demanded by the authorities towards full payment for allotting a plot to him but subsequently, he was informed that under the new policy, the price of plot had enhanced and, thus, he should deposit the balance amount and that the plot originally earmarked for petitioner had not been acquired by the Authorities and, therefore, he must pay the enhanced price for getting allotment, *held*, the Government was entitled to enhance the price provided there was some justification for doing so and that justification has to be made out giving facts and figures to the Court. The Authorities' stand that the price was tentative as the land had not yet been acquired was also without any force. Once the Department decided to allot a plot at a particular price which they claimed to be full price then irrespective of the fact whether the land had been acquired or not would disentitle them to enhance the price later. Thus, the Authorities were directed to allot the plot to the petitioner at the price already deposited by him: (1992) 2 Rev.L.R. 311: (1992-1) 102 Punj.L.R. 632: 1992 Punj.L.J. 296; (1989) 2 Rev.L.R. 423 (D.B.).

A Court can enforce compliance by a public authority of the obligation laid on it unless it is established that there are special considerations in public interest. Thus, where the Government announced a scheme for allotment of land to non-resident Indians living abroad to build residential houses in Delhi and the petitioners applied under the scheme and deposited earnest money but the Government subsequently dropped the scheme in public interest, *held*, as the scheme was dropped in the interests of the general public it would be inequitable to enforce the withdrawn promise against the Government. [A.I.R. 1977 S.C. 1496, Foll.]: A.I.R. 1984 Del. 413.

Where the State Housing Development Authority invited applications for allotment of houses under various schemes and it was clearly mentioned in the brochure that the cost of the houses mentioned in the brochure was merely an approximate and was liable to variations and houses were allotted to the petitioners and they took possession thereof, *held*, subsequently, the petitioners could not challenge the increase in cost by the authority: A.I.R. 1988 All. 268 (D.B.).

Where the petitioners applied for allotment of flats and the registration booklet regarding allotment of flats indicated that the authority could change and modify the conditions and its decision would be binding, *held*, the petitioners were estopped from contending that authority could not change the terms and conditions represented to them at the time of registration of flats: A.I.R. 1986 All. 362: (1986) 12 All.L.R. 350 (D.B.).

Where respondent-Development Authority proposed to construct commercial and residential flats in 1977 and the petitioners and others got their applications registered as prospective hire-purchaser and made the prescribed deposits for the purpose but said Authority intimated to the petitioners the revised estimated cost of flats twice in 1979 and 1980 to which the petitioners conceded but when the Authority again intimated to the petitioners a further hike in cost of flats in 1984, the aggrieved petitioners pleaded estoppel, *held*, the petitioners and others, who got themselves registered as far back as 1977 to 1979 were continuing their registration but because of repeated and unexplained increase of the cost of flats intimated by the Development Authority they were placed

disadvantageously in a peculiar condition of helplessness. If they were now asked to withdraw their registration and take back their respective deposits as suggested by the Development Authority, the petitioners stood to suffer seriously because now they could not be put back in the position in which they were in 1977 when they could have exercised an option to acquire flats elsewhere at reasonable cost. Thus, the increase in prices of flats could be struck down on the principle of promissory estoppel: A.I.R. 1986 Madh. Pra. 88: 1985 M.P.L.J. 616 (D.B.).

Where the policy did not indicate the price on which the industrial sheds would be sold on hire-purchase and purported to be "provisional" and subject to change in the light of further discussion with the bankers and other authorities, *held*, such an inchoate policy can neither attract the doctrine of promissory estoppel nor confer any rights or impose any duties on the parties: A.I.R. 1993 Del. 211: (1993) 49 Del.L.T. 56.

Where under its Housing Scheme of 1982 which admittedly provided for allotment of 50 per cent. houses on cash down and the balance on hire purchase basis, the Delhi Development Authority subsequently invited retired and retiring Government servants for out of turn allotment on the same basis, *held*, the Authority could not unilaterally insist that such Government servants who got themselves registered and acted to their detriment must pay for the houses on cash down basis; the Authority directed to adhere to its original allotment Scheme: A.I.R. 1995 Del. 212 (F.B.).

Where petitioners applied for allotment of the shops under Scheduled Castes quota in response to advertisement and in terms of the advertisement they were required to deposit 25% of the reserve price as indicated in the allotment letter, and the petitioners acting on such representation deposited the requisite amount and after taking possession of shops from the respondent, Delhi Development Authority, also started business, but thereafter D.D.A. issued revised demand notices in respect of the shops allotted to the petitioners whereby the price of shops, as originally fixed was revised, *held*, had the petitioners known at that time of deposit of the 25% of the reserve price, as they were required to pay originally, that revised demand of balance of 25% of reserve price would be raised by the D.D.A., they would have perhaps not purchased such shops. Therefore, the D.D.A. was estopped from raising further demand of balance of 25% of the reserve price vide their impugned letters under the doctrine of promissory estoppel: (1994-2) 107 Punj.L.R. 5: (1994) 54 Del.L.T. 68.

Where a plot which was originally earmarked for service industries in the lay out plan was allotted to the petitioner by the Housing Board of the State Government on the payment of one-third cost but subsequently, such allotment was cancelled on the ground that the allotment made was irregular, *held*, when the Housing Board had not used the said plot for the original purpose for which it was earmarked, and when the actual order of allotment had been issued by the Government after receiving a portion of consideration and it had also executed a lease-cum-sale agreement, in such a situation the doctrine of promissory estoppel clearly attracted and, thus, the State Government was not justified in cancelling the allotment: (1992) 1 M.L.J. 578.

Where land was acquired on payment of full compensation under the Land Acquisition Act and a promise was made to allot them plots in the scheme, *held*, since the position of the claimants was not changed to their detriment on such promise, the rule of estoppel was not attracted; the promise was a mere concession and conferred no right on the claimants: 1989 Punj.L.J. 318. Where though an oustee of land applied for allotment of plot in 1974 at the reserved price, his case could not be finalised till new policy decision was taken by the Government in 1981, *held*, he could not justifiably claim the consideration of his application under 1974 policy decision; equitable doctrine of promissory estoppel could not be invoked merely on account of having applied for allotment of residential plot at the reserve price: 1983 Rev.L.R. 411.

The petitioner was allotted an alternative plot in lieu of land acquired by the Delhi Administration, the petitioner made the requisite deposits of earnest money and balance of the premium due. Thereafter, the petitioner constructed a building on the said plot after obtaining sanction of the building plans from competent authority. The allotment was cancelled later on. *Held*, because of the action of the respondent the petitioner had been placed in a position from where the withdrawal would cause financial loss to the petitioner. Thus, the cancellation of order of allotment by the respondent was barred by estoppel: A.I.R. 1985 Del. 466.

Where the petitioner was allotted a residential plot by the respondent-Housing Board and he was also granted a no objection

certificate to put up residential building in the said plot and a planning permit was also issued permitting the petitioner to construct the building according to the plan and the petitioner put up a building in the plot in accordance with the approved plan but thereafter the respondent-Housing Board cancelled the allotment and ordered resumption of possession of the plot, *held*, the petitioner having acted upon the promise of the respondent had constructed a residential building and it was not open to the respondent to rescind from the promise and refuse to execute the sale deed at such a late stage. [A.I.R. 1986 S.C. 806, Foll.]: (1991) 1 M.L.J. 339.

Where the requisite 15 percent payment for allotment of a flat was accepted belatedly by the Housing Board as well as also other payments thereafter, *held*, it was not open to the Board to turn round and contend that because of belated payment the allotment is deemed to have been cancelled under Cl. 3 of the agreement when Cl. 4 thereof provided for extension of time; the Board could not refuse to allot the plot: 1989 Punj.L.J. 767 (D.B.).

Where a Company was allotted a plot on conditions, *inter alia*, of payment of its cost and completion of construction within specified period but the belated payment was nevertheless accepted but on its failure to complete the construction within time, the allotment was cancelled and the Company was required to deliver back the plot and on its inspection the Company was found to have started fencing of the plot which was considered to be a trespass and the Company was asked to remove the fence and other materials kept there, *held*, mere acceptance of belated payment was no declaration or act or omission on the part of the authorities which could create such an impression amounting to a promise or inducing a belief or expectation in the Company's mind that the allotment order still subsisted or the cancellation order had been revoked; the Company could not invoke to its aid the doctrine of promissory estoppel and the theory of legitimate expectation: A.I.R. 1994 Mad. 14.

Where lands were allotted by Delhi Development Authority to petitioners—educational societies for construction of school buildings at the rate calculated on the basis of no profit no loss and according to the allotment letters, the societies were to pay the difference of the cost of land as might be decided by D.D.A. which meant increased cost of acquisition and other development charges and the societies proceeded with the construction of building but subsequently the D.D.A. demanded the cost on the basis of market value of the land, *held*, as the allotment letters were issued within the authority given under the law and the societies changed their respective position after making payment and taking possession of their respective lands, principle of promissory estoppel was applicable. [A.I.R. 1990 Del. 75, Affirmed]: A.I.R. 1991 Del. 96: (1990) 42 Del.L.T. 651: 1990 Rajdhani L.R. 522 (D.B.).

The petitioner, a housing society, submitted a requisition to the Government for the acquisition of lands for a housing scheme. The Government acquired 8.72 acres of land and directed the petitioner to deposit certain amount but the petitioner deposited much less amount and, thus, the Government released only 5.45 acres to the petitioner. The society repeatedly demanded release of balance land saying that the amount already deposited by it was sufficient as the cost of total land and failed to deposit remaining amount inspite of the Government's requests. Subsequently, the Housing Board decided to allot said remaining lands to another Samiti, to which the petitioner objected raising plea of estoppel. *Held*, the transaction between the petitioner and the Government was purely that of sale and purchase and no agreement or concluded contract had been entered into between the parties. On the contrary, any offer for settlement of the land was on the condition of the payment of the price, which the petitioner failed to pay. Therefore, the principle of promissory estoppel was not attracted: A.I.R. 1984 Pat. 133: 1984 Pat.L.J.R. 1: 1984 B.L.J.R. 256 (D.B.).

A Housing Society was negotiating with holder of a certain land for construction of a housing colony for its members but as his land was included in a scheme of the Improvement Trust, the Society requested the trust to release said land and for permission to develop it into a colony. When subsequently, the society was informed by the trust that it had passed a resolution and also obtained State Government's sanction for releasing said land, the Society, acting on the said promise, got sale deed of the impugned land executed in its favour from the owner of the land and proceeded ahead with the survey of the land and preparations of plans for development. But, subsequently, the trust intimated that the permission and sanction accorded to it was cancelled. *Held*, the

trust was in law capable to perform the promise held out by it and acting on said promise the society had changed its position, thus, the trust could not be permitted to go back from its promise. [A.I.R. 1968 S.C. 718; A.I.R. 1971 S.C. 1021, Rel. on]: A.I.R. 1975 Madh. Pra. 93: 1974 M.P.L.J. 887 (D.B.).

Where on the assurance of an Improvement Trust of favourable consideration and exemption from the improvement scheme certain persons set up a society and deposited money with the Trust but the scheme framed by the Trust was scrapped by the Court due to more than 3 years' delay on its part and on farming fresh schemes thereafter the Trust declined to honour its assurance on the ground that they were new schemes, *held*, the Trust's contention gives a complete go by to the well known maxim; "equity feeds the grant of estoppel". The Trust was estopped from refusing to allot plots to the society: A.I.R. 1979 P.&H. 196 (D.B.).

Where State Government allotted certain lands to the respondents which had been escheated to the State and were under mortgage and the respondent-allottees deposited mortgage amount and, consequently, Collector issued order of allotment and warrants of possession, *held*, by reason of said orders in favour of the respondent-allottees, they had acquired a right under the doctrine of promissory estoppel to call upon the Government to regularise the allotment of land to them if for any reason order of allotment made by Collector was defective. Thus, even if no registered deed of conveyance or agreement of sale was executed by Government, the respondent-allottees were entitled to claim title to the land. [(1978) 80 Punj.L.R. 195, Affirmed]: A.I.R. 1989 S.C. 1426.

Where the Managing Officer acting within ambit of its authority made a representation to allot the disputed land in favour of the petitioner-society and acting on that representation the petitioner-society deposited certain amount towards payment of price and as a result of the allotment of land made in favour of the members of the petitioners-society, said members did not get themselves registered for allotment of any plot of land with any other society, but later on Government refused to grant disputed land to the society, *held*, as the society and its members had put themselves in a disadvantageous position on the basis of the representation made to them by the concerned officer, the doctrine of promissory estoppel was applicable and the Government was estopped from going back on the commitments made by its Officer. [A.I.R. 1980 S.C. 1285, Foll.]: I.L.R. (1980) 2 Del. 1450: A.I.R. 1981 N.O.C. 149.

Where the petitioner purchased plots from Municipal Committee in an open auction and deposited the entire amount and even sale deed had been executed in her favour but the Committee refused to sanction the plans for construction of flats on said plots, *held*, having auctioned the property, it was incumbent on the Municipal Committee to carry out their part of the duty. They were obliged to accept the instalments, consider and approve the plans in accordance with law and to permit the petitioner the possession and enjoyment of the properties sold to her. [A.I.R. 1971 S.C. 1021, Foll.]: 1992 Punj.L.J. 417.

Where certain land was acquired by the Government for a development scheme and it stood vested in the Development Authority but by the impugned resolution the development authority reconveyed the land to the petitioner land owner, *held*, as said resolution was void as the Development Authority had no jurisdiction to reconvey the land, the petitioner land owner could not invoke the doctrine of promissory estoppel: A.I.R. 1989 N.O.C. 100: I.L.R. (1989) Karn. 75.

Where the terms of the lease did not provide for charging of any fee for granting consent by the Delhi Development Authority to lessee for sale or transfer of the leased property, the order of recovery of such fee would not be valid in view of S. 3 of the Government's Grant Act, 1895. Thus, where D.D.A. granted sale permission to the plaintiff-lessee subject to payment of transfer fee and the plaintiff made the payment under protest eventhough under the lease deed, the D.D.A. was not empowered to impose such condition, subsequently the plaintiff sought to recover that amount, *held*, as payment was made by the plaintiff under pain of refusal of permission, principle of promissory estoppel could not operate against him. Further, there could not be estoppel against statute and as the D.D.A. had charged the amount which it was prohibited from charging under S. 3 of the Government Grants Act. 1895, it could not call in aid the doctrine of estoppel: A.I.R.

1988 Del. 184: 1988 Rajdhani L.R. 23: (1988) 34 Del.L.T. 37.

Where the State Government acting in its administrative capacity handed over impugned premises to the petitioner society and the latter collected money from people for purposes of setting a museum and library but subsequently the State Government demanded back the possession of the impugned premises, *held*, Government was estopped from going back from its promise. [A.I.R. 1980 S.C. 1285 and A.I.R. 1982 Guj. 107, Rel. on]: A.I.R. 1984 N.O.C. 16: (1983-2) 24 Guj.L.R. 1329: (1983) 3 Guj.L.H. 1084.

Where City Municipality, predecessor of respondent Corporation, planned to construct a new central fish market in place of erstwhile market and accordingly it directed all stall holders, fish vendors, etc., to shift their business to alternate temporary sheds and subsequently the petitioner Society of stall holders in erstwhile market invoked doctrine of promissory estoppel against respondent Corporation on its failure to comply with the promise held out by it to the stall holders that they would be given adequate alternate accommodation in the new market, *held*, in the absence of positive evidence that such a promise was held out by Corporation, the plea taken in the petition by petitioner society remained a plea only. Therefore, the question of enforcing S. 115 of the Evidence Act as against the State or the respondent Corporation which was an instrumentality of the State under Art. 12 of the Constitution, not arise: A.I.R. 1993 Karn. 220: (1993) 1 Karn.L.J. 84.

Where with a view to rehabilitate the squatters at road side the Municipal Committee formulated a scheme and with a view to ascertain the true situation and decide about the entitlement of the squatters for allotment of alternative site/shop, surveys were conducted and the petitioners, some of those squatters, contended that their names appeared in the said survey and, therefore, they were entitled for allotment of shops, *held*, as no policy was framed nor was any promise made for allotment of alternative site/shop, the plea of promissory estoppel could not be raised by them: A.I.R. 1988 Del. 57: (1987) 32 Del.L.T. 297 (D.B.).

Where a Municipal Scheme for building tenements on the plots of slum dwellers did not provide for immediate delivery of possession of tenements to the slum dwellers which was provided for by a separate agreement with each slum dweller and slum dwellers, who were mere purchasers of plot from the original allottees, had not entered into any such agreement with the Corporation, *held*, the doctrine of estoppel was not attracted merely because immediate possession had been given pursuant to the agreement with other original allottees; besides, the purchasers could not contend that they had purchased the plots on the Corporation's representation that immediate possession of the tenements constructed on the plots would be granted to them: A.I.R. 1982 Del. 59.

A party obtaining sanction for a lay out plan from the Hyderabad Municipal Corporation by representation that it would earmark and set apart certain areas as open space for a park, playground and community hall, *held*, it was precluded from varying or altering the lay out plan contrary to its representation except by the Corporation's prior permission. [A.I.R. 1971 Cal. 407, Rel. on; A.I.R. 1973 S.C. 814, Disting.]: A.I.R. 1977 N.O.C. 259: (1977) 2 An.W.R. 219.

Where petitioners were granted lease of plots purchased by them under a housing accommodation scheme prepared by the respondent-Trust and subsequently the petitioners challenged the action of the respondent-Trust of leasing out disputed site for construction of Dharamshala eventhough said site was reserved for the purpose of garden only in the map shown to the petitioners at the time when plots were offered, *held*, when the plots in the said scheme were offered to the public on the basis of the map, there was an implied promise given to the intending purchaser that the open land would be kept as an open land and, therefore, on the principles of promissory estoppel the respondent-Trust could not lease out any portion of the open land for constructing a Dharamshala: A.I.R. 1986 Madh. Pra. 134: 1986 Jab.L.J. 537 (D.B.).

Where petitioner purchased flats from Housing Board and the original layout plan sanctioned by the State Government provided for an area reserved for community facilities but later on Board started constructing multistoried buildings on site meant for community facilities which was challenged by the petitioners on the ground of

promissory estoppel, *held*, the petitioners were entitled for the developed area to be provided by the Board for community facilities particularly in view of the fact that they had charged the cost of the whole land proportionately from the allottees and also recovered the expenses on the development thereof in the same ratio and, thus, it could not be said that no such promise was held out by the Board or that the petitioners had no legitimate expectation, short of ownership, of such facilities being provided by the Board: A.I.R. 1994 Him. Pra. 60 (D.B.).

Where the defendants were induced to purchase or take on lease the plots on the basis of the plan of a residential colony prepared by the plaintiff, owner of the plots, and the said plan described the suit land as earmarked for a park, *held*, the plaintiff was barred by estoppel from having a declaration from the Court that the disputed land was her private land and she could do whatever she liked in respect of the suit land and prevent other people from entering into the said land: A.I.R. 1971 Cal. 407: (1971-72) 76 Cal.W.N. 556.

Where the petitioners, holders of residential plots, had consented to the allotment of plots keeping in view the amenities to be provided to them as per numbering plan which included a School and a Community Centre but the competent authority under the Punjab Urban Estates (Development and Regulation) Act, 1964 in a meeting decided to change the proposed use of spaces in question and instead allotted the sites for the purpose of a Convent School and a Satsang Bhawan and the petitioners pleaded estoppel, *held*, it was in accord with the public policy and in the interest of public order and peace and harmony that the change of the user of the sites was decided upon by the competent authorities; it was clearly a governmental and executive function in consonance with the existing circumstances and the demands of the public interest. Therefore, the rule of promissory estoppel would not apply in such a situation: A.I.R. 1986 P.&H. 167: 1986 Punj. L.J. 126: 1986 Rev.L.R. 103.

Where the State Minister as Chairman of the Haryana Urban Development Authority had recommended the claimant for allotment of plot but no application valid under law was made, and there was nothing to show that the claimant had acted upon that recommendation to his detriment, *held*, the doctrine of promissory estoppel is not attracted; the Authority is not bound to allot the plot to the claimant: 1989 Punj.L.J. 647.

(*d*). In case of lease, licence, permit, etc.—The State has to function as a Model State and it cannot back out, with the passage of time, after giving assurance to the citizens to do a particular thing which is within its competence. Thus, where the State Government sanctioned to grant lease of disputed land to the petitioner but it cancelled the order of sanction of leasing the land in petitioner's favour after a period of six years without assigning any reasons regarding irregularity in sanctioning of the lease, *held*, the State Government was estopped from cancelling the sanction of lease: 1991 Punj.L.J. 145.

The doctrine of promissory estoppel applies when there is a clear and unequivocal promise relying on which the other side has acted to his prejudice. Thus, where no clear and unequivocal promise was given at any time to the petitioner-allottees of impugned land that said land would not be resumed or that they would not be evicted, *held*, on resumption of land by Government subsequently, the petitioners could not invoke doctrine of promissory estoppel: A.I.R. 1989 Gau. 12: (1987) 2 Gau.L.R. 421 (D.B.).

It is no doubt true that there is a limitation that the principle of estoppel does not operate at the level of Government policy, where there is a change of Government policy, the statement is applicable but not in a case where there is neither a change in the Government policy nor a replacement of the earlier policy by a new one. The petitioner was granted lease of a building owned by State Government for a period of 3 years. The petitioner invested huge amount of money as the guidelines issued by the State Government provided a maximum period of 30 years for the lease. The petitioner applied for renewal of the lease and it was extended for 6 months. When renewal was in force, the State Government issued a notification inviting tenders for leasing out the impugned building which was in valid occupation of the petitioner and the petitioner pleaded estoppel. *Held*, it was on the basis of the Government policy and the guidelines appended to the Government order that the petitioner

acquired the right to the benefit of lease of impugned building; the right that was invested in the petitioner by virtue of the Government policy could not be taken away unless the policy was changed by the Government. As the said policy continued to exist the right of petitioner to take advantage of such policy also existed; the notification inviting tenders during the rightful occupation of the petitioner of the impugned building was unjustified, the principle of estoppel operated against the Government: A.I.R. 1989 Karn. 192.

If the public interest suffers, the equitable doctrine of estoppel cannot be invoked. On the other hand, in the ordinary course if a citizen is induced to act upon the promise of the Government and he alters his position, on the principles of promissory estoppel, the citizen has to be protected. Where original acquisition proceedings regarding petitioners land were withdrawn on technical grounds pursuant to which petitioner developed a dairy farm on impugned land but subsequently Government issued a notification acquiring the land of the petitioners and the aggrieved petitioner pleaded estoppel, *held*, the State Government never made any promise to the effect that the disputed land of the petitioner would not be acquired in future. Further, the petitioner failed to plead promises made by the Government in objections he had filed under S. 5-A of the Land Acquisition Act, 1894. Thus, the doctrine of promissory estoppel could not be invoked by the petitioner: A.I.R. 1989 Guj. 187: (1989-1) 30 Guj.L.R. 194 (D.B.).

Where land belonged to the Municipal Corporation but it was leased out by the Stadium Committee headed by the District Collector which had no right over the land and was no part of the Corporation, *held*, the lease being illegal, it was not open to the lessee to contend that the Corporation was estopped from asserting the illegality of the lease or the consequent construction on the land as being in violation of the T.N. Parks, playfields and Open Spaces (Preservation and Regulation) Act, 1959: (1990-2) 106 Mad.L.W. 610 (D.B.).

Where the State Government set up a High Powered Committee to compute compensation for the acquired lands of an *inamdar* who undertook not to prefer appeal against the award to be passed on its basis but on finding the compensation so computed to be excessive and unreasonable, the Government reviewed it, *held*, there was absolutely no Government representation that the *inamdar* would be paid compensation as computed by the High Powered Committee; it could not also be said that the *inamdar* had, relying on such representation, acted to his detriment; besides, the High Powered Committee was only a fact finding Committee; by no stretch of imagination could it be termed as an effective State organ which could bind the Government by its report; the doctrine of promissory estoppel was not attracted: (1986) 6 Guj.L.H. 896 (D.B.).

Acts of Parliament are not representations; they either create duties for statutory bodies or rights for citizens or both; in either event the citizen has a legal remedy to compel the statutory body to perform its duty towards him. Thus, where the Delhi Development Authority had given a plot of land on perpetual lease for construction of a cinema house and the lessee invoked the doctrine of promissory estoppel against the Authority that it had not carried out the assurances of planned development of the District Centre embodied in the Delhi Development Act when tenders for the lease were invited and consequently the lessee incurred losses in its cinema business which rendered him incapable of making timely payment of annual rent resulting in accumulation of arrears, *held*, for want of pleadings and evidence that the lessee had available alternative sites at lower rent which but for the Authority's assurances he would have taken, the only inference is that the lessee had entered into the transaction as a prudent businessman on commercial considerations with open eyes; the doctrine of estoppel was not attracted: A.I.R. 1980 Del. 83: I.L.R. (1979) 2 Del. 742 (D.B.).

The Municipal Committee resolved to sell certain land and the petitioner deposited money even before said resolution was approved. The Municipal Committee accepted the money subject to the approval of the State Government. Before any approval could be obtained the petitioner submitted a building plan which was sanctioned. The petitioner proceeded with the construction but subsequently sanction of the plan was revoked and the petitioner pleaded estoppel. *Held*, as there was no evidence of any promise or representation by the Committee

on the basis of which the petitioner might have altered his position, the petitioner was not entitled to invoke the principle of promissory estoppel: A.I.R. 1994 P.&H. 175.

Where the Regional Development Authority granted permission to the petitioner regarding construction of a Cinema House but the State Government set it aside under S. 64 of the Bihar Regional Development Authority (Second) Ordinance, 1976 which empowered State Government to set aside any resolution of the Authority if it was in excess of authority conferred by law, *held*, as permission granted was absolutely legal, the State Government could not set it aside. Further, the State Government never objected to said construction and, thus, it would be estopped from setting aside the permission when the construction was near completion: A.I.R. 1978 N.O.C. 26 (Pat.) (D.B.).

A body corporate, whether statutory or incorporated, has to act within the framework and guidance of its binding rules; thus, where the Municipal Corporation did not communicate its decision on the sanction sought from it for a building plan within 2 months of the application, it could not be contended that the Corporation had thereby refused to sanction the plan and a fresh sanction is required to be sought unless the relevant rule expressly provides therefor: (1992) 2 Cal.H.N. 163: (1992) 2 Cal.L.J. 122.

Where permission by the then Minister for Works and Housing was granted to the Indian Express with the Delhi Development Authority concurring to amalgamation of two leaseout plots on the basis whereof two basements and extra construction were built, *held*, the lessor Government is clearly precluded by promissory estoppel to contend that the Minister's order was illegal, improper and invalid: A.I.R. 1986 S.C. 872: (1986) 1 S.C.C. 133.

Where respondent applied for permission to transfer the disputed property by way of sale under S. 27(2) of the Urban Land (Ceiling and Regulation) Act, 1976 and the permission was granted after making an enquiry but subsequently the competent authority recalled its earlier order under S. 27 and declared the said sale in favour of petitioners as *null* and *void*, *held*, it was a duty of the competent authority to take care and caution before passing an order under S. 27 granting permission and once permission was granted and properties were sold on the basis of such permission, the innocent and *bona fide* purchaser could not be made to suffer for any lapse or negligence on the part of the competent authority: A.I.R. 1988 Cal. 38: (1987) 1 Cal.L.J. 143: (1987) 1 Cal.H.N. 251.

Where a promoter constructed and sold flats on the representation when S. 7-A of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 that only one building would be raised on the plot but later on by amendment of the section construction of an additional building was also allowed, *held*, the promoter could not be estopped to raise the additional building in accordance with the law and building rules: (1994) 1 Bom.C.R. 444.

Where the competent authority granted permission under S. 21(1) of the Urban Land (Ceiling and Regulation) Act, 1976 on the condition that the construction would commence within the time specified and on the breach of condition, it cancelled the permission, *held*, the condition being illegal, the competent authority could not contend the condition having been accepted, its validity could not be impugned in the writ Court; there can be no estoppel against statute: A.I.R. 1994 Guj. 130.

Where the Municipal Corporation in the tender and auction notices had expressly reserved its rights to cancel the auction or to refuse the highest bid or tender and it cancelled the auction, *held*, the doctrine of estopped was not attracted; the Corporation had made no promise to hold the auction at any rate; the party had done nothing to its prejudice pursuant to any promise. [A.I.R. 1971 S.C. 1021; A.I.R. 1967 S.C. 1427, Disting.]: A.I.R. 1982 Mad. 56 (D.B.).

Where a Municipal Corporation invited tenders for sale of a property and the tender of the petitioner was found to be the highest and subsequently, the Corporation sought for confirmation from the petitioner about her willingness to deposit the entire amount of bid within sixty days from the date of receipt of the final acceptance of the tender by the Corporation, and the petitioner agreed to fulfil said condition and wrote to the Corporation in that regard but the petitioner did not get any reply from the Corporation and on enquiries, came to know that it was trying to dispose of the property to the Government

of India, without finalising the tender in her favour, she, therefore, sought a declaration from the writ Court that the transaction should be completed in her favour, *held*, the Corporation merely sought confirmation from the petitioner as to whether she was agreeable to pay the bid amount within sixty days from the date of receipt of final acceptance of the tender, as the petitioner did not specify the same in her tender. Therefore, that by itself could not be considered as a promise made by the respondent for accepting the tender of the petitioner. The principles of estoppel could not be invoked: A.I.R. 1994 Andh. Pra. 312.

Where upon the Company's request for leasing out a large area in a certain area in the Port for keeping its goods was responded to by the Port's Traffic Manager indicating willingness to give a lessor area in a different part on conditions stated, *held*, it did not result in an agreement of lease; it did not satisfy the requirements of S. 34 of the Major Port Trusts Act, 1963 either; since the promise made by the Traffic Inspector is void and unenforceable against the Board of Trustees, it is doubtful whether the Chairman of the Board himself could have sanctioned the lease, the doctrine of promissory estoppel is not attracted: A.I.R. 1991 Andh. Pra. 331: (1991) 1 An.L.T. 582 (D.B.).

Where the State had executed a valid lease deed in favour of a person who was entitled thereunder to claim possession but on the representation of the State that he would be granted lease of another alternative property he surrendered his first lease to the State, *held*, the State Government was estopped from declining to lease the alternative property to him; he had changed his position to his detriment on the State's representation; the State must show ideal conduct *qua* citizens and must not drive law-abiding citizens to litigations: A.I.R. 1979 Ori. 120 (D.B.).

Where the Corporation of the city had leased certain petty shops to the petitioners for certain period whereafter it sought to evict them to which they pleaded that as the then Minister for Urban Development had promised them that they would not be evicted, the Corporation could not evict them, *held*, once the petitioners had entered into the lease with the Corporation, they were bound by the terms thereof. Thus, when the lease had come to a lawful end then the question of invoking the doctrine of promissory estoppel could not arise: A.I.R. 1987 Karn. 159.

Where the Panchayat Rules provided that the shops could be leased out only by public auction, *held*, no estoppel can operate against the Panchayat merely because by its illegal resolution the Panchayat had leased the shop for 3 years on enhanced rent; there can be no estoppel against statute: (1990) 1 M.L.J. 241.

Where land belonging to a *devaswom* was leased by a Trustee, with the Commissioner's sanction, for 99 years with provision for renewal but not for revision of rent and thereafter the State Government allowed him to clear-fell a part of the leased land and it was only thereafter that the State Government initiated revisional proceedings for cancellation of the Commissioner's sanction under S. 99 of the Hindu Religious and Charitable Endowments Act, 1951 which were sought to be quashed on the ground that the lessee had acted to his detriment on the Government's representation by investing large amounts in clear felling and development of the land and it was, therefore, estopped from exercising its revisional powers, *held*, the rule of estoppel is not attracted; the grant of clear-felling permit did not imply validity of the lease; the lessee did not act to his detriment on the faith of that representation; and there could be no estoppel because the revisional power was exercisable for the public good and for persons other than the Government: A.I.R. 1972 Ker. 39: 1970 Ker.L.T. 838: 1970 Ker.L.J. 911 (F.B.).

Where land acquired for excavation of *bajri* for use in the Canal Headworks at Harika Pattan was no more required on completion of the project and it was auctioned for cultivation without success as it had become *banjar qadim* and *choe-burd* whereafter it was leased out on annual rent and the lessee reclaimed the land to make it *barani* and constructed residential quarters for himself and his servants at the cost of Rs. 1,40,000 and Rs. 80,000 on the assurance that it was a long lease for 20 years and when the Government decided to surrender the land to the original owners on refund of compensation, the lessee purchased their rights by registered deeds, *held*, the Government was estopped from refusing to transfer the land to the lessee or from dispossessing him from the land: 1992 Punj.L.J. 83.

Where State Government granted licence to the petitioner to establish a saw mill and the petitioner acting on the said permission spent huge amount but, subsequently, said permission was withdrawn, *held*, it would be inequitable if the petitioner was not allowed to start this mill and the Government was estopped from cancelling the licence. [A.I.R. 1986 S.C. 806, Foll.]: A.I.R. 1990 Gau. 24: (1989) 1 Gau.L.R. 63 (D.B.).

The rule of promissory estoppel is not founded upon any right, statutory or contractual but on equity. Thus, where the contract contained a clause for extension of time in case the work was not completed but the State revoked the clause when the contractors had already invested money on the basis of the aforesaid clause, *held*, the contractor had altered his position on the assurance from the State, the rule of promissory estoppel was attracted; revocation was illegal: A.I.R. 1984 J.&K. 10.

The plaintiff-contractor entered into a contract with defendant trust for construction of a road. Under the terms of the contract it was obligatory on the plaintiff to settle the rate at the earliest with the Engineer on account of additional work done by him. The plaintiff received payment after completion of work. But, thereafter filed a suit claiming payment for additional work on account of having supplied earth beyond the lead of two miles. Though the defendant-trust pleaded that the plaintiff was to supply the earth at flat rate irrespective of any lead.

Held, the plaintiff neither settled the extra rate with the Engineer concerned nor filed any bill claiming that amount. Thus, the plaintiff by his own acts and conduct was disentitled to claim amount on account of additional work done by him: A.I.R. 1984 P.&H. 185.

The tender of the petitioner, a trader in tendu leaves, was accepted by the State Government. The petitioner's application for renewal of last year's agreement was refused on the ground that unit for which the petitioner's bid was accepted had been regrouped into another unit and the petitioner pleaded estoppel.

Held, the Government did not make any promise. On the other hand, under the agreement option was given to the petitioner to apply for renewal of his agreement on such terms as the State Government might accept but if was open to State Government under the agreement to refuse renewal without disclosing any reason. There was valid reason for refusing renewal. Thus, the principle of estoppel was inapplicable: A.I.R. 1987 Madh. Pra. 212 (D.B.).

Corporation invited tenders on the condition that if the tenderer was not intimated within forty days he must get in touch with the Corporation, otherwise it would presume that the Corporation's acceptance or rejection of his tender, whichever be the case, would be assumed to have been communicated to him. On expiry of 40 days the tenderer approached the Corporation and was apprised that the finalisation of the contract was not proceeded with because of the High Court's injunction, whereupon the tenderer demanded back the earnest money. *Held*, the contract not having been finalised within the stipulated time, it stood frustrated; the Corporation was estopped thereafter from finalising the contract unilaterally and refusing to refund the earnest money: A.I.R. 1990 All. 205 (D.B.).

Where the respondent-State Electricity Board invited tenders for supply of conductors and petitioner's tender was accepted by the Board and the petitioner supplied conductors amounting to one-third of total supply but by a letter the respondent asked the petitioners to defer further supply in pursuance of a clause of the contract due to unavoidable circumstances but subsequently the respondent invited fresh tenders, *held*, as the respondent deferred further supplies in pursuance of terms of contract between the parties, no question of promissory estoppel arose: A.I.R. 1984 Madh. Pra. 44: 1984 M.P.L.J. 20 (D.B.).

Where the petitioners-lessees of the forest land granted to them by the Government applied for renewal of the lease and they also paid the renewal fee as well as premium on the demand made by the Government and were allowed to continue in possession of leasehold land pending the formal grant of renewal but subsequently after a long time the impugned Government orders changing the policy of the Government was passed as a result of which grant of renewal was refused, *held*, the Departmental Officers who had delayed the issue of the formal grant of renewal could not take advantage of

impugned Government orders which came into existence long subsequently and say that the petitioners had no right of renewal under the said Government Orders. The delay in the disposal of their application for renewal of lease by the respondents could not prejudice the applicants in any way: A.I.R. 1985 Mad. 104 (D.B.).

When there is a clash between personal and public interest, the latter must prevail. The petitioner applied for and was granted provisional certificate to start a factory for manufacture of hydrated and burnt lime by the District Industries Centre. The petitioner was allotted plots on lease for that purpose. The petitioner also got sanctioned a loan from State Financial Corporation and started construction of the factory. The petitioner applied for grant of "no objection certificate' from the Special Area Development Authority (SADA) and Town and Country Planning Authority but it was refused on the ground that manufacture of hydrated lime would result in air pollution though State Pollution Board had granted it.

Held, the SADA and the Town and Country Planning Authority were not parties to the grant of lease of the plots for manufacturing hydrated and burnt lime and the petitioner had not acted on their promises in erecting the factory. There could be no promissory estoppel against them because the petitioner had taken loan and constructed the factory at his own risk. Overriding public interest required that even the District Industries Centre which had granted provisional certificate to start said factory to the petitioner should not be bound by its promise and should be free to act unfettered by it: A.I.R. 1989 Madh. Pra. 82: 1989 M.P.L.J. 63 (D.B.).

Where by an open advertisement, the Collector acting on behalf of the President of India and in association with the Department of Tourism invited tender for lease of land and construction thereupon of a good and accomplished restaurant and eventually a completed contract between the parties was executed, construction was raised and the restaurant partially started functioning when the Government cancelled the contract on the ground of want of authority in the Collector, *held*, there had been a specific promise held by the Government inducing the petitioners to carry a belief in their mind about the validity of leasehold rights and allowing the construction to go ahead and the petitioners acted on that promise and assurance since the representation was clear in terms, in spirit as also in law. Therefore, the respondent-Government was estopped from going back from its promise: (1989) 2 Bom.C.R. 261 (D.B.).

The petitioner was granted lease of impugned well for certain period after Collector gave permission to the Panchayat for leasing out said well. On expiry of period of lease, the Resident Deputy Collector granted further extension to the petitioner without any proposal to that effect from the Panchayat contrary to S. 98 (1) of the Gujarat Panchayats Acts, 1962. Order of Resident Deputy Collector was cancelled on the ground that recommendation of Panchayat or previous sanction of Collector for extension of lease was missing. The petitioner contended that Panchayat had no authority to deal with the well and its recommendation was not necessary. *Held*, the petitioner had never questioned the rights of the Panchayat in the past. It had entered into a contract with the Panchayat pursuant to order granting him lease of the impugned well. It was, therefore, not open to the petitioner to contend that Panchayat had no authority to deal with the well in question and that its recommendation was not necessary for considering the question of any lease for a further period beyond the expiry of the period for which it was granted to the petitioner: A.I.R. 1991 Guj. 63.

Where on account of failure of the petitioner, who was highest bidder in an auction held by the State, to submit property statement within stipulated time the auction held in his favour was cancelled and the petitioner who had participated in the second auction subsequently challenged the order of cancellation of auction in his favour, *held*, by participating in the second auction which was a follow up action as a result of passing of cancellation order the petitioner must be deemed to have waived his right to challenge said order of cancellation of earlier auction: A.I.R. 1989 Ori. 233 (D.B.).

Where the petitioners were not given coupes for which they had given highest bids at the auctions as the State Government refused to ratify the bids for good reasons and the petitioners pleaded estoppel, *held*, before

the ratification by the State Government of the bids of the petitioners and execution of agreements between the State and the petitioners it could not be said that the petitioners had altered their position to their prejudice and that consequently the State was estopped by doctrine of promissory estoppel: A.I.R. 1987 Ori. 115: (1987) 63 Cut.L.T. 339 (D.B.).

Where on expiry of lease of a restaurant belonging to Government, fresh auction was held thrice, in which the erstwhile lessee consciously participated, expressed no grievance with regard to holding the auctions and calling for tenders and he did not insist for offer being made to him, on any revision of rent, at the appropriate time, it was subsequently, not open to him to turn round, when the ultimate results had gone against him, to say that there had been a violation of the rules to his prejudice: A.I.R. 1991 Mad. 108.

Where an auction bid had to be approved by competent authorities and it was cancelled and rebid ordered but no clear and specific case is made out but is only vaguely and generally averred that the first bidder had acted on the faith of the promise embodied in the acceptance of his bid at the auction, *held*, in the absence of the requisite factual foundation, the doctrine of estoppel was not attracted. [A.I.R. 1979 S.C. 621, applied; A.I.R. 1974 Pat. 267, Disting.]: A.I.R. 1980 N.O.C. 180: 1980 B.L.J.R. 306 (D.B.).

By a resolution passed by the Public Utilities and Markets Committee on 11th July, 1941 the plaintiff was to be the sole occupier of stall No. 85 and 86 and he was to hold stall No. 84 as one of the occupiers along with *B*. However, the rent roll was not corrected in accordance with the resolution and consequently subsequent rent receipts and licences were issued showing that *B* and the plaintiff were joint occupiers of all the three stalls. No objection was taken on behalf of the plaintiff to the licences and rent receipts as he was in occupation of the three stalls at all material times in terms of the resolution of 1941.

Held, that it could not be said that because of acceptance of the rent receipts and licences without any objection the plaintiff was estopped from claiming to be the sole occupier of stall No. 85 and 86 because the plaintiff did not make any representation to the Corporation on which the Corporation acted. The issue of rent receipts or licences was the act of the Corporation itself. Moreover, it is well-known that the person claiming the benefit of an estoppel must show that he was not aware of the true state of thing. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel and the Corporation could not say that it was not aware of the resolution of 1941: (1959-60) 64 Cal.W.N. 60.

When on the basis of order passed by Mayor-in-Council allotting to the respondent a stall, respondent has deposited the sum demanded as per proper receipt, the Corporation is estopped from cancelling its order: (1991) 2 Cal.L.J. 1: (1990-91) 95 Cal.W.N. 492.

Where the petitioners were bidders in auctions held by the Municipal Council for collection of terminal/passenger tax and they had deposited the requisite amounts as required under the agreements besides security deposit/earnest money but before the date of commencement of those contracts, they were cancelled, *held*, as individual cases had not been picked or chosen but the State Government had issued general orders taking a policy decision that the collection of terminal tax would not be by way of auctions, no case of discrimination was made out. The principle of promissory estoppel was not applicable: A.I.R. 1991 Madh. Pra. 99: 1991 M.P.L.J. 77 (D.B.).

Where the auction in which the petitioner purchased a shop, was subject to confirmation but said confirmation was not granted, however, the petitioner not only remained in possession of the shop but also raised construction without any sanction and apprehending dispossession also got an injunction order in his favour, *held*, he being a rank trespasser was not entitled to the protection of the Court on the ground that after having illegally entered into possession, he raised the construction on the disputed property and was not estopped; no amount of acquiescence will legalise the act which is otherwise illegal: 1993 Punj.L.J. 638 (D.B.).

Certain Harijan persons took Nazul land on lease for one year by offering highest bids relying on the representation made by the Tahsildar that the land would be transferred to Harijan lessees on payment of 90 times the land revenue. The Government later on

decided to sell fifty percent land in public auction and fifty percent by auction to Harijans. *Held*, that the Government must strictly adhere to the conditions on which the Nazul land was put to auction by which lease was granted and the Government should determine the eligibility of the Harijan lessees for permanent transfer of the Nazul lands in their favour under the Rules before disposing it of in any other manner.

The Government is not exempted from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the Judge of its own obligation to the citizen of an *ex parte* appraisement of the circumstances in which the obligation is claimed not to be enforceable: 1968 Punj.L.J. 142.

The ordinary laws of estoppel that arise out of the conduct of the principals apply equally well to contracts entered into by a District Board through its executive officers, with different bus-owners in respect of licences: A.I.R. 1938 Mad. 227: (1938) 1 M.L.J. 391.

Where under a scheme for giving gainful employment to the educated unemployed persons the petitioners were granted routes for operating their buses by the State Road Transport Corporation as its nominee but subsequently the Corporation invited fresh tenders from the educated unemployed persons for operating on various routes including the routes granted to the petitioners and the petitioners pleaded estoppel, *held*, there was no question of estoppel against the Corporation particularly when the petitioners expressed their inability to operate on their routes on the highest rate offered by the fresh tenderers: A.I.R. 1986 Madh. Pra. 103: 1985 M.P.L.J. 434 (D.B.).

Where permits for supply of cement were issued to the petitioners and the petitioners paid advance price and commenced construction of buildings but the State Government refused to supply the quantity of cement covered by permits on account of amendment of Cement Control Order by the Central Government pursuant to which State Order was also amended, *held*, the amendments were effected by statutory orders issued by the Central and State Governments. There could not be any question of promissory estoppel against statutory orders issued by competent authorities having the force of law: A.I.R. 1985 Ker. 255: 1985 Ker.L.T. 244.

Where the contract for setting up an ash-handling plant was granted by the State Electricity Board to a sister concern of the Board's Consulting Engineers who had participated in the drawing up of the project and the grant was impugned by an unsuccessful bider in a writ petition, *held*, the contract was not void; it was only voidable at the Board's instance; since there was ample evidence on record that the petitioner had never, despite knowledge, objected to the consideration of the successful bidder for the grant of contract even in his representation to the Chief Minister and other high dignitaries, he was estopped from impugning the same after the contract had been granted: A.I.R. 1992 Madh. Pra. 318: 1992 Jab.L.J. 593: 1992 M.P.L.J. 953 (D.B.).

Where licences were granted for one year to the handicapped and riot victims to run public call offices at the bus stands and no legal right of renewal of the licence was granted or guaranteed to them, *held*, the new policy to allot the booths by public auction could not be said to be arbitrary; the authorities could not be compelled to renew the licences of the allottees; the doctrine of estoppel was not attracted: A.I.R. 1995 S.C. 461.

Where one of the conditions under which licence was granted to the appellants—producers of yarn—was that the packing of yarn was to be in accordance with directions of Textile Commissioner and Textile Commissioner issued a notification wherein every producer of yarn was required to pack it in hank form which was challenged by the appellants, *held*, the appellants, having accepted the condition while taking the licence, could not now turn round and say that they were not bound by the same: A.I.R. 1993 S.C. 1596: (1993) 3 S.C.C. 438.

Promissory estoppel is a part of the principle of equity. It arises out and on account of equity and ends in equity. It has been said that where law ends equity begins. By its very nature, therefore, it can be called in aid where the justice of the case so requires. It follows that the doctrine of promissory estoppel will not apply to enforce contractual relations between the parties nor would it apply in the teeth of an obligation or liability

imposed by law. In order to base one's claims on promissory estoppel one must state definitely and specifically that he acted on the faith of the promise or representation held out to him. In other words, he must make out a clear and proper case of promissory estoppel.

An auction was held in respect of impugned Jalkar and the settlement was made in favour of the petitioner. Thereafter respondent made several representations to the Collector who decided to hold a fresh bid after giving notice to both, the petitioner and respondent. The bid was knocked down and parwana was issued in favour of the petitioner as respondent did not participate. But on finding that no notice was served on the respondent, Collector ordered re-bid subsequently in which both the petitioner and respondent participated. But bid was knocked down in respondent's favour and the petitioner pleaded estoppel.

Held, a promise was made to respondent to give him notice of bid but bid was held without any notice having been served on him though on the assurance of the authority he had deposited certain amount. The petitioner's bid was not arbitrarily cancelled rather he was given a chance to participate in the bid. Thus, the petitioner could not rely upon the doctrine of promissory estoppel: 1980 B.L.J.R. 306: 1981 Pat.L.J.R. 477 (D.B.).

Where on account of default in payment committed by the appellant the fishery rights were granted to the respondent and the respondent deposited prescribed amount and requested the authority to issue the patta of settlement of the Jalkar in his favour but taking a favourable view of the representations made by the appellant, the Government decided settlement of Jalkar with the appellant and the respondent pleaded estoppel, *held*, the doctrine of promissory estoppel was not applicable as it is well settled that there cannot be any estoppel against the Government in exercise of its sovereign, legislative and executive functions.

Further, as the settlement of Jalkar with respondent was not made and executed in the manner prescribed by Art. 299 of the Constitution it could not be held to be binding on the State Government. [A.I.R. 1968 S.C. 718, Disting.]: A.I.R. 1977 S.C. 2149: (1978) 91 Mad.L.W. 13: 1977 U.J. (S.C.) 586: (1977) 4 S.C.C. 145.

The petitioner, highest bidder in a public auction, was issued a provisional parwana of settlement of the impugned ghat after he had deposited half of auction money the petitioner thereafter invested huge sums of money over the improvement, running and management of the ghat. But subsequently the Government settled ghat in question in favour of another person. *Held*, the Government are not exempt from the equity arising out of the acts done by citizens to their prejudice, relying upon the representation made by the Government. Thus, the Government was estopped from making settlement of ghat in favour of person other than the petitioner. [A.I.R. 1968 S.C. 718; A.I.R. 1971 S.C. 1021, Rel. on]: A.I.R. 1974 Pat. 267: 1974 B.L.J.R. 595 (D.B.).

Where the petitioner society applied for extension of lease of fishery granted to it and the State Government granted extension pursuant to which the petitioner deposited revenue, incurred expenditure in making fishing arrangements but subsequently Government cancelled its previous order of extension, *held*, the State Government was estopped from cancelling the extension order: A.I.R. 1982 Gau. 14.

Where the Deputy Commissioner's purported action in granting fishery rights was approved by the Commissioner and some consequential deposits were also accepted which was in direct infraction of the State's general instructions and specific directions *qua* the grantee, *held*, the State is not bound by the doctrine of promissory estoppel: A.I.R. 1986 Pat. 267: 1986 Pat.L.J.R. 149: 1986 B.L.J.R. 206 (F.B.) [Overruled in A.I.R. 1992 Pat. 21 only on another point.]

Where a Government notification to change the system of allotment of lease right for minerals was issued after the petitioners had applied for leases in response to earlier advertisement and petitioners raised objections at the time of draw of lot against the changed system on account of impugned notification, *held*, it could not be said that by their conduct the petitioners had become disentitled to question the validity of the notification: A.I.R. 1980 Raj. 83: 1979 W.L.N. 354: 1979 Raj.L.W. 502 (D.B.).

A mining lease was sanctioned in favour of the petitioner for which Rs. 25,000 was fixed as annual dead rent but subsequently, the said rent was revised and was fixed at Rs. 68, 000 and the petitioner agreed to it and accordingly, the lease deed was registered. *Held*, the petitioner having himself accepted the revised terms and further having undertaken to pay the revised rates could not be permitted to go back on the principle of estoppel: 1994 D.N.J. 616 (Raj.).

Where petitioner applied for distributorship of L.P.G. and a letter of intent offering the distributorship was issued to him relying upon which he took various steps to comply with the requirements specified in the letter and completed all the formalities for the commissioning of the distributorship but later on said letter was cancelled on some non-existent ground, *held*, principle of promissory estoppel was attracted: A.I.R. 1991 All. 1: 1990 All.L.J. 686: 1990 All.W.C. 1305 (D.B.). Where there was a provision for transfer of R.E.P. licence and it was so transferred to the petitioner with notice to the Licensing Authority and the licence had been used by the time the irregularity came to the notice of the Licensing Authority, *held*, the petitioner could not be made to suffer for any lapse or negligence on the part of the original licensee: A.I.R. 1985 Cal. 358: (1985) 2 Cal. H.N. 122.

Where petitioner-company which was supplying meat to respondents for many years conveyed to the respondents that it would supply frozen meat, if asked, at a competitive rate cheaper than other and the respondents stated that at the appropriate time a tender would be floated in which the petitioner could also offer a tender in terms of the advertisement but no such tender was floated and respondents accepted offer of another company at a higher rate than what was offered by petitioner which was contested by the petitioner-company, *held*, there was no unfairness or unfair discrimination against the petitioner-company: A.I.R. 1990 P.&H. 206 (D.B.).

Where the lessee of a sea-shore plot carrying on business of salt-manufacture was permitted by the Government to induct a financial partner only for the purposes of providing finance and in view of S. 14 of the Partnership Act, 1932, the leasehold rights did not become partnership property and later on by an undisclosed and clandestine deed of retirement the lessee retired from the partnership and the Government thereafter renewed the lease and received royalty from the financial partner (because of withholding of material information and the fraud practised on the Government), *held*, the doctrine of promissory estoppel and acquiescence is not attracted: A.I.R. 1995 Guj. 61.

Where the petitioner applied to the State Government for settlement of a piece of land on a sea coast with a view to manufacture salt and though the State Government allowed him in 1961 to occupy the land on a licence fee per year, it kept matter pending from 1972 but did not disturb the petitioner's possession till 1979 when it wanted to settle the land in favour of another person, *held*, the Government was clearly bound by estoppel (1987) 1 Cal.H.N. 106.

Where the petitioners-travel agents, after investing considerable amounts for the purpose of fulfilling the conditions imposed by the Government for obtaining the recognition to deal with passport matters, secured such recognition but subsequently the Government withdrew said recognition, *held*, the petitioners were entitled to the benefit of doctrine of promissory estoppel: A.I.R. 1993 Mad. 216.

Where a recognised travelling agent had for over two decades been dealing with the Regional Passport Office on behalf of his clients and was, earlier in 1979, derecognised for failure to apply for renewal and on moving the Court his facilities were restored, contend in 1988 that the Government was barred by promissory estoppel from terminating his recognition on enunciation of a new policy in 1986 and his failure to apply for renewal, *held*, the recognition as a travelling agent is not a right but a privilege; there is no evidence of any promise of allowing him to continue to deal with the Regional Passport Office notwithstanding any change in Government policy; no conditions for invoking promissory estoppel made out: A.I.R. 1990 Guj. 167: (1989-2) 30 Guj.L.R. 856: (1989-2) 9 Guj.L.H. 234 (D.B.).

(*e*). In excise cases.—There is no estoppel applicable to excise matters but it is well settled that the Revenue cannot change its opinion at all at its sweet will. The Department should not be permitted to take different stand when there is no good or cogent reason for the change of the view. But, if the facts are different or if further and fresh facts are brought on record or if the process of manufacture has changed or if the relevant entries in the Tariff have undergone a modification or if subsequent to the earlier decision there has been the pronouncement of a High Court or the Supreme Court which necessitates reconsideration of the issue, in that event, undoubtedly the Department have power to take a different view of the matter: (1991) 55 E.L.T. 189 (Cal.).

If according to law a commodity fell within a particular tariff item, *held*, the fact that the Central Excise Department earlier approved its classification under another tariff item will not estop the Department from revising that classification to one under which it should legally fall. [A.I.R. 1989 S.C. 617, Rel. on]: A.I.R. 1991 S.C. 999: (1991) 1 (Supp.) S.C.C. 57.

Where under a notification certain varieties of cloth were exempted from excise duty and the Superintendent, Central Excise misinterpreting another notification wrote to the assessee that they were also exempt from additional duty as well and the assessee in consequence neither charged nor deposited the additional duty but the Assistant Collector, the proper officer empowered to recover excise under R. 10 of the Central Excise Rules read with R. 173-J, called upon the assessee to pay the additional duty, *held*, the rule of estoppel was not attracted; it is a rule of equity and cannot prevail over a rule of law: (1975) 2 Karn.L.J. 93.

Where in exercise of its powers under Rr. 57-K and 57-N of the Central Excise Rules, the Central Government notified that the vanaspati and soap manufacturers would be allowed money credit adjustable in the payment of excise duty on their final products if they used a certain type of oils as an input but subsequently the notification was rescinded, *held*, the money credit earned during the period the notification remained in force could not be taken away; the manufacturers had the right to get it adjusted against the excise duty payable by them. [A.I.R. 1977 S.C. 522, Foll.]: (1990-2) 10 Guj.L.H. 617 (D.B.).

Where the Central Government, to attract fresh investment, announced an excise relief to the new tyre factories established under S. 11 of the Industries (Development and Regulation) Act, 1951 as also to established factories undertaking substantial expansion but later on revoked the relief announced for the existing factories, *held*, though the revocation was effected under S. 8(1) of the Central Excise Rules, 1944, a legislative power, the Government was estopped from doing so as it could not show that revocation was made in public interest the burden whereof lay upon it; the Courts insist on a highly rigorous standard of proof for discharging such burden; a mere allegation of the industries taking undue advantage of the concession with no supporting affidavit of a concerned officer from the Finance Department containing relevant particulars is not sufficient to repel the estoppel: A.I.R. 1991 Raj. 45: (1989) 2 Raj.L.W. 386: (1989) 2 Raj.L.R. 662 (D.B.).

Where a clear representation was made by the Central Government that the MODVAT system was being adopted for a particular article and following such representation/promise with its implementation, the petitioners voluntarily adopted the scheme which was optional under R. 57-G, but subsequently, the Government, by a notification, withdrew the MODVAT benefits in respect of that article, *held*, the doctrine of promissory estoppel was fully attracted and applicable in the instant case, especially when the benefit of MODVAT having been extended, was withdrawn by the Government without any reasons germane or otherwise being assigned: 1988 Mah.L.J. 807: (1989) 1 Bom.C.R. 68 (D.B.).

Where the Under Secretary of the Central Board of Excise and Customs by his letter, dated 24-5-1976, to the Cigarette Manufacturers' Association that they could seek exemption from excise duty on the value of corrugated fibre board containers wherein cigarettes were delivered on the factory gate on the basis whereof they did not recover excise duty thereon from the customers, *held*, though the letter did not constitute a special order of exemption contemplated under R. 8(2) of the Central Excise Rules, 1944, yet it would operate as a promissory estoppel against the Board; it was precluded from recovering excise duty on the containers. [A.I.R. 1980 S.C. 1285, Overruled]: A.I.R. 1986 S.C. 806: (1985) 4 S.C.C. 369.

Where under a Government notification certain dyes were exempted from excise duty if they were manufactured from any other dyes liable to excise duty at the time of manufacture, *held*, a manufacturer who had voluntarily paid excise duty on the basic dyes though not liable to such duty, *held*, he was not entitled to claim exemption of duty on the dyes manufactured from such basic dyes; the payment of duty on basic dyes not liable to duty was not contemplated under the notification and could not earn any exemption; the manufacturer could not contend that but for the notification he would not have manufactured the dyes; the Department is not estopped from levying duty on the manufactured dyes: A.I.R. 1985 S.C. 537: (1985) 2 S.C.C. 77.

The basic requirement for the applicability of the doctrine of promissory estoppel is a representation on the part of the Government. Where Government issued a notification allowing the liquor retail vending

licencees to open bars within or adjoining their licenced premises subject to certain conditions but subsequently Government in public interest decided not to grant new licences or renew the existing licences for the bars attached to the retail vending shops, *held*, as there was no representation by the Government that the licences for the bars would be continued so long as the retail vending shops were allowed to function, there was no question of promissory estoppel. Further, even assuming that there was any representation on the part of the Government when bars were permitted to be opened, the principle of promissory estoppel could not be invoked as the larger public interest required a change of policy, as a result of which, the impugned decision was taken: A.I.R. 1993 Mad. 282: (1993-2) 112 Mad.L.W. 18 (D.B.).

Where the petitioners were granted licenses for the supply of country liquor at the specified rates and some business was already transacted before another letter was served by the Board to the petitioners to reduce the price and although the petitioner started the supply at the reduced rate but clarified by way of affidavits that they were doing so under protest, *held*, rule of promissory estoppel could be invoked against the Board authorities and they could not abruptly modify the price without recalling its earlier order. [A.I.R. 1968 S.C. 718, Foll.]: A.I.R. 1978 Pat. 157: 1978 B.L.J.R. 1: 1978 B.B.C.J. (H.C.) 342 (D.B.).

Commissioner revoking licence of bottling Indian made Foreign liquor granted to party holding licence for bottling beer by making endorsement in his licence without opportunity of hearing—Principle of promissory estoppel is attracted: 1983 Tax.L.R. 2681 (All.).

Where the petitioner-Company applied to the State Government for allotment of industrial alcohol or rectified spirit and the Government allotted specified quantity of rectified spirit per year subject to availability of alcohol in each year in the State and thereafter the petitioner-Company took steps to put up the plant and machinery and also secured loans but State Government thereafter decided to allot denatured spirit to petitioner instead of rectified spirit, *held*, the plant, which has been put up by the petitioner-Company, was designed to have only rectified spirit as the raw material. Such a substitution of raw material would adversely affect the production, ability, capacity and viability of the plant. The Government was not entitled to modify its earlier order and insist upon the supply of denatured spirit; the Government was estopped from imposing such unreasonable condition on the petitioner: (1993) 1 M.L.J. 205.

Licensees granted privilege to supply arrack by wholesale—Licensees expending money and acquiring large stocks—Amendment abolishing privilege—Rules enabling licensees to get licence renewed also abolished—Repeal of rules by Ordinance which Governor is entitled to promulgate cannot be challenged on ground of promissory estoppel: 1984 Tax.L.R. 2545: (1984) 1 M.L.J. 96: (1984) 97 Mad.L.W. 29 (D.B.).

Where notification prescribing a reduced strength for sale of country liquor was issued by the State Government in the middle of the year and the petitioners, licence-holders for sale of country liquor of higher strength pleaded estoppel, *held*, the declaration of strength had been made by the State Government in discharge of its statutory function. Moreover, the notification was a piece of subordinate legislation and was not an executive direction because it formulated a binding rule of conduct generally for the purposes of the Excise Act. The notification had been made in exercise of the legislative function of the State Government. The doctrine of promissory estoppel was, hence, inapplicable to it: A.I.R. 1981 All. 292: 1981 All.W.C. 410 (F.B.).

Courts have power in appropriate cases to compel performance of the obligations imposed upon departmental authorities by orders which are executive in character, when they find that any person has acted to his detriment on solemn promises made by the State Government or its authorities concerned. Thus, where the petitioner agreed to supply the country spirit to the Government Warehouses during certain period on the assurance of Excise Commissioner that he would be paying at least 42 paise per L.P. Litre and under the provisions of the Bihar and Orissa Excise Act, 1915, the Excise Commissioner was competent to do so, *held*, the State was bound to pay the difference between 42 paise and 33 paise per L.P. Litre, which had already been paid: A.I.R. 1975 Pat. 123: 1975 B.L.J.R. 192 (D.B.).

Where the memorandum, the letter and the sale notification on the basis of which the appellants were claiming the right to continue the licence to vend liquor for a period of five years, clearly mentioned that the grant of licence was on an annual basis and such renewal after every year was subject to the conditions mentioned therein and also subject to any change in policy and thereafter Government changed its policy, *held*, the doctrine of promissory estoppel was not applicable since the Government was fully competent to change its policy under the terms of the grant of licence itself; and it is also well settled that the right to vend excisable articles is exclusively and absolutely owned by the State Government: A.I.R. 1992 S.C. 1191: (1992) 2 S.C.C. 631.

The petitioners contended that Sale Officers who conducted the auctions for the arrack shops had represented that supplies of arrack would be made at a specific rate and on that basis only they had made their bids at the auction sales. They further stated that Taluk Excise Officers had passed the indents on the basis that licencees could lift arrack at specified rate and they placed reliance on certain rubber stamp seals used by Excise Officers on the indent forms. On failure of the Commissioner to supply arrack on the basis of entitlement quota the petitioners pleaded estoppel. *Held*, no record or document has been produced to substantiate the plea that the Sale Officers had made said representation. As regards the Excise Officers, except for some instances where rubber stamp seals relating to the previous years had been used, there was no other material to sustain the statement of petitioners. Further, it is settled that estoppel cannot be pleaded against the State in exercise of its legislative or statutory functions and the Government is not bound by act of its Officers and agents beyond the scope of their authority. Therefore, both on grounds of paucity of materials as well as on grounds of law, the argument relating to promissory estoppel could not be sustained. [A.I.R. 1980 S.C. 1285, Rel. on]: (1985) 98 Mad.L.W. (S.N.) 93.

(*f*). In case of house/property tax.—There can be no promissory estoppel or equitable estoppel against Government in exercise of its sovereign, legislative or executive functions and the power to impose a tax is legislative power. Thus, the delegated authority who was the Chief Commissioner exercising the power of Legislature conferred by S. 7-A of the Capital of Punjab (Development and Regulation) Act, 1952 in issuing impugned notification levying house tax was immune from attack on the basis of promissory estoppel: (1979) 1 Ren.L.R. 701: (1979) 2 Ren.C.J. 123: (1979) 12 Ren.C.R. 210: I.L.R. (1979) 1 Punj. 388 (D.B.).

Where the area in ownership of a Government Company came to be included in the area covered by the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam 1973, and under an agreement entered into between the Government Company and the Special Area Development Authority constituted under the 1973 Act, it was agreed that in lieu of exemption from the payment of property tax, the company would be paying an agreed amount annually for five years with an additional agreed amount as grants-in-aid, towards development, and the company discharged all its liabilities under the agreement, *held*, the company had, acting upon the agreement, altered its position by making transfer of its properties, and was rendering civic services by payment of an amount for development and, thus, the Special Area Authority was estopped from demanding the property tax contrary to and in derogation of the terms of agreement: A.I.R. 1991 Madh. Pra. 332: 1991 M.P.L.J. 790 (D.B.).

(*g*). In case of sales tax.—Where the cashew manufacturers impugned the revocation by a subsequent notification the exemption from sales tax levy by an earlier notification under the Kerala General Sales-tax Act, 1963 but there was nothing to show that they had in fact altered their position by acting upon such representation to their prejudice sufficient to create an estoppel, *held*, the Government having the power under the Act to issue and revoke the notifications and the revocation being in response to a public hue and cry, promissory estoppel was not attracted: A.I.R. 1987 S.C. 2239: (1986) 2 S.C.C. 365: (1986) 2 U.J. (S.C.) 121: (1986) 1 S.C.R. 610.

The Government can withdraw an exemption granted by it earlier if such withdrawal could be done without offending the rule of promissory estoppel and depriving an industry entitled to claim exemption from payment of tax under the said rule. If the Government grants exemption to a new

industry and if on the basis of the representation made by the Government an industry is established in order to avail the benefit of exemption, it may then follow that the new industry can legitimately raise a grievance that the exemption could not be withdrawn except by means of legislation, having regard to the fact that promissory estoppel cannot be claimed against a statute. Thus, where an exemption granted by the State Government under Gujarat Sales Tax Act (1 of 1970) was only by way of concession to encourage setting up of industries, *held*, as such it was always open to the State to withdraw or revoke the concession; therefore, the same could be withdrawn without violating the rule of promissory estoppel: A.I.R. 1987 S.C. 142: (1987) 1 S.C.C. 31: (1987) 1 U.J. (S.C.) 38.

A brochure was issued by the State Government announcing its "new policy" declaring that incentive and concession, one of them being—refund of sales tax would be available to those persons who set up selective large scale industries in the focal point. Acting on it the appellants-industrialists met the Chief Minister and found him interested in encouraging in setting up of industries and Director of Industries also assured them that the concession as announced shall be available. The appellants accordingly, set up industries. *Held*, a provision or agreement to refund tax due or realised in accordance with law cannot be comprehended. No law can be made to refund tax to a manufacturer realised under a statute. This would be contrary to the Constitution. Any agreement for such refund being contrary to public policy was void under S. 23 of the Contract Act. The constitutional requirements of levy of tax being for the welfare of the society and not for a specific individual, the agreement or promise made by the Government was in contravention of public purpose, thus, violative of public policy. No legal relationship could have arisen by operation of promissory estoppel as it was contrary both to the Constitution and the law. [A.I.R. 1977 P.&H. 268, Affirmed]: A.I.R. 1992 S.C. 1075: (1992) 2 S.C.C. 411.

There can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers. Thus, where at the time of auction held for grant of licences to sell country liquor, the Government announced exemption from sales tax in respect of sale of country liquor but by a subsequent notification said exemption was withdrawn and sales tax was imposed, *held*, the fact that sales of country liquor was exempted from sales tax as announced by the Government previously could not operate as an estoppel against the State Government and preclude it from subjecting the sales to tax if it felt impelled to do so in the interest of the Revenues of the State which were required for execution of the plans designed to meet the ever increasing pressing needs of the developing society: A.I.R. 1976 S.C. 2237: 1976 U.J. (S.C.) 656: (1976) 3 S.C.C. 540. *See* also I.L.R. (1979) 2 Karn. 1909.

Doubtless as regards proprietary interest, there may be estoppel by conduct known as estoppel by pais. But any conduct of a Government servant in violation of his duty, will not operate as estoppel against Government.

The Sales Tax Authorities under Orissa Sales Tax Act had no jurisdiction to grant certificates of registration to fictitious persons or to persons who had no business. Hence, though these persons may technically be said to be holders of registration certificates, nevertheless, in the eye of law, they cannot be held to be registered dealers because they have not been "validly" registered under the provisions of the Act and any mistake committed by the subordinate officers of the Sales Tax Department either due to negligence or due to collusion, cannot, on general principles, operate as estoppel against Government. If a person in good faith is prevented from paying tax on the assertion by the person authorised to levy taxes to the effect that no tax was payable there may be an estoppel so far as realisation of penalty or interest from him for the tax that is ultimately found to be payable, is concerned. But it does not affect his liability to pay the tax. The question of levying penalty or charging interest for non-payment of taxes is a matter of discretion with the taxing authorities but the levy of taxation is not a matter of discretion, it is clearly a statutory duty : I.L.R. (1964) Cut. 575 : (1965) 16 S.T.C. 271 : A.I.R. 1965 Ori. 44.

A necessary ingredient of a proper plea of promissory estoppel is the averments as to a representation by way of holding out a promise and the other party acting upon that representation. If there is no case that a person has acted upon the representation of

another the very basis or foundation of the plea of estoppel must be found to be absent.

Where the Government made a representation under Sales Tax Act and the assessing authorities took a stand contrary to such representation but when there was no case before Sales Tax Officer or the Court in tax revision that, based upon the representation of the Government the assessee altered his position by acting on the faith of it.

Held, that no question of promissory estoppel arises: (1981) 48 S.T.C. 460: I.L.R. (1981) 2 Ker. 697: 1982 Tax. L.R. 3117 (D.B.).

Where an assessee manufacturing 26 varieties of compressed woollen felt of varying hardness, density and thickness sent a sample of only one variety to the Commissioner of Sales-tax for claiming exemption of sales tax allowed to cloth under S. 42-B and Entry 6, Sch. 1 of the M.P. General Sales-tax Act, 1952 on the basis whereof the Commissioner accepted it as cloth eligible for exemption, *held*, the Commissioner was not estopped from declining to accept the other varieties as cloth which were not pliable, an essential attribute of cloth; however, the Commissioner asked to consider waiver of past tax to save the industry from financial ruination: A.I.R. 1986 S.C. 626: (1986) 2 S.C.C. 103: (1986) 2 U.J. (S.C.) 202.

(*h*). In case of electricity charges.—An electricity Board is an autonomous statutory body; though subject to Government's exercise of some powers, it is not otherwise subordinate to the Government; in matters of fixing tariff, it has to act in exercise of its statutory powers under the Electricity (Supply) Act, 1948 and the Government under S. 78-A thereof can only issue directions on questions of policy; the Board's non-compliance therewith would not amount to disobedience of lawful orders. Thus, if the Government under such a direction asks the Board to grant concessional tariffs to mini steel plants and the Board declines to do so, the mini steel mills cannot compel the Board to charge them concessional rates; the doctrine of estoppel is not attracted, the Board not having made any representations to them. [A.I.R. 1968 Ker. 76 (F.B.), Rel. on]: A.I.R. 1982 Andh. Pra. 189: (1981) 1 An.W.R. 404 (D.B.).

Where State Government announced certain concession/incentives for establishment of new Industries in State and one of them being exemption from payment of minimum consumption guarantee charges for a period of five years but as the bills issued by State Electricity Board to petitioner included minimum consumption charges, petitioner invoked doctrine of promissory estoppel, *held*, the State Electricity Board was not estopped by rule of estoppel from charging the minimum consumption charges as the policy decision of the Government was not binding on the Board. [(1993) 1 Civ. Rev. Cas. Rep. 658, Foll.]: A.I.R. 1995 All. 209 (D.B.).

It is one thing to say that the Government had on the party's representation and request expressed its willingness or consent or decision to accord exemption; it is, however, a totally different thing to contend that the party had acted and changed its position to its detriment on the Government's promise to exempt the party: A.I.R. 1991 Mad. 371 (D.B.).

Neither S. 49 nor S. 59 of the Electricity Act, 1948 empowers the Board to enhance the rates for supply fixed under an agreement; the Board cannot override contractual obligations by unilaterally enhancing the rates by making regulations under S. 79 (*j*) of the Electricity Act, 1948; the power to make regulations under S. 79 (*j*) of the Electricity Act, 1948 must obviously be exercised consistently with the Act; the regulations so made cannot go beyond the Act. If the power to enhance the rates unilaterally in derogation of the contract does not reside anywhere in the Electricity Act, 1948, it cannot be created by regulations made thereunder which are in the nature of subordinate legislation. [A.I.R. 1972 Ker. 206; A.I.R. 1975 Ori. 100, Reversed]: A.I.R. 1975 S.C. 1967.

Where the State Electricity Board, on detecting short meter reading resulting from wrong wiring, raised revised demand which was resisted by the consumer on the ground that as under the agreement it had to pay and had paid the charges every month as and when the bill was tendered, the Board could not issue the revised bill, *held*, that clause in the agreement referred to charges for supply of electric energy in regular course; had there been no wrong wiring or under-recordings, the bills tendered would have shown higher amounts than those paid by the consumer; that clause did not preclude the Board from making a revised demand on discovery of mistake at a later stage: A.I.R. 1988 Guj. 121: (1988-1) 8 Guj.L.H. 36: (1988-1) 29 Guj.L.R. 165.

Under a fuel adjustment clause contained in tariffs framed for supply of electricity, State Electricity Board was entitled to receive price of electricity whenever the final rate of fuel surcharge was worked out by it. The Board kept on levying fuel charge provisionally for a number of years on the petitioner

but subsequently, it issued revised bills and claimed surcharge retrospectively on determination of final rate.

Held, the liability to pay fuel surcharge arose under the fuel adjustment clause and the petitioners were aware of said clause and had agreed to pay surcharge as and when final rates were worked out by the Board. Thus, there was no question of promissory estoppel or equitable estoppel: A.I.R. 1984 Raj. 131.

Where short reading in the electricity meter of the petitioner, a Company carrying on an industry, resulting from wrong wiring was detected after several months and the State Electricity Board issued a revised demand notice retrospectively, but the petitioner contended that demand was unjustified as it could not recover the same from its customers, *held*, the petitioner not having shown that it was obliged to market its finished goods at a rate lower than the prevailing market rate, the contention had no merit; all that had happened was that the petitioner had been charged much less for its electricity consumption, the manufacturing cost for its end products must have gone down much lower than what it was for other similarly situated units; the resultant effect was larger margin of profit for the petitioner and not any loss. Thus, the petitioner could not invoke the principle of estoppel: A.I.R. 1988 Guj. 121: (1988-1) 8 Guj.L.H. 36: (1988-1) 29 Guj.L.R. 165.

Where a Power Corporation was, as per its agreement with the State Government, permitted to supply electricity to sister concerns and third parties and to charge its own price therefor and though a uniform tariff was applicable for the electricity drawn by the Corporation and other concerns from the Electricity Board, but no provision was made in the agreement for granting rebate to the Corporation, *held*, the normal rule being that an agreement incorporates all the terms and conditions governing the relationship between the parties, and, therefore, the demand for rebate not incorporated in the agreement between the parties could not be enforced independently of the terms of the written agreement: A.I.R. 1994 N.O.C. 314 (Karn.).

Where the Electricity Board had granted rebate in consumption charges consequent upon a resolution passed by the State Government and the consumers enjoyed the rebate and concession, *held*, the Board is not estopped from withdrawing the rebate and concession on the State Government's modifying the resolution. [A.I.R. 1971 S.C. 1021, Disting.]: A.I.R. 1979 N.O.C. 76: 1978 B.L.J.R 568 (D.B.).

Where an Electricity Board granted 25 per cent rebate in demand and energy charges to high tension industries which was later on extended by the State Government to all industries except those which were notified in its order, and the rebate was subsequently withdrawn both by the Board as well as the Government, *held*, as the claimant had commenced regular production after the Board and the State Government had withdrawn the rebate, the doctrine of promissory estoppel was not attracted: A.I.R. 1993 S.C. 1521: (1993) 2 S.C.C. 425.

Where the State Government agreed to make available power at concessional rate in order to persuade the petitioners to agree to locate their Industries, *held*, it would not enable the petitioners to disown their obligations to pay higher tariffs as determined by State Electricity Board from time to time for the periods beyond the periods covered by special agreements regarding concessional tariff: A.I.R. 1985 Andh. Pra. 299 (D.B.).

Where a concession for supplying electricity was granted by the Portuguese Government to a Company and the Central Government, after Goa's liberation, had for years been acting in a manner convincingly consistent with the belief that the Company was a grantee of a valid and legal concession under the Electricity Act, 1910, *held*, the concession was valid and on the principle of estoppel, binding on the Central Government since the petitioners did undergo expenditure on the strength of the representation of Government. [A.I.R. 1971 S.C. 1021; A.I.R. 1968 S.C. 718, Foll.]: A.I.R. 1972 Goa 33.

Where "Power Intensive Industries" were classified on the basis of (*i*) the intensity of power consumed, more or less, as raw-material, and (*ii*) ratio of the cost of power and cost of the end product, roughly at 20 per cent; and such differential was evolved as a rational basis to distinguish "Power Intensive Industries" from the High Tensions Category-1 consumers, *held*, merely because some delay occurred in bringing in other similar industries to this category, the classification did not cease to be reasonable, rational or violative of Art. 14 of the Constitution; especially when some of the objecting industries themselves had enjoyed concessional rates of tariff as "Power Intensive Industries" for about 12 years: A.I.R. 1993 Andh. Pra. 183: (1993) 1 An.W.R. 353: (1993) 1 A.P.L.J. 465 (D.B.).

Where the Chief Engineer of the Board initially felt that a consumer deprived of

electric energy arising out of a strike or lock out need not pay the minimum charge but upon reconsideration in the light of the agreement's terms he decided not to grant any such remission and the first view was contained only in an inter-departmental communication never conveyed to the consumers, *held*, the earlier view cannot give rise to an estoppel; the rule of estoppel is not attracted: (1988) 1 Raj.L.R. 988 (Raj.).

Where the supplementary agreement between the consumer and the Electricity Board was executed but the additional supply was commenced 16 months thereafter and the first bill therefor was issued a year thereafter, *held*, it could not be contended that a writ petition filed 4 months thereafter to impugn the relevant clause in the agreement was hit by laches; it could not be contended that the consumer had thereby acquiesced in the higher charges by conduct: A.I.R. 1988 Raj. 64 (D.B.).

Where following the tripartite negotiations between the State Electricity Board and the appellant-Company, the Company was assured uninterrupted supply of electricity and supply of power at concessional rates but there was not any unilateral promise made by the State or the Electricity Board to the Company and subsequently by an amendment the tariff rates were increased which were challenged by the appellants, *held*, the foundation of promissory estoppel was absent as the agreement was the result of negotiations between the parties and on such negotiations, the terms and conditions were agreed upon between the parties and there was no unilateral promise to be acted upon: A.I.R. 1992 S.C. 2169.

(*i*). In case of Railways.—To find whether estoppel could be based on a representation, it has to be viewed as a whole; it must also be clear and unambiguous, not tentative or uncertain. Thus, where the Railway Board promised concessional freight rates for carriage of raw materials to a fertiliser factory intended to be set up subject to the stipulation that as the special rates were being quoted ahead of the factory's actual setting up, there might be a need to review them when the goods were actually moved, *held*, the factory could not enforce the special concessional rates because the Board's representation was neither clear nor unqualified: A.I.R. 1987 S.C. 2414.

Where goods despatched to various destinations by wagons upto 9-1-87 were charged freight for the shortest and the cheapest route irrespective of their actual route as provided under R. 125(1) (*b*) of the Goods Tariff No. 39, Part I, Vol. I whereafter the Railways started charging freight for the longest route, *held*, the Railway Administration was estopped from denying to the consignor the benefit of R. 125(1)(*b*) which amounts to a promise to the consignor: A.I.R. 1994 Guj. 104.

Contract between plaintiff and Government on printed forms—Plaintiff to supply bhusa at certain stations, in certain qualities at certain period—Written agreement containing clause that non-supply of wagons not to be excused for non-performance—Oral agreement that Government would supply wagons—Plaintiff led to belief up to last moment that wagons would be supplied—Wagons not made available—Estoppel: I.L.R. (1957) Punj. 783 : A.I.R. 1957 Punj. 141.

Entitlement of the contractor for an outagency of Railways to be paid charges even with regard to goods for which there was no consignee and when wharfage charges were not collected. *See* (1982) 1 Karn.L.J. 169.

(*j*). In case of promise to give loan.—No estoppel can arise if there is no clear and unequivocal promise. Where the sanctioning letter of the Corporation had stated that it had agreed to advance loan for setting up the specified project and also clearly stated that the intimation did not constitute a commitment on the part of the Corporation and in fact later withdrew the sanction, *held*, no estoppel can arise in view of the fact that there was no definite and precise promise to be acted upon. [A.I.R. 1979 S.C. 621, Rel. on]: A.I.R. 1992 Ori. 93: (1991) 72 Cut.L.T. 185 (D.B.).

Promissory estoppel being an equitable doctrine must yield when equity so demands; if shown from the facts and circumstances that it is inequitable to hold the Government to its promises, the Court will not raise equity in promisee's favour; the Court also will not enforce the promise if public interest will suffer in fulfilment thereof. It is only when the Court is satisfied that in the overriding public interest the authorities should not be bound by their promise and should be freed from it that the Court would refuse to enforce the promise. Thus, where a Company seeking rehabilitation finance was found on detailed inspection that it was hopelessly mismanaged but instead of being denied the benefits of the rehabilitation scheme, it was called upon to comply with certain requirements which the Company was initially not ready and willing to fulfil the conditions and the Bank thought that the scheme would be of no help to the Company, *held*, the Company having rendered itself

disentitled to the scheme by its own misconduct and mismanagement, the doctrine of promissory estoppel was not attracted, especially when equity was against the Company. [A.I.R. 1979 S.C. 621, Foll.]: A.I.R. 1993 Guj. 132: (1993-1) 13 Guj.L.H. 560.

The principle of promissory estoppel is akin to the principle of legitimate expectation. Unless there is overriding reason of public policy or other compelling or overriding consideration of public interest or other extenuating circumstances, in normal circumstances, the State is bound to fulfil its promise. Where State Government promised to give interest free sales tax loan to the industrial units which came into production within a certain period and the petitioner company was sanctioned certain sum out of which only a part was disbursed and remaining loan was not paid on the ground that as it was facing financial constraints, therefore, State was not in a position to grant loan as demanded by the petitioner and the petitioner pleaded estoppel, *held*, plea of promissory estoppel was not applicable: A.I.R. 1994 Pat. 162 (F.B.).

Where the State Financial Corporation not only advanced a term loan but also agreed to advance an additional loan on the basis whereof the customer later on sought assistance of other financial institutions to expand his business to the terms, conditions and concessions whereof the Corporation also agreed to join on principle but subsequently the Corporation cancelled its additional term loan but also withdrew the concessions and reliefs for the earlier term loan as well, *held*, the customer had tried to expand his business and raised capital therefor on the Corporation's assurance; the principles of promissory estoppel were clearly attracted against it: A.I.R. 1994 All. 123 (D.B.).

Where acting on the solemn undertaking by the appellant Financial Corporation that it would advance loan to the respondent, the respondent executed project of setting up a hotel and, thus, incurred expenses and suffered liabilities but thereafter the appellant-Financial Corporation refused to disburse the loans in terms of the agreement entered into between the parties, *held*, the principle of promissory estoppel would estop the Corporation from backing out of its obligation arising from a solemn promise made by it to the respondent: A.I.R. 1983 S.C. 848: (1983) 3 S.C.C. 379: 1983 U.J. (S.C.) 564, affirming A.I.R. 1982 Guj. 198 which had affirmed A.I.R. 1981 Guj. 212. *See* also (1984-1) 25 Guj.L.R. 267.

Where the petitioner applied for a term loan which was sanctioned by the respondent-bank and certain amount was disbursed towards the loan but subsequently Bank refrained from releasing further amounts whereupon petitioner pleaded promissory estoppel, *held*, principle of promissory estoppel could not be invoked as there was a specific term in the contract which empowered respondent-bank to terminate the agreement of loan: A.I.R. 1995 Del. 199 (D.B.).

(*k*). Other cases.—The doctrine of promissory estoppel also applies against the Government. It is no defence for the Government to say that because of executive necessity, it need not keep up its promise. Where employees of a Central Government owned public sector undertaking after having been promised assignment of land by State Government were refused allotment on the ground that State Government employees were to be given preference in matter of assignment of housing sites, *held*, had the Government told the management of the public sector undertaking in the beginning itself when vast tracts of land were readily available for construction purposes, the management would have explored alternative arrangements to provide housing accommodation to their employees. Because of the promise made by the State Government, the management, thinking that the promise would be acted upon, did not explore other possibilities. It was the promise of the Government that had altered the position of the petitioner-society. Thus, the doctrine of promissory estoppel was applicable to the facts of the case: A.I.R. 1990 Andh. Pra. 331: (1990) 1 An.W.R. 840.

An agency agreement for operating pay phones entered into between the agent and the Telephone Department empowered the latter to change the rate of commission payable to the agent and also, on three months' notice, to revise the terms and conditions thereof. S. 4(2) of the Indian Telegraphs Act, 1885 does not restrict or abridge the Central Government's power to do so. The agency agreement is, thus, not statutorily regulated; the decision to reduce the rate of commission would come into effect only when the number of calls exceed 10,000. The agent collects huge charges from the customers which he deposits after retaining them for several days and the demand for security deposit or its increase is merely to protect the Department's interest; there is also an arbitration clause in the agreement; the agreement is for a limited period and renewable from time to time; and it also contains a provision for its termination; the decision to reduce the commission or to demand enhanced security deposit is by

the Government itself, and not by its delegate, and has been made in public interest. The doctrine of promissory estoppel is not attracted merely because the agent is aggrieved by the reduction in the rate of commission or enhancement of the security deposit which allegedly would cause him irreparable loss for which he has made no case: A.I.R. 1995 Cal. 234 (D.B.).

Where royalty on timber was agreed to be imposed not on the timber actually used but on the mill's installed capacity consequent upon a meeting of the Nagaland Timber Industries Association and the State Government, *held*, royalty on the installed capacity is indeed a tax and the State Legislature cannot impose it even if "forest" is included in the State List; therefore, the imposition of royalty on the installed capacity is illegal; the agreement agreeing to imposition of royalty on the mills' installed capacity cannot create a promissory estoppel. [A.I.R. 1961 S.C. 552, Rel. on]: A.I.R. 1995 Gau. 37 (D.B.).

Where a public sector company entered into and concluded a contract with a private party for sale of its R.E.P. licences to be issued to it by the Government against its exports or railway wagons to Bahrain and Vietnam for a consideration then computed which later on was found to be the result of a mistake as to the true value of the licences which in fact was more than double of the agreed consideration whereupon the public sector company repudiated the contract which was opposed to by the private party on the ground of promissory estoppel, *held*, there can be no promissory estoppel in respect of a concluded contract; it applies only when there is no such contract but only a promise made by the party intending to create a future legal relation and the other party had acted upon it and changed its position; the rule of promissory estoppel is a rule of equity, not of contract; the Court will not apply it if it is satisfied that the promise was made under a mistake as to an essential or material fact to his prejudice, even if it is a unilateral mistake; the promisee cannot be allowed to take advantage of such a mistake; it would be inequitable to the Government even if the doctrine of promissory estoppel was assumed to be applicable: A.I.R. 1984 Cal. 306: (1984) 2 Cal.H.N. 212: (1983-84) 88 Cal.W.N. 840 (D.B.).

Sanction for construction of building—Mere supply of electricity cannot amount to according sanction for building—Supply of electricity and charging for the same would also not estop Corporation from demolishing structure: A.I.R. 1967 Punj. 82.

Where State Government appointed petitioner as poet laureate and by an order converted his limited term of appointment into one of life appointment but with the assumption of office by a new Government petitioner's appointment to said post was terminated, and the petitioner pleaded estoppel, *held*, no case for invoking said doctrine was made out as petitioner suffered no detriment by being appointed as a poet laureate. Further, the doctrine of promissory estoppel has no application to the abolition of a Governmental post: A.I.R. 1985 Andh. Pra. 136: (1984) 2 An.W.R. 449: (1984) 1 An.L.T. 20.

The Madras Education Rules and the Text Book Committee Rules are instructions for guidance of the Department; not designed to safeguard the publisher's interest but conceived in public interest, the Rules confer no right on the publishers; they hold no representation or even an assurance to the publishers that they will not be changed nor do envisage the publishers' participation in the scheme; the Government is at liberty to change the text books or to delete or add to their list or prescribe the text books from outside the list. The Government cannot be estopped from resiling from the Rules: A.I.R. 1972 S.C. 1126.

Where State Government at the request of the appellant withdrew an appeal against an earlier suit filed by appellant for a declaration that Government was not entitled to make deductions from his salary but thereafter State Government filed a suit under S. 70 of the Contract Act, 1872 for recovery of amount spent on appellant's training and appellant pleaded estoppel, *held*, the State withdrew appeal at the instance of appellant. No assurance by words or conduct could be said to have been given by the State that no legal action would be taken to recover the amount from him. Therefore, the principle of promissory estoppel was not applicable: A.I.R. 1987 P.&H. 117: (1987) 91 Punj.L.R. 681.

Rr. 6 and 32 of U.P. Service Rules are two different methods of appointment—No preference can be given to one source over the other—R. 22 is applicable only to appointments made under R. 6 and not to those made by Governor under R. 32(2)—Question of seniority of public servant is justifiable—Person appointed under R. 32(2) belongs to same service as persons recruited under R. 6 and hence he cannot be discriminated against—Judicial Officer accepting service in the State Judicial Branch, on repeated assurances by Government—It is not open to Government to retract from them—Principle of

legal or equitable estoppel would apply—Evidence Act, 1872, S. 115 : (1964) 8 Fac. L.R. 375 (All.).

Where on the basis of certain specific promises made by the State Government as inducement, the employees moved into a newly created department, *held*, the employees having acted thereon could not be denied rights and benefits promised to them. [A.I.R. 1979 S.C. 621, Foll.]: A.I.R. 1980 S.C. 768.

Where the Collector had provisionally allotted some fair price sugar shops to dealers who then made requisite deposits, executed agreements and obtained licences when the determination of the number of shops and the attachment of ration cards to them was in the hands of the Government, *held*, it could not be said that the Collector had made to them a firm, clear, unambiguous and unequivocal representation on the basis whereof they had acted to their detriment; the Government was, thus, not estopped from keeping the provisional allotments and the scheme under abeyance: A.I.R. 1974 Andh. Pra. 55: (1973) 2 An.W.R. 157 (D.B.).

Where permission to transport sandalwood had been granted, and the sandalwood was successively transferred, State would be estopped from asserting its title to the wood: (1976) 2 Kam.L.J. 297.

Factory once treated by Mahapalika as being outside its *octroi* limits—It does not operate as estoppel against Mahapalika—Once goods were brought within the boundary, *octroi* dues were payable: 1969 All.Cr.R. 228: 1968 All.W.R. (H.C.) 347.

The petitioner purchased an estate and made an application under S. 11 of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act for the acquisition of the proprietary rights. The Administration accorded sanction to the petitioner for the felling of trees upon payment of 15 per cent of the sale price of the trees as required under sub-Ss. (2) and (3) of S. 11 of the Himachal Pradesh Private Forests Act, 1954. The petitioner requested the Divisional Forest Officer to issue an export permit on payment of fees stipulated. The Divisional Forest Officer having failed to issue the export permit, the petitioner prayed the Judicial Commissioner's Court to issue a writ. *Held*, that as the Government had accorded sanction to the petitioner to fell the trees without payment of price therefor, and as most of the trees had been felled and converted into charcoal or timber, the petitioner had acted to her prejudice relying on the aforesaid order of Government and the doctrine of changed situation had come into play. The Government was, therefore, estopped from putting their plea that the compensation did not confer proprietary rights in the trees on the petitioner: A.I.R 1961 Him. Pra. 32.

Where the Government, having postponed the enforcement of Ss. 2 and 4 of the Madras City Police and Gaming (Amendment) Act, 1949 till 30-6-1976 by a notification but later on enforced them from 31-3-1975 and the Race Club contended that on the Government's assurance embodied in the notification, it had borrowed several lakhs of rupees for giving advances to owners for purchase of race horses, and incurred other expenditure which was set at naught by preponing the enforcement, *held*, the doctrine of promissory estoppel could not be invoked; the preponement had a beneficial effect upon thousands of poor and middle class people who were losing heavily and undergoing sufferings by betting on horse races; besides, there was no representation that the two sections would not be brought into force earlier than 30-6-1976: A.I.R. 1976 Mad. 238: 1976 Mad.L.W. (Cr.) 88 (D.B.).

When the Punjab Security of Land Tenures Act contained no provision to enable the Government to exempt any land from the Act's operation nor did the Act itself exclude a well-run farm from a big land owner's surplus area but merely barred its use for settlement of evicted tenants and on the enactment of the Haryana Ceiling on Land Holdings Act, 1972 such farms stood vested in the State Government under S. 12 thereof, *held*, it could not be contended that any representation was made by the Government that such lands purchased by persons from big landholders would be exempt from the operation of the law of ceilings; the rule of estoppel was not attracted: A.I.R. 1977 P.&H. 221: 1977 Punj.L.J. 230: 1977 Rev.L.R. 418: I.L.R. (1977) 2 Punj. 116 (F.B.).

Where the father and sons claiming separate permissible area under the Punjab Land Reforms Act had in their declarations in the affidavit form had described the sales effected by them after the appointed day but before the enactment of the Act as *bona fide* so that they would not affect the permissible limit of their agricultural holdings, *held*, they could not subsequently impugn those very sales in civil suits on the ground that they were without consideration, not for legal necessity and not binding on them; no one can state a fact on solemn affirmation before one forum and contend conversely in the other Court; the doctrine of promissory estoppel is attracted: 1994 Punj.L.J. 530: (1994-3) 108 Punj.L.R. 453.

Where a shrewd and reasoned politician appointed as Vice-Chancellor on the promise that his term therefor would be renewed and consequently he resigned his membership of the Legislative Assembly, *held*, the doctrine of estoppel was attracted; the Chancellor could not be allowed to resile from the promise: A.I.R. 1982 P.&H. 439 (F.B.)

The Development Authority brought into force a housing scheme and the petitioner society came forward to take up the building activity. The lay out was sanctioned by Director, Town and Country Planning and scheme was approved. The State Government directed finalisation of the scheme under S. 50(7) of the M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973. The Development Authority duly complied with the said direction but thereafter State Government revoked the scheme under S. 52 of the Adhiniyam, on the ground that continuance of the scheme was contrary to Master Plan and was against public interest and the petitioner pleaded estoppel. *Held*, the development work undertaken by the petitioner either under the contract or as an agent of the Development Authority was at a stage when the scheme had actually not come into force and was only at the initial stage of proposal. Even if for any reason the Department of Town and Country Planning or any other authority had approved the plans or even observed that it was in accordance with the Town and Development Scheme, it was all done before steps were taken to bring about a proper housing scheme as required by S. 50 of the Adhiniyam. The land could be acquired and the petitioner could be asked to take up the development and the construction work only thereafter. There was, therefore, no representation by the State Government of having approved or sanctioned any scheme in terms of S. 50 of the Adhiniyam which led the petitioner to enter into contract with the Development Authority and proceed to develop the land and invest capital in so doing. Thus, any expression or opinion by the Town and Country Planning Authorities prior to the coming into force of the Scheme would not estop the Government from forming of opinion leading to an action under S. 52(1) (*c*) of the Adhiniyam based upon the material put before it and collected under the steps taken under S. 50 of the Adhiniyam: A.I.R. 1987 Madh. Pra. 193 (D.B.).

Where the petitioner, a voluntary organisation working primarily for the welfare of tribal people, was sanctioned a grant for certain amount by the State Government for meeting its administrative and functional expenses but grant was stopped in the middle of the financial year, *held*, as the petitioner under the impression and *bona fide* belief that grant had been sanctioned continued their activities for various projects, the Government was estopped from cancelling the grant in the middle of the financial year: A.I.R. 1987 Raj. 26: 1986 Raj.L.W. 179: 1986 Raj.L.R. 407.

26. Estoppel against University/Education Board.—Cases pertaining to refusal to permit a candidate to appear in the examination or cancellation of the examination may broadly be categorised as: (*1*) Where the candidate practised fraud or was guilty of misstatement or suppression of facts in his application form on the basis whereof he was admitted to the examination; (*2*) Where there was technical defect in the filled up form or there was any deficiency, like shortage in attendance which the authorities were competent to condone in their discretion under the statute, rules or regulations; (*3*) Where the candidate was patently ineligible on the particulars supplied by him; and (*4*) Where his eligibility depended upon one of the two reasonably possible interpretations of law or rules or regulations having the force of law. (*i*) Cases in the first category donot attract estoppel and authorities are within their rights to cancel the admission or the examination on discovery of fraud because fraud vitiates everything; (*ii*) Cases in the second category attract estoppel when the admission card has been issued and the candidate has appeared even if in one paper; the authorities will be deemed to have represented to the candidate that the defect had been cured or the deficiency had been condoned; but if the examination had not yet begun, the invocation of estoppel will depend upon the facts of each case; (*iii*) Cases in the third category do not attract estoppel for there can be no estoppel against the statute like in a case where a candidate not having passed the B.A. examination was appearing in the LL.B. examination; (*iv*) Each case falling under the fourth category will attract estoppel or not will depend on peculiar facts of each case; if the candidate has appeared even in a single paper, the authorities may well be deemed to have accepted the other possible interpretation which favours the candidate. Thus, where a candidate was allowed to and did appear in the examination as an ex-student, *held*, the University was estopped from cancelling his examination later on by relying upon the other possible interpretation of an "ex-student" in the Ordinance which worked to

the examinee's disadvantage: A.I.R. 1978 Madh. Pra. 86 (F.B.).

Where revaluation of answer books, sought by an examinee and allowed by the University, results in awarding of lower or higher marks in the reappraisal, *held*, it would be binding both on the examinee and the University; both of them are estopped from impugning the marks; there is no justification for the contention that since the University Ordinance No. 159, issued under the Nagpur University Act, 1974, is a beneficial legislation, the revaluation will not bind the candidate unless it results in enhancement of his marks: A.I.R. 1986 Bom. 255: 1985 Mah.L.J. 705: (1986) 2 Bom.C.R. 567 (D.B.).

Where a failed student applied to the Head of the Department under the Transitory Regulation of Magadh University for permission to reappear at the examination with full knowledge that such benefit was available only to those who had passed the Master of Honours so as to improve their Class and not to a failed candidate, but he managed to obtain the admit card and appear in the examination, *held*, the benefit of the Regulation could not be extended to him; besides, the principle of estoppel could not apply to the University for mere grant of the admit card to the failed candidate: A.I.R. 1990 Pat. 205: 1990 B.B.C.J. 424 (D.B.).

Where the petitioner submitted his application for appearing in the examination beyond the last date and his application was not rejected and his name did find a place in the nominal roll and he was also issued a hall ticket to take up the examination without getting an undertaking that he would appear in the examination at his own risk, since decision was pending on his belated application, *held*, once the application of the petitioner, though submitted after last date, was entertained, processed and treated as valid, it was not open to the respondent to stop the publication of result of the petitioner on the ground that no decision had yet been taken on his belated application: (1994) 1 M.L.J. 111.

The proviso to Ordinance 83-A of the Gujarat University conferred widest powers on the University to cancel name of student for the examination who had failed to keep duly the terms as per the requirement of the University for relevant course even if irregularity in terms had not been noticed at the time of admission of examination. The name of the petitioner who had appeared at the theory examination, but was yet to appear at the practical examination was cancelled from the list of candidates permitted to take up the examination on the ground that he failed to keep regular terms. The petitioner pleaded estoppel. *Held*, the petitioner had not completed the examination since he was still to appear at the practical examination and, thus, it could not be contended that on account of the omission on the part of the authorities to take proper care in the matter of the petitioner having not kept regular terms and by the acceptance of the application form for admission and allotment of seat number and consequent appearance of the petitioner in theory examination, the University was estopped by acquiescence in cancelling the name of the petitioner from the list of the candidates permitted to appear in the examination: A.I.R. 1985 Guj. 99 (D.B.).

Where admission of the petitioners was cancelled in mid-session when they were virtually about to complete their course on the ground that they failed to comply with condition mentioned in the Rules for admission and the petitioners pleaded estoppel, *held*, cancellation of admission of the petitioners at a time when they had almost finished the course and that too for no fault of theirs, was barred on ground of promissory estoppel: A.I.R. 1990 Madh. Pra. 15 (D.B.).

Where Ordinance 310 of the Marathwada University mandated that no student failing to secure 50 per cent aggregate marks is eligible to sit in the examination and the University has no discretion in the matter, *held*, the University is not estopped from refusing admission where it has represented that the student could appear in the examination subject to production of the eligibility certificate: (1987) 2 Bom.C.R. 409 (D.B.).

Where the petitioner was declared successful in I. Com. examination by mistake and was, thus, admitted for B. Com. course by the University but after five months of his admission to said course the University declared him as failed, *held*, evidently the petitioner was not misled by the mark-sheet issued by the University and therefore, the University was not estopped from declaring him unsuccessful: A.I.R. 1989 N.O.C. 29 (Ori.) (D.B.). *See* also A.I.R. 1956 Mad. 309: (1956) 1 M.L.J. 25.

Where the petitioner was declared successful in B.A. Part I examination and on the basis of the University's assurance contained in the mark sheet, the petitioner appeared in subsequent years in other examinations but after a lapse of more than two years the University declared that petitioner had failed in B.A. Part I examination, *held*,

mark-sheet was prepared by the University Authorities and doctrine of promissory estoppel was applicable because it was on the assurance of the University Authorities, contained in the mark-sheet, that the petitioner secured admission and passed in subsequent examinations; and, moreover, the Court cannot be oblivious to the principles of equities which are in favour of the petitioner as it is too late in the day for the University to ask the petitioner to appear in B.A. Part I examination: A.I.R. 1992 All. 122: (1991) 18 All.L.R. 403.

Where the petitioner, a student of B.A. Part I was wrongly declared successful and she continued to prosecute her studies unabated in the College and stepped up the academic ladder to reach III year but she was not allowed to appear in Part III examination on the ground that she had not cleared the B.A. Part I examination, *held*, the petitioner should be allowed to appear in Part III examination, though her result should not be declared until she cleared B.A. Part I examination: A.I.R. 1989 Madh. Pra. 197 (D.B.).

Where petitioner was declared successful as per provisional list of the result but later on by means of a correction slip which was issued after two and half months he was declared unsuccessful on account of mistake which had occurred as the tabulators misread the Grace Marks Rules of the University, *held*, the University was not estopped from issuing correction slip correcting the examination result of the petitioner. [A.I.R. 1985 S.C. 941; A.I.R. 1989 S.C. 382; A.I.R. 1989 S.C. 823; A.I.R. 1989 S.C. 183, Disting.]: A.I.R. 1991 Karn. 35.

Where notwithstanding the provision in the proviso to Regn. 120 of the Council of Higher Secondary Education Orissa Regulations that a candidate failing in some subjects in the Higher Secondary Examination has to clear all subjects at one time, a candidate so failing was permitted to appear, after scrutiny of his application by the School as well as the Council, piecemeal for each failed subject and having cleared them was declared successful, *held*, the Council was estopped subsequently from revoking his result on the ground of his not having passed the failed subjects in one go: A.I.R. 1990 Ori. 228 (D.B.).

As per regulations of Rajasthan Secondary Education Board, dealing with High Secondary Examinations, if a candidate obtained less than 33% marks in one of the papers of 10th Class examination, he/she was not entitled to admission for 11th class. The appellant failed to obtain 33% marks in Mathematics and, therefore, he took admission in a private school in 11th Class and successfully took the examination of said class. When he sought to appear in 12th class examination to be conducted by the Board he was declared ineligible as per rules. The appellant contended that as he had been admitted in 11th class and passed the same, he should be permitted to appear in the Senior Higher Secondary. *Held*, as the appellant was not having minimum qualification, he could not be admitted to 11th class. In view of this, the appellant could not derive any benefit and the principle of estoppel could not be pressed into service: A.I.R. 1995 Raj. 115 (D.B.).

Where a student, shown as having passed the High School examination as per the results published in a newspaper having exclusive right to publish them, was admitted in the College and passed the Intermediate and B.A. Part I examinations and upon his subsequently failing to obtain the High School Certificate, the Board of the High School and Intermediate Examination issued him a notice to show cause against cancellation of his admission to the Intermediate course, *held*, the Board's inaction during all this period had rendered the student's originally impeachable admission as unimpeachable; though the admission was in direct violation of a statute, yet the doctrine of equitable estoppel which is a rule of justice should prevail over all other rules: A.I.R. 1974 All. 290.

Where a student passing an examination from some other Board was given admission in a College affiliated to the Madurai University after forgoing his fees deposited in some other College and his admission was not provisional and the regulations of the University showed that the University authorities could grant exemption from the operation of the rule in appropriate case, taking resort to which, the University cancelled his admission after 4 or 5 months from the date of admission, *held*, doctrine of estoppel was clearly applicable to the present case and thus, cancellation of his admission was not justified. [A.I.R. 1956 Mad. 309; A.I.R. 1968 Del. 131, Rel. on]: A.I.R. 1978 Mad. 315: (1978) 1 M.L.J. 440: (1978) 91 Mad.L.W. 394 (D.B.).

Where a candidate declared successful in the Intermediate Arts examination was granted a provisional certificate by the University as also a College leaving certificate on the basis whereof she got admitted to the B.A. Course—was later on asked by the College Authorities to discontinue her studies for not having passed the Intermediate

examination whereupon she produced a fresh provisional certificate from the University declaring her to have passed the Intermediate examination, *held*, there could not be a better case for attracting the rule of estoppel: A.I.R. 1985 Ori. 37: (1984) 58 Cut.L.T. 221 (D.B.).

Where petitioner was declared to have passed Intermediate Science examination and on that basis she got herself enrolled in College but later on her result was cancelled due to mass-copying involving 11 other students, *held*, petitioner was entitled to be protected by applying the principle of promissory estoppel. [A.I.R. 1982 Ori. 188 (D.B.), Overruled]: A.I.R. 1993 Ori. 27: (1992) 74 Cut.L.T. 603 (F.B.).

Where after declaring result of entrance test, the University discovered that there was mass copying in the said test and, thus, cancelled it and announced a date for a fresh test to which some of the successful candidates objected, *held*, mere announcement of the result of the test created no vested rights in the candidate, nor was there any question of estoppel since it was not shown that any of the candidates was damnified in any way: A.I.R. 1974 Andh. Pra. 283: (1974) 2 An.W.R. 89.

Where on the basis of revised mark-sheet issued to the petitioner as a result of revaluation, the petitioner was shown to have passed B.Sc. Part I examination and on the basis of said mark-sheet, the petitioner was admitted in B.Sc. Part II and he took examination of said course but subsequently his result was withheld on the ground that he had failed in Part I examination, *held*, on the representation made by the University as conveyed by the mark-sheet, the petitioner did not re-appear at the B.Sc. Part I examination. The University had the opportunity of checking its records before admitting the petitioner to Part II examination and they were, hence, in a position to discover the mistake if there was any, not having done that the University was clearly estopped from withholding the petitioner's result. [A.I.R. 1976 S.C. 376; A.I.R. 1973 All. 442, Rel. on; A.I.R. 1980 S.C. 1285, Disting.]: A.I.R. 1983 All. 378: (1983) 9 All.L.R. 254.

Where the Court found that the mark-sheet on the basis whereof the failed examinee had obtained admission to the College on the basis of a wrong information communicated to the Headmaster of the School on account of an unholy alliance forged by the examinee in the Board's office and the Board had made no representation to the examinee at all, *held*, no estoppel can operate against the Board; it is well known that fraud vitiates all actions; and the law is not different for a claim based on estoppel: A.I.R. 1981 Ori. 91 (1981) 51 Cut.L.T. 455 (D.B.).

Where examinees sought a *mandamus* to the University for declaring their examination results when they had obtained the admit cards by a fraudulent collusion with the Principal of the Government Teacher's Training College, *held*, there could not possibly be any legal estoppel in their favour; the hallowed rule is that fraud vitiates everything. [A.I.R. 1981 Raj. 8, Dissent. from; A.I.R. 1982 Pat. 122, Overruled]: A.I.R. 1987 Pat. 259: 1987 Pat.L.J.R. (H.C.) 591: 1987 B.L.J.R. 590 (F.B.).

Where a student misled by the mark-sheet showing her to have been passed in English could not send her form for appearing in the supplementary examination, *held*, the University was estopped from contending that she did not obtain 30 marks in English; estoppel is attracted even if the representation resulted from a mistake; it need not arise out of a fraudulent intent. [A.I.R. 1965 S.C. 1812; (1892) 19 Ind. App. 203 (P.C.), Rel. on]: A.I.R. 1971 Ori. 276 (D.B.).

Where the petitioner was declared successful in B.A. Part I examination in June, 1987 and on the basis of said result the petitioner obtained admission in second year B.A. course but in November, 1987, she was informed that her result for the B.A. Part I examination had been cancelled whereupon she pleaded estoppel, *held*, when the petitioner's result for B.A. Part I examination was cancelled, there was enough time for her to prepare for the papers of that examination. At that time the petitioner had not been placed in a situation where she could not possibly appear in B.A. Part I examination for the current session. Therefore, the principle of estoppel was not applicable. [A.I.R. 1973 All. 442; 1987 All.L.J. 388, Disting.]: A.I.R. 1988 All. 234 (D.B.).

Where the Board of Secondary Education had declared an examinee to have passed on the basis whereof he was admitted in the College but the Board later on notified his having failed when there was no time left for him to apply to sit in the supplementary examination, *held*, the examinee having acted upon the Board's representation, the Board was estopped from asserting that the examinee had not secured the requisite marks: A.I.R. 1984 Ori. 215 (D.B.).

Where petitioners were allowed to continue their studies in the Science stream but after some months the Principal of the College after detecting certain irregularities in their admission to Science stream directed them to switch over to Arts group in Class

XII final examination or to take fresh admission in Class XI examination, *held*, as the students were admitted though provisionally by the Admission Committee of the College or the Principal of the College contrary to the instruction and/or regulations prescribed from time to time by the Higher Secondary Council, they could not be held responsible for such omission and commission and, thus, they could not be made to suffer for laches and lapses of the respondent-Principal: A.I.R. 1990 Cal. 253.

Where the students, despite shortage of attendance, were allowed to take practical as also a part of final examinations and were not detained as required under Regn. 21 of the Orissa University of Agriculture and Technology Under-Graduate and Post-Graduate Semester Regulations, *held*, the University Authorities were estopped from debarring them from the entire examination: A.I.R. 1983 Ori. 17: (1982) 54 Cut.L.T. 429 (D.B.).

Where the marks and division obtained by the High School certificate examinees as per mark-sheets supplied to them were at variance with the results printed by the Board which could have easily been discovered by them, *held*, the examinees could not invoke the rule of estoppel against the Board when it revoked their results indicated in the mark-sheets and issued fresh mark-sheets in conformity with the printed results which reduced their marks and division; the erroneous marking had been corrected under the Board rules which permitted revised marking by special examiners after valuation of the first set of examiners was found to be erratic: A.I.R. 1990 Ori. 90 (D.B.).

Where all that the petitioner had done after he was declared to have passed, was that he had applied to different institutions for job and had received two call letters when the University corrected its mistake by declaring him unsuccessful, *held*, a mere application for job could not be said to bring about change or alteration of the position of the petitioner; therefore, principle of promissory estoppel had no application to such a case. [A.I.R. 1982 Ori. 188 (D.B.), Overruled]: A.I.R. 1993 Ori. 27: (1992) 74 Cut.L.T. 603 (F.B.).

Where the University authorities after admission of a candidate to the House Surgeoncy course on the mark-sheet, dated 1-2-1991, showing her to have passed in the M.B.,B.S. informed her on 23-4-1991 that it was found that she had in fact failed in the subjects of medicine and O.G., *held*, the settled position is that whether or not estoppel is attracted depends upon the facts and circumstances of each case; it is also settled that the examining authorities can rectify their errors properly and within reasonable time whether or not it goes to the advantage or disadvantage of the student; the doctrine of promissory estoppel is, thus, not attracted. However, the University was directed to allow the student to complete her House Surgeoncy course and pass the medical and O.G. examinations to complete the M.B.,B.S. course without requiring her to study the House Surgeoncy course thereafter: (1993-1) 111 Mad.L.W. (S.N.) 63.

27. Estoppel in cases of admission to educational institutions.—Basis of selection changed abruptly to the detriment of candidates—Principle of equitable estoppel—Applicability: A.I.R 1969 Ori. 80.

Where the Government in the brochure informed that though for the purpose of admission of the foreign nationals sponsoring by the Government was necessary but not in case of candidates from the developed countries, *held*, such a guideline could not fall within the pale of promissory estoppel: (1992) 2 Serv.L.R. 605: (1992) 1 Cal.L.J. 212: (1991-92) 96 Cal.W.N. 701.

Person not eligible admitted by Principal of College—Cancellation at instance of University—There is no question of estoppel: 1970 Mys.L.J. (S.N.) 258 (D.B.).

Where the petitioners were refused permission to appear in B.Sc. (Agriculture) Part I examination as it was found by University that they were admitted by the Principal of College in said course in breach of criteria prescribed by Admissions Committee and the petitioners pleaded estoppel, *held*, there can be no estoppel against law particularly where the legislative mandate is so clear and emphatic, namely, that no one admitted in contravention of the provisions of S. 28 shall be permitted to appear at the examination. Thus, the University was well within its right by virtue of sub-S. (6) of S. 28 of the U.P. State Universities Act, 1973 not to permit the petitioners to take up the examination. Further, at no point of time did the University which was the final authority in regard to the

admissions and grant of permission to the students to appear at the examinations held by it, directly or by any act or omission or even by implication made any representation to the petitioners or led them to act to their detriment believing any such supposed representation so as to attract the principle of estoppel; whatever was done in the present case was in disregard/breach of the criteria laid down by the University: A.I.R. 1985 All. 1 (D.B.).

The petitioner applied for admission to B.Arch. course and the only information given to petitioner and other candidates as mentioned in information brochure was that the candidate should have passed Intermediate examination with Physics, Chemistry and Maths. The petitioner was permitted to appear in the entrance examination and was declared successful but thereafter he was refused admission on the ground that he did not obtain 55% marks in Intermediate examination though the candidates were not informed about said condition earlier.

Held, the petitioner having been admitted to the entrance examination and having been allotted Roll No. could not be declared to be not eligible. Thus, the respondents were estopped from refusing admission to the petitioner to B.Arch. course: A.I.R. 1985 All. 257 (D.B.).

Where a candidate applied for admission to the engineering course with full knowledge of the prospectus which set forth instructions to the candidates, prescriptions with regard to eligibility for the course, and the methodology of selection, but he was not admitted for not satisfying the mark rules, *held*, he was estopped from challenging the prescription on constitutional ground; if the candidate had any objection to their validity, he ought not to have sought admission under the very same prescriptions: A.I.R. 1986 Mad. 179.

Where the provisional admission of the petitioner to a certain course was cancelled on the ground that he did not possess requisite minimum qualification and certificates filed by him were from a fake and bogus institution, *held*, the cancellation of the petitioners' admission was neither illegal nor without jurisdiction and principle of equitable and promissory estoppel did not operate in this case: A.I.R. 1993 Raj. 187.

Where a candidate lower in merits was mistakenly admitted to the clinical pathology course, his admission was cancelled after he had studied only for 3 days and he had thereby lost no chance for admission elsewhere, *held*, the doctrine of estoppel was not attracted: A.I.R. 1995 Madh. Pra. 23.

Where petitioner who had obtained less than qualifying marks but stating the facts truly in his application, was provisionally admitted to a particular course by the University and who had also paid fees, etc. and started attending the classes after completion of the necessary formalities, and subsequently his admission was cancelled, *held*, the plea of estoppel was available to the petitioner: A.I.R. 1992 Del. 105: (1991) 43 Del.L.T. 670 (D.B.).

Where a girl candidate deficient by 6 marks from the prescribed minimum for admission to the post graduate course was nevertheless admitted, allowed to pay fees, attend classes and continue studies for the full first year and the College, even though advised of her ineligibility and cancellation of her admission by the University six months before the examination, did not inform the student, *held*, the doctrine of estoppel was clearly attracted; she could not be kept out of the examination as she had concealed no fact and committed no fraud. [A.I.R. 1968 Del. 131, Foll.]: A.I.R. 1980 Del. 27 (D.B.).

Where petitioner was granted admission as a result of mistake on the part of the respondent-University and there was no suppression of facts by the candidate who acting on the representation made by the University persued particular course for a reasonable period of time but her admission was cancelled when said mistake was detected by the University, *held*, the University was estopped from cancelling her admission: A.I.R. 1994 N.O.C. 107 (All.) (D.B.).

Where the petitioners joined a certificate course in physical education on the basis of recognition granted by the State of Haryana to said course but subsequently the State Government derecognized said course while the petitioners were persuing the course, *held*, as the petitioners had joined the course on the basis of the recognition given by the State of Haryana and the recognition was in force at the time when they joined the course,

the Government was estopped from derecognising the certificates obtained by them at the end of the course: A.I.R. 1987 S.C. 2027: (1987) 2 S.C.C. 445.

Where a candidate provisionally admitted in the course of physical training instructor had regularly attended the classes and underwent training during the entire course period of one year whereafter without notice to, or hearing, the student's admission was cancelled on the ground that his sports certificate on the basis whereof he was admitted had not been verified and attested, as required under the Rules, by the Rajasthan Sports Council, *held*, the authorities, having failed to carefully scrutinise the certificate at the initial stage, were themselves to blame and were estopped from cancelling the admission after the course was over. [A.I.R. 1990 S.C. 1075, Foll.]: A.I.R. 1995 Raj. 44.

When a student is admitted into the institution without resorting to *mala fide* practice or unfair means and the School in its turn also over-looked a regulation which prohibited such admission, there could be no interference from the end of the School if the student succeed in the examination in due course: (1988) 2 Cal.L.J. 197: (1988) 2 Cal.H.N. 271.

Where a student secured admission in the Polytechnic in "reservation quota' by fraudulently obtaining a false certificate of belonging to a scheduled caste, *held*, the authorities could not be estopped from cancelling his admission after he had completed one year's studies. [A.I.R. 1981 Raj. 8, Dissented; A.I.R. 1979 Del. 87, Disting.]: A.I.R. 1982 Madh. Pra. 205: 1982 M.P.L.J. 695 (D.B.).

Where petitioner claimed his status to be a backward class and he was given admission provisionally on that basis but it was subject to final decision and as on enquiry the caste certificate produced by him was found to be false, his admission was cancelled, *held*, the mere fact that the petitioner had studied for four years subsequent thereto could not be a ground to say that he acted to his detriment. At no point of time, the respondent acquiesced to the continuance of the pursuit of study by the petitioner as a Backward Class student. It was not open to the petitioner to blow hot and cold to plead that the respondent was estopped to cancel the provisional admission. [A.I.R. 1976 S.C.376, Disting.; (1983) 1 A.P.L.J. (H.C.) 250, Expl.]: A.I.R. 1986 Andh. Pra. 196.

Where a candidate belonging to the reserved category sat in the entrance examination without submitting the requisite category certificate and thus as a general category candidate but failed to qualify and subsequently contended that he should have been considered as a reserved category candidate, *held*, the Admit Card itself had given him sufficient notice of his candidature and he had moreover already taken examination as a general category candidate, he was estopped from challenging his non-selection: A.I.R. 1994 J.&K. 42 (D.B.).

Advertisement by College inviting applications for admission therein—Subsequent instructions by State barring admission to non-residents of Punjab—College held estopped from refusing to consider applications by non-residents of Punjab: 1981 Lab.I.C. 768 (Punj.).

Where State Government invited applications for admission to certain course for which minimum qualification was intermediate and the petitioners who held certificate of "Vidushi" from Prayag Mahila Vidyalaya, Allahabad and "Madhyama" from Hindi Vishwavidyalaya, Allahabad which were recognised by the State Government as equivalent to Intermediate were granted admission but later on their admission was cancelled on the ground that they did not have the minimum qualification, *held*, there could not be any justification for cancellation of the admission of the petitioners at a point of time when they had almost completed their courses of studies and moreover it was not the case of the respondents that the petitioners had not been able to follow the instructions given to them in English: A.I.R. 1994 Pat. 15 (D.B.).

Where a candidate for admission to the M. Tech. course had given Industrial Management as his first choice but accepted admission for Hydraulics on the promise that he would be considered for his first preference subject to availability of seats was refused the only seat which fell vacant and was claimed by him, *held*, the doctrine of promissory estoppel was attracted; the Institute must be tied down to its promise: A.I.R. 1987 Mad. 22.

Where the petitioner appeared at entrance examination with knowledge of rules framed for purpose of valuation of answer scripts but later on challenged the arbitrary

or capricious manner in which the answer books were examined and evalued, *held*, it could not be stated that as the petitioner had appeared at the examination he was estopped from challenging the validity of the said rules: A.I.R. 1983 N.O.C. 127: (1982) 2 Cal.L.J. 196.

Where the mark-sheet for M.Sc. (Previous) examination showed the examinee to have been successful and upon his application for scrutiny of some of his answer books the University reaffirmed that there was no change in the marks obtained by him, *held*, the University was estopped from contending on the completion of his final year's course that having failed in the previous examination he was not entitled to take the M.Sc. (Final) examination: A.I.R. 1973 All. 442.

Where the appellant, a diploma holder serving in an Engineering College, applied for admission to B.E. Degree course beyond the last date, and certain objections were raised by the Officer-in-Charge, Admissions, including the objection that the appellant had obtained less than 60 per cent marks in the Diploma examination passed by him, and after considering all facts and circumstances and also the objections by the office to the admission of a candidate, the Vice-Chancellor directed his admission and the appellant deposited the requisite fees but by a subsequent order his admission was put in abeyance on the ground that he was admitted by mistake and the appellant pleaded estoppel, *held*, when after considering all the objections to the admission of a candidate, the Vice-Chancellor directed the admission of such a candidate, such admission could not be said to have been made through mistake. Further, assuming that the appellant was admitted through mistake, the appellant not being at fault, it was difficult to sustain the order withholding the admission of the appellant. [W.P. No. 521 of 1988, D/4-5-1988 (Raj.), Reversed]: A.I.R. 1989 S.C. 823: (1989) 15 All.L.R. 356: (1989) 1 S.C.C. 399.

Where a candidate was admitted to B.E. (Civil) Course on the basis of being a Konda Reddy as per the Community Certificate issued by a Deputy Tahsildar which was countermanded by the Divisional Officer and upon the candidate's writ petition further enquiry was ordered by the High Court pending which the candidate was allowed to take the final examination and direction was issued for publication of result without awaiting the result of enquiry. [1993 W.L.R. 485; 1991 W.L.R. 898, Rel. on]: (1994) 1 M.L.J. 95.

Where the petitioners were duly admitted to the Engineering College but subsequently their admission was cancelled on the ground that they failed to secure minimum marks in the qualifying examination as laid down in the prospectus though regulations of the University did not lay down any minimum marks of eligibility for admission to Engineering College, *held*, as the petitioners were selected for admission after being intimated as successful, the College was estopped from cancelling their admissions: A.I.R. 1989 Ori. 173: (1989) 68 Cut.L.T. 65: (1989) 1 Ori.L.R. 440 (D.B.).

Where the appellant while securing his admission in the Law College admittedly submitted his mark-sheet alongwith the application for admission and subsequently pursued his studies for two years and the University also granted him the admission card for the Pre-Law and Intermediate Law examinations and thereafter he was admitted to the Final year of the course but at the stage of the declaration of his results of the Pre-Law and Inter-Law examinations, the University raised the objection to his so-called ineligibility to be admitted to the Law course, *held*, the University was clearly estopped from refusing to declare the results of the appellant's examination or from preventing him from pursuing his final year course: A.I.R. 1990 S.C. 1075.

Where petitioners were admitted to LL.B. course even though they failed to secure minimum 40% marks in the qualifying examination on the recommendations of the Education Minister but later on their admission was cancelled, *held*, since the obtaining of 40% marks in the qualifying examination was the condition precedent for the eligibility for admission to the course of instruction in law, mere acquiescence or permission granted by the University to the petitioners on the recommendation of the then Education Minister to prosecute their studies could not operate as estoppel, the same being contrary to the statutory rule. [A.I.R. 1978 Madh. Pra. 86, Disting.]: A.I.R. 1988 Madh. Pra. 138: 1988 M.P.L.J. 9 (D.B.); A.I.R. 1989 Madh. Pra. 292: 1989 M.P.L.J. 476 (D.B.); (1983) 2 Kam.L.J. 175; 1979 M.P.L.J. 637.

Where condition precedent for admission to BAMS course was that candidate must have passed Sanskrit in Intermediate and the petitioner did not fulfil that requirement but he was nevertheless issued a letter for admission in said course but subsequently admission was refused and the petitioner pleaded estoppel, *held*, said condition was requirement of law and there could be no estoppel against law: A.I.R. 1986 All. 158 (D.B.).

Where the State Medical Faculty of Homeopathy, anticipating amendment of Regn. 35, granted maximum grace marks of 20 per cent in each subject, declared a failed examinee as passed in 4 out of 5 subjects which decision was recalled 6 months thereafter on the twin pleas of non-approval by the Government and the latter's advice that the Faculty had no such power, *held*, since the decision did not require the approval of the Government which could only annul, but did not annul, the Faculty's decision, it was not without jurisdiction; the Faculty was estopped from recalling the earlier decision: A.I.R. 1977 Ori. 123 (D.B.).

Provisions relating to reservations made in the Constitution are only enabling provisions in the exercise of which it is open to the executive Government to make reservations. Whether reservations should be provided to a particular category or classes of persons to whom reservations can be made is exclusively a matter for the executive Government to decide. A Court cannot compel the executive Government to make reservations if it decides not to make reservations to a category or classes of persons for whom reservations can be made. Thus, where the State Government did not provide for reservation to the category of outstanding sports persons in Medical Colleges as in the past and the petitioner raised plea of promissory estoppel, *held*, the principle of promissory estoppel could hardly be applied to such a case, where Government was free to modify its policies from year to year depending on a variety of factors: A.I.R. 1981 Karn. 58.

One of the essential requirements to invoke the doctrine of promissory estoppel is that one party by his word or conduct made to the other has to make a clear and unequivocal promise or representation which is intended to create a legal relation or affect the legal relation in future, having regard to the dealings which have taken place between the parties. Thus, where there was reservation in the Medical course earlier also for the wards of the Armed Forces personnel transferred to the State of Maharashtra but for the first time a restriction was imposed that such transfer must be within a period of one year prior to receipt of application, which was challenged, *inter alia* on the ground of doctrines of promissory estoppel and the legitimate expectations, *held*, when the transfer of Armed forces personnel was not shown to have been made to enable his ward to get admission in medical course nor was it shown that such transfer was sought for enabling his ward to get such admission, the challenge on the basis of aforesaid two doctrines was without any merits: 1993 Mah.L.J. 1370 (D.B.).

Merely because a candidate was allowed to sit in the entrance test for admission to a Medical College, *held*, does not operate as an estoppel against the Selection Committee and preclude it from not admitting the candidate for want of proof of the candidate's requisite domicile. [A.I.R. 1958 Andh. Pra. 470, Disting.]: A.I.R. 1972 Andh. Pra. 83 (D.B.).

Where two candidates for admission to the Government College in the M.B.,B.S. course were placed only on merit lists and the Government had directed that they be admitted in other Colleges of the Annamalai University which was later on found to be beyond the Government's power, *held*, they had no right to admission to the Government College as they were only placed in the waiting list; the Government's direction for their admission based on an erroneous view of law could not amount to a representation giving rise to the rule of estoppel: A.I.R. 1988 Mad. 212 (D.B.).

Where the petitioner was allotted a seat in Medical College under the Army quota due to mistake committed by Selection Agency and on securing the seat, she discontinued her studies in the Agricultural College and joined the Medical College but about 4 months thereafter her admission was cancelled, *held*, based upon her selection and allotment to the Medical College, the petitioner gave up her course of study in the Agricultural College and, thus, she altered her position to her detriment. Therefore, the respondent-University was estopped from cancelling her admission: A.I.R. 1994 Andh. Pra. 297.

Estoppel arises only if there has been a representation by the persons sought to be estopped and the person setting up estoppel has shifted her position to her detriment on account of the representation. Where the petitioner after an eleven year course of study sponsored by the University passed the I.S.C. Examination and thereafter joined the B.Sc. degree course and thereafter she sought admission to M.B.,B.S. course and was provisionally selected also but she was required to produce a certificate from the concerned University to the effect that she had passed an "Examination equivalent to pre-degree with eligibility for admission for M.B.,B.S." and as she could not produce it, her provisional selection was cancelled and contending that she was admitted in B.Sc. degree course after treating the I.S.C. examination equivalent to that of pre-degree examination but the respondents wrongfully refused to treat I.S.C. examination as equivalent to pre-degree examination with eligibility to medical course, *held*, there was no representation made to the petitioner when she joined the B.Sc. degree course that thereby she would acquire eligibility to join medical course. There was no averment in the petition that even when she joined the B.Sc. degree course her intention was to ultimately join the medical course, and under the belief that eligibility to B.Sc. degree course was the same as the eligibility to medical course she joined the B.Sc. degree course. There was also no averment in the petition regarding detriment which she would suffer. Thus, as the necessary ingredients constituting estoppel were not established, said doctrine was inapplicable: A.I.R. 1981 Ker. 149: 1981 Ker.L.T. 380 (F.B.).

The petitioner fell short of attendance in B.Sc. Part I therefore she took re-admission in said course during next year and pursued her studies. Thereafter petitioner sought admission to M.B.,B.S. course through a quota reserved for *bona fide* students of degree course and annexed a certificate in that regard alongwith the application though she qualified for being admitted against reserved quota but she was refused admission on the ground that she was not a *bona fide* student of degree course. *Held*, the certificate of being a *bona fide* student of the degree course was issued by the University authorities and the application form for M.B.,B.S. course and said certificate was accepted by the University. She was entitled to appear at the examination and considered against the quota reserved for students of degree course. The University was estopped from contending that the petitioner was not a *bona fide* student of degree course: A.I.R. 1989 All. 35: 1989 All.W.C. 369: (1989) 15 All.L.R. 90 (D.B.).

Where alongwith her application for admission to M.B.,B.S. course, the petitioner enclosed a letter stating that her actual date of birth was 12-4-1969 and not 12-4-1970 as mentioned in her School record and she was permitted to take the entrance examination even though she was underaged, and she passed said examination but was refused admission on the ground of being underaged, *held*, when the application was accepted and the petitioner was permitted to sit for the examination, the only conclusion was that her plea that her age was not correctly entered in the school register was accepted. Further, the acceptance of application form amounted to a promise to be acted upon and, thus, the petitioner suffered a detriment and, therefore, the respondents were estopped from pleading that the petitioner was not entitled to a seat in the medical course: A.I.R. 1988 Andh. Pra. 2.

Where petitioner secured admission to M.B.,B.S. course on production of a false social status certificate but he was admitted provisionally subject to verification and report by the Director of Tribal Welfare and when said Officer reported that the petitioner maintained a false social status his provisional admission was cancelled, *held*, as admission of petitioner was subject to verification by Director of Tribal Welfare there was no unequivocal assurance that the admission given to the petitioner was final and conclusive. Further, the petitioner knew on the date of submitting application that he did not belong to Scheduled Caste but he produced a false certificate therefore, he could not invoke doctrine of equitable estoppel, as a person who comes to equity must come with clean hands: A.I.R. 1989 Andh. Pra. 159: (1989) 2 An.L.T. 491.

Where petitioner was granted provisional admission to M.B.B.S. Part I course on the basis of his claim to be a member of Schedule Tribe and he also appeared for Part I Examination but he was prevented from appearing at Part II of M.B.B.S. course on the ground that petitioner's name had not been cleared by the Director of Tribal Welfare and the aggrieved petitioner invoked the doctrine of promissory estoppel, *held*, the plea of promissory estoppel could not be made applicable to the facts of the case as the doctrine of estoppel applies to a case where a person is given an unequivocal assurance and on such assurance, he acted and having made such promise, later relent to extend the promise,

with the result, the party suffers. Admittedly, the petitioner's admission into first year M.B.B.S. course was only provisional and his social status claim had yet to be cleared by the Director of Tribal Welfare and as long as the petitioner's social status claim was not so cleared, the petitioner was not entitled to seek continuation in the M.B.B.S. course. [A.I.R. 1989 Andh. Pra. 159, Rel. on]: A.I.R. 1995 Andh. Pra. 181.

Where minimum marks required for admission to M.B.,B.S. entrance examination by SC/ST candidates were 35% but as seats were left vacant in the reserved quota, the minimum percentage was reduced to 25% by the State Government and the said action was challenged, *held*, plea of estoppel could not be raised against the Government in such a case. [A.I.R. 1981 S.C. 2045, Foll.]: A.I.R. 1988 S.C. 481: (1988) 1 S.C.C. 258: (1988) 1 U.J. (S.C.) 351; A.I.R. 1989 Madh. Pra. 61: 1988 M.P.L.J. 799: 1989 Jab.L.J. 3 (D.B.).

Where a candidate of the general category had been admitted to the Medical College treating her to be that of scheduled caste by mistake but immediately thereafter when the mistake was detected, her admission was cancelled, *held*, the principle of estoppel could not be invoked as she knew that she was given admission under a mistake: A.I.R. 1987 All. 22: 1986 All.W.C. 165 (D.B.).

Where candidates obtained admission to a medical course in Maharashtra claiming to be Mahadeo Kolis, declared a Scheduled Tribe as early as in 1933 and it was found that their father had described himself as a Hindu Koli as per his School admission register of 1943, *held*, they were rightly refused the status of Mahadeo Kolis by the authorities; merely because they had been admitted on their false representation as to their caste, they cannot invoke the doctrine of equity or promissory estoppel; their hands were not clean: A.I.R. 1995 S.C. 94.

Where a person coming from West Pakistan on his claim of belonging to a scheduled caste got provisional admission and readmission in the M.B.,B.S. course and was in the fifth and final year when his admission was cancelled on the ground that on verification it was discovered that he did not belong to a Scheduled Caste, *held*, it was not open to the Authorities at that late stage to turn round and cancel his admission; they were estopped by inordinate delay of four years. [A.I.R. 1976 Cal. 347, Disting.; A.I.R. 1976 S.C. 376, Rel. on]: A.I.R. 1979 Del. 87.

Where the petitioner secured admission in Medical course on the basis of a false declaration that he belonged to the Scheduled Tribe but the truth came to the notice of the Authorities after about three years, when the petitioner was in final year of M.B.,B.S., *held*, the Authorities were estopped from unseating him on the principle of estoppel. [A.I.R. 1979 Del. 87, Rel. on]: A.I.R. 1981 Raj. 8.

Where the petitioner who had produced a caste certificate showing that he belonged to a Scheduled Caste was admitted to first year M.B.,B.S. course in 1975 but after four years by impugned order the respondent cancelled his admission on the ground that he belonged to an upper class and the petitioner pleaded estoppel, *held*, as there was acquiescence on the part of the Authorities concerned and no forgery or fraud was alleged to have been committed by the petitioner, it would be too late in 1979, when the petitioner was finishing his final year M.B.,B.S. course to cancel his admission to the Ist year M.B.,B.S. course which was made in as far back as in the year 1975. Further, if the impugned order was allowed to stand, it would lead to a ridiculous situation, too harsh and against the petitioner not commensurate with the fault, if any, committed by him before his admission. [A.I.R. 1976 S.C. 376; A.I.R. 1981 Raj. 8, Foll.; A.I.R. 1979 S.C. 621, Expl.]: A.I.R. 1982 Pat. 122: 1982 B.L.J.R. 238 (D.B.).

Where the petitioners applied for, and were granted admission in M.B.,B.S. course in a self-financing Institute on the basis of the prospectus issued by it without concealing any information and they were allowed to appear in the examinations for certain semesters by the University to which said Institute was affiliated and in this way the petitioners spent considerable time and money in the Institute for the portion of the M.B.,B.S. course, but subsequently the University took the stand that they were not eligible for being admitted to the said course, *held*, the principle of equitable estoppel squarely applied to the facts of the case and the petitioners could not be prevented from prosecuting their studies further: A.I.R. 1991 Mad. 45: (1991) 1 M.L.J. 163.

The petitioner doing her degree course in science had appeared in the entrance examination of M.B.B.S. On declaration of results her name appeared in the list of successful candidates which was also communicated to her by the authorities and on that representation she left her degree course in science and took admission in M.B.B.S. complying with all the formalities required Subsequently, she was informed by a notice, about

cancellation of her admission in M.B.B.S. as she was selected by mistake due to error in decoding of index number. *Held*, the petitioner had changed her position substantially to her prejudice on the representation of the Selection Board and it would be now impossible to restore the *status quo*. As the petitioner had all the qualifications as laid down by the University and examination had been prescribed for making a selection because there were more candidates than seats. Thus, the principle of estoppel directly applied and the order of cancellation could not be permitted to stand as a bar against the petitioner continuing in the Medical College because it was sheer negligence of the Selection Board. [A.I.R. 1971 Ori. 276; A.I.R. 1956 Mad. 309; A.I.R. 1972 Mys. 135, Foll.]: A.I.R. 1975 Ori. 155: (1975) 41 Cut.L.T. 69 (D.B.).

Where a candidate acting on the basis of the representation made by the Selection Committee intimating that he had been provisionally selected for admission to the Medical College in Orissa, for a reserved seat for Scheduled Caste, resigned from Government service only in order to join the College, but later he was refused admission on the ground that he was Scheduled Caste belonging to State of West Bengal and thus, was not entitled to be admitted against a seat reserved for Scheduled Castes in State of Orissa, *held*, the petitioner had never suppressed any fact from the Authorities and had declared his permanent address being that of State of West Bengal and there was no requirement in the prospectus or in the application form that the Scheduled Castes of Orissa only were to be admitted against the reserved seat. Furthermore, he, on the basis of the representation made by the Selection Committee, had acted to his gross detriment resigning from Government service. Thus, it would be as such completely inequitable and against all senses of fair play and justice to refuse him admission to which he had otherwise become entitled: A.I.R. 1989 Ori. 120: (1988) 2 Ori.L.R. 28 (D.B.).

It cannot be laid down that a prospectus relating to post graduate courses once issued by the Government, cannot be altered at all at a subsequent stage. The Government which has the competence to issue rules or regulations, has, as a corollary, powers to amend or alter or even repeal and reissue such rules and regulations. Further, in the sphere of higher educations in professional courses, a static and stagnant continuity of Rules once formulated would be totally inappropriate and dangerously counter-productive. A theory of promissory estoppel cannot be countenanced in such situations Thus, the doctrine of promissory estoppel would not have application in relation to admissions to higher specialised studies in Medical Colleges run by or under the Control of Government. [1986 Mah.L.J. 907, Overruled]: A.I.R. 1992 Bom. 233: (1992) 94 Bom.L.R. 43: 1991 Mah.L.J.1336 (F.B.).

Where the original prospectus issued for admission to post graduate medical course did not contain any provision for reservation for Scheduled Caste or Scheduled Tribe candidates but the Government by impugned notification made a reservation for Scheduled Caste and Scheduled Tribe candidates and the petitioners challenged said action of the Government on the principle of promissory estoppel, *held*, even if it be assumed that the issue of prospectus amounted to a representation and promise that the admission would be purely on the basis of merit, it would be inequitable to hold the Government to the alleged promise made in the prospectus as it would be interfering with the constitutional mandate in Art. 46 of the Constitution which is fundamental in the governance of the country (Art. 37 of the Constitution) and would unduly interfere with the accepted policy of the State and Union Governments to provide for real opportunity of advancement of the interest of the Scheduled Castes and Scheduled Tribes: A.I.R. 1982 Pat. 126: 1982 Pat.L.J.R. 267: 1982 B.L.J.R. 433 (D.B.).

Where the petitioners applied for admission to post graduate course in Medicine on the basis of representation contained in notice and prospectus issued at the time when applications for admission were invited that candidates would be selected on the basis of merit but at the time of final selection the Government changed the basis of selection and made a reservation for the Scheduled Castes and Scheduled Tribe candidates, *held*, Government was estopped from changing the basis of selection subsequently. [A.I.R. 1969 Ori. 80, Rel. on]: A.I.R. 1981 Pat. 164: 1981 B.L.J. 237: 1981 B.L.J.R. 294: 1981 Pat.L.J.R. 110 (D.B.).

Where at the time when the petitioners took admission to first M.B.B.S. course the rules governing the admissions to post graduate medical course provided that only marks obtained at the final M.B.B.S. examination would be considered for preparing merit list for post graduate course but subsequently University changed the criteria for preparing the merit list for admission to post

graduate course and petitioners pleaded estoppel, *held*, while the petitioner and similarly situated students were admitted to first M.B.B.S. course, no promise could be said to have been made by the University that the same rules which were then governing the admissions to post graduate medical courses would continue to apply to them. It was also difficult to believe that the petitioners and others like them joined M.B.B.S. course because the rules governing admission to post graduate medical courses provided that only the marks obtained at the final M.B.B.S. examination would be taken into consideration for judging their merits, and that they would not have joined the medical course if those rules were going to be changed by the University. It was also not possible to accept that when they joined the medical course all of them had done so with a view to prosecute post graduate medical course also. Further, the University framed the Rules in exercise of its statutory powers. Therefore, the principle of promissory estoppel could not be applied: A.I.R. 1991 Guj. 23: (1990-2) 31 Guj.L.R. 1066 (D.B.).

Where certain rules meant for selection of candidates for post graduate courses in medicine provided for weightages of marks for extra curricular activities, rural service and for sterilization operations and the State Government as per directions of the Supreme Court deleted said rules and the petitioners who sought admission to post graduate course pleaded estoppel, *held*, the principle of estoppel which was an equitable principle could not be taken aid of by the petitioners. The rules of admission are not statutory in nature and are subject to change and amendment from time to time. The rules containing weightages of marks came to be deleted as a result of the decision of the Court and the principle of estoppel cannot operate against the State in such a situation: A.I.R. 1992 Madh. Pra. 364 (D.B.).

Where the College Dean acted arbitrarily, beyond his authority and without the Government's knowledge or consent, directed admission of candidates to the Post Graduate Medical courses in contravention of the existing rules, *held*, the doctrine of promissory estoppel is not available to uphold admissions which are not in conformity with the rules: A.I.R. 1982 Goa 1.

Where University in exercise of its statutory powers had enacted rules after obtaining directions from the High Court for preparation of merit list for admission to Post Graduate Medical courses, which rules sought to effect a change in the earlier rules, *held*, the principle of estoppel was not available against the Government in exercise of its legislative, sovereign or executive powers and as in the instant case, the rules were framed by the University in exercise of its power under S. 32(2) of the Medical Council Act, 1956 which were also approved by the Executive Council, the University was not estopped from changing the rules: A.I.R. 1984 N.O.C. 65: (1983-2) 24 Guj.L.R. 1214: (1983) 3 Guj.L.H. 752 (D.B.).

Where the respondent did not challenge the merit list prepared in the context of selection for house jobs in 1988 but later on it challenged the merit list for admission to M.D. course which was nothing but a reproduction of the merit list of 1988 confined to a narrower group of students of the same batch, *held*, the respondent should be barred to challenge said merit list on equitable considerations: A.I.R. 1991 S.C. 1872: (1991) 4 S.C.C. 279.

Where admission to the post graduate course in a Medical College was challenged by several petitioners under Art. 226 of the Constitution and a consent order in the appeal against the judgment of the Single Judge provided for according of consideration for selection to writ petitioners alongwith 'other eligible candidates' who had applied for admission during the 1989 session and one such candidate challenged his omission from the selection made in terms of the consent order, *held*, the candidate, not satisfying the eligibility test of one year's rural service, was rightly not selected as he was not amongst other eligible candidates'; merely because he had earlier been allowed to sit in the entrance test and given an admit card would not clothe him with promissory estoppel. Participation in the test, and ultimate selection are two different things; his claim that he was superior in merit than those selected cannot override the eligibility ban. [A.I.R. 1976 S.C. 375, Disting.]: A.I.R. 1995 J.&K. 68.

Where petitioners submitted their applications for admission to post graduate course in Medicine and the respondent published a notice giving list of selected candidates on the basis of a Government notification restricting selections for post graduate course to students of the current batch only and precluding the students of earlier batches from competing or being selected. While the original rules for selection entitled residents of all batches 1 year to compete and did not preclude them from selection and the petitioners who were precluded from being

selected for Post Graduate course on basis of impugned Government notification pleaded estoppel, *held*, the Government and the Authorities concerned were stopped on basis of principle of equitable estoppel from issuing the impugned notification as it was against the rules of equity and good conscience to use them against the candidates including the petitioners. [A.I.R. 1969 Ori. 80, Foll.]: A.I.R. 1981 Goa 39.

Where the appellant who had passed her M.B.B.S. examination from the State of Andhra Pradesh, applied to the Maharashtra Government praying for creation of a Housepost and the State of Maharashtra after considering the high merit of the appellant specifically created a supernumerary Housepost for the appellant and after completing her house-job, the appellant applied for the issuance of an application form for the Post-Graduate Degree course in medical sciences which was refused on the ground of failure to observe reciprocity by the State of Andhra Pradesh and the appellant pleaded estoppel, *held*, though the appellant could be refused at the very outset, that is to say, her application for creation of a supernumerary Housepost could be turned down on the ground of failure to observe reciprocity by the State of Andhra Pradesh. But, after creating the supernumerary Housepost specifically for the appellant so as to enable her to become eligible for the Post Graduate Degree course in medical sciences, the State of Maharashtra was not at all justified in refusing her even an application form and in not considering her case for admission in the Post Graduate Degree course. [W.P. No. 28 of 1987, D/- 3-8-1988 (Bom.), Reversed]: A.I.R. 1989 S.C. 382.

The petitioner appeared in Pre-Medical test conducted by Aligarh Muslim University and took admission in Medical College, Aligarh. After completing first year she was transferred to Medical College, Lucknow and she completed her M.B.B.S. Thereafter, she was refused admission in post graduate course on the basis of a Government order under which students admitted through CPMT, a Pre-medical test conducted by the State were eligible for reserved quota for Post Graduate course. *Held*, while admitting the petitioner into the M.B.B.S. course, her attention was not drawn towards the bar provided in the said Government order. She was allowed to complete her course for M.B.,B.S. classes. She was also allowed to participate in the test for admission to post graduate classes and certificate of merit was also granted to her. Further, the State Government had acquiesced to the transfer of the petitioner from Aligarh to Lucknow Medical College. The State Government was estopped from denying her admission to the Post Graduate course on the ground that she was a transferred student from Aligarh and had not passed CPMT: A.I.R. 1990 All. 179 (D.B.).

Where prospectus did not provide that only fresh candidates were to be admitted to the post graduate study course and the petitioner had clearly mentioned in his application that he was an "in service" candidate and he was allowed to undergo the process of selection and was selected, *held*, his admission could not subsequently be cancelled on the ground that he was an "in service" candidate: A.I.R. 1982 Ori. 106.

Some medical graduates challenged the prospectus for admission into the post graduate medical admission for the year 1989 on the allegation that the prescription that a candidate for the purpose of getting admitted to the Post Graduate course must complete his or her house job of 12 months on or before 31st May, 1989, was contrary to the directions of Supreme Court in (1987) 4 S.C.C. 459. The State contended that the All India Entrance Examination for Post Graduate Medical Courses held by the All India Institute of Medical Sciences was not conducted in time as fixed by the Supreme Court and intimation of the results was sent late and because of that several States also were not complying with the time-frame indicated by the Court in the said decision and as such the scheme formulated by the Court was not being implemented properly. It was also found that those who had qualified beyond the cut-off date in the previous year had taken examination in terms of the prospectus of present year with the new group. *Held*, as the mistake of the State in fixing a date beyond the cut-off date fixed by the Supreme Court had misled a group of candidates, therefore, in interest of all, the mistake committed by the State was to be condoned and on the basis of the result of the selection examination with 31-5-89 as the cut-off date admissions for the present year were to be permitted. [A.I.R. 1989 Pat. 241 (D.B.), Affrimed]: A.I.R. 1990 S.C. 749.

28. Estoppel by negligence.—In order to create estoppel by negligence mere negligence on the part of the true owner is not enough. Negligence must be so serious a character as to amount to a breach of duty owing by the owner to the party defrauded or to the general public of which the party defrauded is one: A.I.R. 1957 Cal. 551.

Estoppel by negligence and representation—Theft of goods entrusted with mercantile agent with full authority of disposal: A.I.R. 1965 Cal. 355.

In support of plea of estoppel on the ground of negligence, it must be shown that the party against whom the plea is raised owed a duty to the party who raises the plea, or towards the general public of which is he one. There is another requirement which has to be proved before a plea of estoppel on the ground of negligence can be upheld and that requirement is that the negligence on which it is based should not be indirectly or remotely connected with misleading effected assigned to it, but must be proximate or real cause of that result. Negligence which can sustain a plea of estoppel must be in the transaction itself and it should be so connected with the result to which it led that it is impossible to treat the two separately.

Where after the intimation card, on the production of which the respondent in practice used to proceed to issue a cheque against the bills received by it from the appellant for the supply of coal, had been duly posted by the respondent to the appellant it fell into dishonest hands and was fraudulently used by some persons, that would not create an impediment in the way of the appellant's claim on the ground that the appellant was negligent and his negligence creates estoppel. It cannot be said that when the appellant received the intimation card, it owed a duty to the respondent to keep the said card in a locked drawer. But assuming that the appellant had a kind of duty towards the respondent having regard to the fact that the intimation card was an important document, in the absence of any collusion between the appellant and the person who made fraudulent use of the intimation card it cannot be said that the appellant did not show that degree of diligence in receiving the card and trusting his employees to bring the letters from the letter box or in keeping it in safe custody after it was received as he should have. In ordinary course of business, it would be assumed by a businessman that after letters are placed on the table or in a file which is kept at some other place, they would not be pilfered by any of his employees. Under these circumstances, if the intimation card in question was taken away by some fraudulent person, the appellant cannot be charged with negligence which, in turn, can be held to be the proximate cause of the loss caused to the respondent: (1964) 1 S.C.A. 491: (1964) 2 S.C.R. 859: A.I.R. 1964 S.C. 152.

If there was no duty cast upon the customer to scrutinise his bank pass book as soon as received and to inform the banker about any inaccuracies therein negligence on the part of the customer to inform the bank of inaccuracies in the pass book cannot result in estoppel. Estoppel of this kind is described as estoppel by negligence or by conduct or by representation or by holding out of ostensible authority. There could be no case of estoppel by conduct or representation unless there was a duty to inform: I.L.R. (1955) 2 Cal. 365.

For negligence to constitute an estoppel it is necessary to imply the existence of some duty which the party against whom estoppel is alleged owes to the other party. There is a duty of some sort on the part of the customer to inform the bank of irregularities when he comes to know of it. But by mere negligence one cannot presume that there has been a breach of duty by the customer to the bank. The customer should not by his conduct facilitate payment of money on forged cheques. In the absence of such circumstances, mere negligence would not prevent a customer from successfully suing the bank for recovery of the amount.

The authorities in England have more or less consistently held that there is no duty on the part of the customer to intimate the banker about any error that may be seen in the pass book and he will be entitled to claim any amount paid on a forged cheque though there may be some negligence or inaction on his part in not being careful to discover the errors in the pass book or other documents. Where there was no evidence to show that anyone other than the person handling the bank account of a firm/company knew that the forged cheques had been encashed, *held*, the company/firm could not be non-suited on the ground of negligence or inaction. [(1973) 2 Mys.L.J. 156, Affirmed]: A.I.R. 1987 S.C. 1603: (1987) 2 S.C.C. 666: 1987 Cr.L.J. 1872: (1987) 100 Mad.L.W. 1137.

Where bank made payment on a forged cheque and the plaintiff customer immediately after coming to know of the payment of cheque complained to the bank that the cheque was forged and called upon the bank to credit the said amount to his account, *held*, as plaintiff did not ratify the payment of cheque, bank could not plead estoppel against him in order to avoid its liability under S. 85(2) of the Negotiable Instruments Act. [A.I.R. 1978 Cal. 55, Disting.]: A.I.R. 1989 Cal. 92: (1988) 1 Cal.H.N. 272.

Bank giving double credit inadvertently to its customer—Customer acting upon the

credit to his detriment—Estoppel—Customer grossly negligent in scrutinising the weekly statements, accounts and correspondence—Constructive notice—Banker in the circumstances not estopped from claiming refund of excess credit from the customer: (1964) 2 M.L.J. 104: A.I.R. 1964 Mad. 202.

Where a Company's seal was made available by it to its Manager enabling him to use it for endorsement of the Company's cheques, *held*, it amounted to a representation to the bank that he was its Manager; on his endorsing one of the cheques in his own favour and defalcating the amount, the Company was estopped by its conduct from contending that its Manager has no authority to endorse the cheque and foist the liability therefor on the Bank: A.I.R. 1977 Cal. 363 (D.B.).

Where one *X* took delivery of goods on forged railway receipt and pledged them to *Y*. *Held*, Railway Authorities were not estopped from suing *Y* for recovery of goods since *Y* advanced money to *X* not on the representation made by the Railway. Assuming that the Railway Authorities were negligent in effecting delivery on the basis of railway receipt presented by *X*, the question that arose was whether the act of *Y* in accepting to advance money on the pledge, of the commodity was the proximate result of such negligence on the part of the Railway Authorities. It was the result of acting upon the representations made by *X* that *Y* agreed to enter into the transaction. The entering into the transaction by *Y* was not caused by any representation to that effect that the consignment had been delivered to *X* by the Railway Authorities under railway receipt. That being so, it could not be said that the neglect of the Railway Authorities in relation to the delivery of the goods on the basis of the railway receipt was responsible for inducing *Y* to enter into the transaction. All that can be said against the Railway Authorities was that they should not have delivered the consignment on the basis of the railway receipt presented before them. In giving delivery on the basis of that railway receipt, it could not be said that the Railway Authorities were doing something which could induce others to believe that the person holding the consignment was the real owner thereof or that he had a right to deal with the same: I.L.R. (1967) 1 All. 398: A.I.R. 1967 All. 549.

29. Estoppel by pleadings.—If the factual position giving rise to the plea of estoppel is not pleaded, the pleading would be defective in law. If, on the other hand, the factual position giving rise to estoppel is pleaded and if only the word "estoppel" is not pleaded, the Court would be entitled to connive at that much of inadequacy of pleading: A.I.R. 1987 Bom. 142: (1986) 88 Bom.L.R. 633: (1987) 1 Bom.C.R. 547.

A sued *B* and her sons, *C*, *D* and *E* for possession of two houses. *C* made a statement that he had no interest in the house; on the basis of the statement *B* and *C* were removed from the array of the parties and possession over one house was given to *A* and one was left with *D*. Later on *C* sold the house to *F* who sued *D* for possession. *Held*, that the statement by *C* being a declaration by a party to a suit was binding and he and his representatives-in-interest were estopped from claiming any interest in the property; (2) that if the statement was made either in ignorance or under some wrong impression it has definitely to be proved, and the best person to prove it was *C*; (3) that if the plaintiff *F* had no title it is not necessary for the defendant *D* to establish his title. If *D* can show that the plaintiff has no title to maintain the suit, the plaintiff's suit would be dismissed irrespective of the fact whether the defendant had any right or not: A.I.R. 1957 All. 135.

Where plea of estoppel is not set up in the pleadings or issues, it cannot be availed of later because estoppel is eminently a matter of pleading: 119 I.C. 152: A.I.R. 1929 Mad. 467; (1917-18) 22 Cal.W.N. 179: 44 I.C. 254; 43 I.C. 556: 46 P.R. 1918: 52 I.C. 739; 23 C.L.J. 122; 16 Nag.L.J. 248: A.I.R. 1934 Nag. 61; I.L.R. 14 Lah. 218: A.I.R. 1933 Lah. 179.

When a party has asserted a certain position in a previous litigation, he cannot agitate the matter on the assumption of fresh fact against persons who were parties in the previous suit: 106 I.C. 484 (L). *See* also (1938) 40 Punj.L.R. 243: A.I.R. 1938 Lah. 525.

A party to a suit cannot be allowed to take a contrary stand than what it has taken in previous litigation: 1983 M.P.W.N. 253.

There is a distinction between a case where the defendant consented to a judgment after pleading as defence the matter which he seeks to set up in the later pleading

and a case where he consents to a judgment before setting up of any pleading. The defendant in the latter case is not estopped as against the plaintiff from subsequently setting up matters which might have constituted the defence because there has never been an issue: I.L.R. (1956) Hyd. 29: A.I.R. 1956 Hyd. 178.

Estoppel by pleading—First suit for judicial separation withdrawn on persuasion of friends—Second suit for divorce on same grounds not barred by estoppel—O. 23, R. 1, C.P.Code has no application: (1970) 72 Bom.L.R. 41: I.L.R. (1969) Bom. 1043: A.I.R. 1970 Bom. 341 (D.B.).

Once an issue of a matrimonial offence has been litigated between the parties and decided by a competent Court neither party can claim as of right to re-open the issue and litigate it all over again. But a party who has made a charge and succeeded in proving it is not precluded from repeating it. So also where there is no adjudication in a charge it is open to a party to make that charge again and it is also open to the other to deny it: (1958) 1 W.L.R. 1275.

Application by landlord for eviction of tenant specifically stating that tenant should deposit certain amount of interest on arrears of rent for exonerating himself from eviction—Amount stated deposited by tenant on date of first hearing—Landlord estopped from contending that deposit falls short on proper calculation: 1969 Cur. L.J. 415: (1969) 71 Punj.L.R. 571: A.I.R. 1969 Punj. 367.

Estoppel by pleadings—Mysore Tenancy Act (XIII of 1952), S. 30—Application under S. 30 by landlord for recovery of rent money agreed to be paid by way of land revenue—Dismissed by Tahsildar on accepting tenant's plea that tenant was liable to pay land revenue and not rent—Subsequent suit by landlord in civil Court for recovery of money—Tenant is estopped from setting plea contrary to that period raised before Tahsildar: (1968) 1 Mys.L.J. 188.

Pleadings—Suit by plaintiff 1—the consignee and plaintiff 2—the insurer as subrogatee of rights of plaintiff 1 by payment of the claim of plaintiff 2 against Railways for damages for loss of goods in transit by fire—Railways in their pleading, denying the subrogation and the right of plaintiff 2—In appeal against decree in favour of plaintiff 1, Railways cannot turn round and utilise allegations of subrogation made by plaintiffs as ground for non-suiting plaintiffs: (1969) 71 Bom.L.R. 214: I.L.R. (1969) Bom. 864: A.I.R. 1969 Bom. 401.

Estoppel by pleadings—Suit by prior mortgagee for sale impleading puisne mortgagee—Decree therein not providing for payment of balance of sale amount to puisne mortgagee—Second suit by puisne mortgagee not barred by *res judicata*—Party cannot be permitted to assume inconsistent positions: A.I.R. 1968 Andh. Pra. 336.

No estoppel against pleading that the transaction (lease) is void under statute: (1973) 2 Mys.L.J. (S.N.) 300.

New and inconsistent plea—Employee alleging absence of any domestic enquiry—Employee cannot be allowed to contend that no proper procedure was followed: A.I.R. 1967 Bom. 147.

Where there was no pleading regarding request of principal-debtor to create a contract of surety, *held*, such a plea could not be reheard subsequently: 1979 B.B.C.J. 140.

Mesne profits—Court if can award more than what is claimed—Plaintiff having no special means of knowing exact income from the land during relevant period—Plaintiff, *held*, not estopped from claiming larger sum as *mesne profits* than what was claimed by him in the plaint: (1962) 2 An.W.R. 18: A.I.R. 1963 Andh. Pra. 42.

30. Estoppel by admission.—It is true that the doctrine of estoppel precludes a party from taking up a position which is inconsistent with an admission which he has previously made, but this doctrine comes into play only when the admission was designed actually or apparently to influence the conduct of the party claiming the estoppel and when the said party has changed his position in reliance on the admission. It does not apply to an erroneous admission on a point of law or when the admission is gratuitous and a party making such an admission is entitled to retract the same and to prove that the admission was mistaken or untrue: (1957) 59 Punj.L.R. 475: A.I.R. 1957 Punj. 317.

A gratuitous admission made by a party in possession in mutation proceedings before a Revenue Officer that another person is the owner of the property does not bind

either maker or the person claiming under him and cannot operate as estoppel. Title to immovable property cannot be transferred by mere admission; title can pass only by effecting a transfer in one of the modes permitted by law and the making of an admission is not one of those recognized modes. Therefore, by person's mere admission that some other person is the owner of a certain property, when in fact that other person has no title at all, he will not denude himself of ownership of the property which really vests in him. Nor is it possible to construe this gratuitous admission as a representation on the faith of which the latter changed his position: A.I.R. 1963 J.&K. 15.

Where an admission was made in a compromise affected between parties to the suit but not incorporated in any decree as the suit itself was dismissed in default, *held*, being a gratuitous admission, it did not amount to an estoppel; it could be withdrawn or shown to be untrue and erroneous as and when it was sought to be relied upon against its maker; it can, however, be considered as a piece of evidence alongwith other evidence but not as a binding admission; of course, the position would have been different if an executable decree based on it had been passed: (1985) 11 All.L.R. 172.

Admissions are declarations against one's interest; they are good but not conclusive evidence; and they can be withdrawn by proving them to be mistaken or untrue. Estoppels, on the other hand, create absolute bar. Besides, estoppels deals with facts, not rights; a party is not estopped from asserting a right which he said that he would not assert; and there can be no estoppel against a statute: (1982) 95 Mad.L.W. 121 (S.N.) (S.C.).

Admission—When amounts to estoppel: (1979) 1 M.P.W.N. 39.

An admission inferred from conduct does neither amount to an estoppel nor is conclusive proof of the matter admitted, but it is certainly strong *prima facie* evidence and may be conclusive when not rebutted by any evidence: 1939 M.L.R. 229 (Civ.).

Admission may operate as estoppel and they do so where parties had agreed to abide by them: A.I.R. 1985 S.C. 998: (1985) 98 Mad.L.W. 686.

Admissions do not operate as estoppel but they must be explained by persons making them: A.I.R. 1929 Lah. 748.

Admissions are relevant against the maker thereof and as laid down in S. 31, they are not conclusive proof of the matters admitted, but they may operate as estoppel: (1988) 2 Hindu L.R. 359 (P.&H.) (D.B.).

An admission operates as estoppel and can appropriately be used against its maker: 1979 All.W.C. 162: (1979) 5 All.L.R. 245: 1979 All.L.J. 231.

Defendants admitting liability to account—Estoppel. *See* A.I.R. 1957 Mad. 735. Admission on matter of law. *See* A.I.R. 1954 Pat. 486.

Admission by mistake—Whether estoppel—It can operate as estoppel. *See* 1979 All.L.J. (N.O.C.) 54.

The admission made by the party in the pleadings is inconclusive and no opportunity need be given to explain the same. If there is evidentiary admission, the only presumption is, that there is an admission made, but is a rebuttable presumption. Unless the admission amounts to estoppel it cannot be used against him. The title cannot pass by a mere admission. Thus, where in a suit filed by a plaintiff-temple for declaration of title in respect of certain land belonging to the temple, plaintiff-temple relied upon an admission made by Ex-Chairman of a Trust Board against his own interest in respect of impugned land, *held*, said admission which was sought to be made use of against defendant Ex-Chairman was not pleaded and no evidence was adduced in that regard. This said admission, even though, was found to be true could not be used as estoppel against maker thereof in a declaratory suit: (1984) 1 An.W.R. 16.

A statement made under some misconception or even misapprehension can certainly be allowed to be withdrawn if it was contrary to the record and was not supported by facts and the law applicable thereto: A.I.R. 1990 N.O.C. 27: (1989) 1 Ren.L.R. 690: (1989) 38 Del.L.T. 94.

Admissions which may have been made under a mistake as to the true legal character of the venture, cannot operate to create an estoppel or acquiescence nor can they be invoked for the purpose of conferring jurisdiction on the Industrial Tribunal, when such a jurisdiction does not vest in it; neither consent nor acquiescence of a party can operate to vest jurisdiction in a Tribunal, where in fact, none otherwise exists: 1968 Lab.I.C. 1546 (Del.).

Admission in the pleading of a previous suit—Admission binds the party making it in subsequent suit and can be used against him: A.I.R. 1969 Pat. 385.

Admission by predecessor of defendant in a previous suit—Is binding on defendant in present suit: A.I.R. 1969 All. 248.

Where a defendant in his written statement in a former suit makes admission regarding the title of a co-defendant in that suit, those admissions do not operate as estoppel in the absence of proof that the co-defendant owing to the written statement acted in any way in which he would not have acted if the written statement had not been filed: 190 I.C. 609: A.I.R. 1940 Rang. 136.

Where in an earlier suit the father of the appellants admitted that he was in possession of gold belonging to the joint family though Commissioners' report in subsequent suit for partition did not advert to existence of gold, *held*, the statement of father of appellants clearly bound them as they were his legal representatives and successors-in-interest; merely because the Commissioner's report did not refer to existence of gold, the admission made by father of the appellants could not be ignored: A.I.R. 1994 Andh. Pra. 16 (D.B.).

Assessment of *mesne profits*—Admission in plaint. *See* A.I.R. 1954 Pat. 447.

Admission operates as estoppel unless allowed to be withdrawn: (1990-1) 97 Punj.L.R. 135: 1990 Punj.L.J. 44.

Admission by Counsel in course of proceeding—Can be withdrawn unless circumstances are such as to give rise to an estoppel: A.I.R. 1967 Andh. Pra. 211.

Where the petitioners sought to take advantage of what they described as admission in Government's affidavits filed in connection with certain earlier proceedings of similar nature and other admissions in Parliament on behalf of the Government, *held*, such admissions being mere expression of opinion limited to the context and rather vague hopes and not specific assurances, were not binding on the Government to create estoppel: A.I.R. 1975 S.C. 2164: (1975) 4 S.C.C. 67.

When the facts are fully set out and admitted, a party's opinion about the legal effect of those facts is of no consequence and no estoppel arises by reason of the admission of the party as to such effect (*See* A.I.R. 1955 S.C. 62). Thus, where the petitioner—company pleaded that the law reports published by it were not newspapers and, thus, Working Journalists Act was not applicable to its establishment and its employees though law reports published by it were registered as newspapers under the Press and Registration of Books Act, 1867 and under Indian Post Office Act, 1898 and it had also filed a declaration under the 1867 Act that law reports published by it were newspapers, *held*, the admission on the part of the petitioner would not estop them from pleading that the law reports journal was not a newspaper within the meaning of the Working Journalists Act: A.I.R. 1983 Bom. 201 (D.B.).

Oral admission of contents of permit by operator—Inadmissible unless operator is entitled to give secondary evidence of the contents—Admissions given in ignorance of legal rights do not operate as estoppel: A.I.R. 1967 Raj. 138.

Admission of a party about due registration of document—If conclusive: A.I.R. 1963 Mys. 335.

Where the defendant's brother in a document had admitted the defendant's title to suit properties and their alienation by the defendant to the plaintiffs and in their suit for possession of those properties on their title and the denial of execution of the document by the defendant's brother was disbelieved, *held*, the document, relied upon as admission, and not estoppel, was sufficient evidence to prove the defendant's title to the suit properties and their alienation by the defendant to the plaintiffs: A.I.R. 1971 S.C. 2548.

Where recitals in the *pattas* and entries in the Inam Register clearly indicated that the subject matter of the grant was both *melawaram* and *kudiwaram*, and for rendering personal service, *held*, the mere fact that the Inamdar had erroneously claimed to be a *melawaramdar* and called the tenants in possession as *kudiwaramdars*, *held*, his admission would not estop the Inamdar that the inam was personal and inalienable: (1974) 87 Mad.L.W. 67 (D.B.).

An admission in a document (will) regarding the alleged adoption of a deceased person cannot amount to an estoppel because it is not made in the lifetime of the deceased and he could not alter his own position acting on faith of the representation made thereby: 1963 Jab. L.J. 817: A.I.R. 1963 Madh. Pra. 348.

Where a person who was entitled to challenge the will was present at the time of mutation on the basis of will but did not object, *held*, he is not estopped from challenging the will, subsequently, if he is able to show that admission was not binding on him or that it was made in ignorance of true facts. [A.I.R. 1926 Lah. 650, Disting.]: 1980 Punj.L.J. 466.

Wrong statement made by party in mutation proceedings—Not binding on him in suit subsequently field by him—*Held*, further, as it was not the defendants' case that they had made any change in their position *qua* the suit and on account of the said admission of the plaintiff, it could not act even as an estoppel: 1968 Cur. L.J. 213.

Estoppel by admissions—Proceedings under O. 21, R. 58, C.P.Code—Statements made by objector amounting to admissions—Statements proved to be wrong in subsequent proceedings—Objector not estopped from challenging title of another person with respect to the property: 1961 B.L.J.R. 795: A.I.R. 1962 Pat. 218.

The admission of liability under a decree obtained against the ward does not create an estoppel and debar the Court of Wards from challenging the validity of the decree on the ground that certain formalities under the Court of Wards Act not having been complied with the decree was not validly obtained: (1929) 31 Punj.L.R. 749: A.I.R. 1930 Lah. 798.

Petition to quash order of Income-tax Officer levying penalty—Officer in his counter-affidavit admitting contents of affidavit by petitioner alleging want of jurisdiction in Income-tax Officer—Would not have operated as estoppel, even if could have been taken on point of law: A.I.R. 1968 All. 203.

Mere conduct is not admission under S. 17 of the Evidence Act for making it eligible to be used as an admission under S. 21 of said Act. Thus, where the respondents, trustees of disputed trust, under coercion submitted return and paid taxes to Board of Religious trust, under Bihar Hindu Religious Trusts Act which applied only in case of public trust, in respect of suit properties but subsequently denied the fact that impugned trust was public, *held*, the trustees not being fully conscious of their rights or not being aware of the true state of law or facts, submitted to the dictates of Board and, therefore, their conduct neither amounted to waiver or acquiescence with knowledge of their legal rights. Therefore, they were not estopped from denying the fact that the disputed trust was a public one. [1968 Pat.L.J.R. 507, Rel. on]: A.I.R. 1974 Pat. 95: 1973 Pat.L.J.R. 509 (D.B.).

Admission in writ petition before Supreme Court that certain lands in possession of petitioners were pasture lands and that they were used by him for grazing his cattle—It is not open to the petitioner in subsequent writ petition before High Court to turn round and say that admission is not correct—He has to abide by that admission: A.I.R. 1970 Goa 59.

Where the owners of the suit land being unsatisfied with the compensation received in respect of their land from the land acquisition officer pleaded that they should get at least Rs. 5,000 per acre, *held*, said claim could neither operate as estoppel nor an admission precluding the appellants from showing that the land was worth more: A.I.R. 1971 Ker. 51 (F.B.).

In every case of estoppel there is a representation and consequently an admission of the existence of a fact. If such an admission is accepted and acted upon by the person to whom it is made, the maker of the admission subsequently cannot be permitted to show that the admission he made was false. Thus, where appellant representing himself to be sole proprietor of a firm took premises on rent from the respondent and executed a rent note in that capacity and the respondent always treated appellant to be his tenant in his individual capacity and infact served a notice upon the appellant alleging that he was his tenant which was not denied by the appellant, *held*, the admission made by the appellant in the rent note and in his reply to notice that he was sole proprietor of the firm operated as estoppel and he could not subsequently plead that firm was tenant of respondent although rent had always been paid by the firm. [A.I.R. 1966 S.C. 1697, Rel. on]: A.I.R. 1983 Del. 555.

Mere admission of existing co-tenancy does not amount to creation of fresh tenancy and therefore, is not contrary to any statute law such as provided in S. 33, U.P. Tenancy Act. The doctrine that there can be no estoppel against statute does not apply in such a case: 1952 R.D. (B.R.) 269.

Where in ignorance of the party's legal rights flowing from S. 203(6) of the Haryana Municipal Act that a Town Planning Scheme not implemented and completed within 5 years of its sanction by the Government lapses, an admission was made that land acquired under the Scheme after its lapse vested in the Municipal Committee, *held*, it did not bind the party: 1989 Punj.L.J. 424.

Eviction proceedings—Original tenant stating that he was tenant from month to month—His successors cannot change the stand and take a plea that since the transaction was of a licence, no suit for ejectment on the basis of a lease was maintainable: 1979 (U.P.) R.C.C. 215: 1979 All. Ren. Cas. 301: 1979 All.L.J. 356.

The admission of the proprietor, whose legal representative is the plaintiff, is only relevant under S. 21 of Evidence Act. It cannot estop him. Under S. 115 of the Evidence Act if all the ingredients constituting estoppel thereunder have not been proved, vague statement of having planted trees made in 1942, without any mention of the number of trees or their kind cannot be held to be groveland under the Agra Tenancy Act; nor can it exclude the possibility that the trees were planted in or after 1928: 1952 R.D. 156: 1952 All.L.J. (Rev.) 285.

An admission made in ignorance of legal rights or under duress cannot bind its maker. Thus, where a candidate, very anxious to appear in Part II of the LL.B. examination, gave an undertaking to the University to file his employer's permission therefor when in fact no such permission was necessary or to abide by any order the University might pass, *held*, the undertaking was given *in terrorem* and in complete ignorance of his legal rights; as the University was bent on prohibiting him from taking the examination he had no alternative but to write the letter; the letter would not put him out of Court in case he challenged cancellation of his candidature by the University: A.I.R. 1976 S.C. 376: (1976) 1 S.C.C. 311: 1976 U.J. (S.C.) 15: (1976) 2 S.C.R. 722.

In criminal proceedings between *A* and *B*. *B* admitted *A*'s title to land in dispute and thereby caused *A* to give him some land—Subsequent suit by *A* for declaration of title to and possession of the land—*Held*, *B* was estopped from denying *A*'s title thereto by his previous admission: 1953 B.L.J.R. 214: A.I.R. 1953 Pat. 318.

Where an accused obtained acquittal in a criminal revision in the High Court by admitting that he would not interfere with the defendant's rights, *held*, it did not amount to an unqualified admission; it only amounted to an undertaking not to take law into his own hands; besides, it was an admission made in *terrorem*; he was, therefore, not precluded from suing the defendants under S. 92 of the Code of Civil Procedure for framing of a Scheme: A.I.R. 1976 S.C. 1569: (1976) 4 S.C.C. 780: (1976) 3 S.C.R. 721.

31. Estoppel by attestation.—Mere attestation of a deed does not by itself impute to the attesting witness any knowledge of its contents. Similarly, a person's relationship with the mortgagor cannot by itself necessarily have the effect of fixing the former with the knowledge of the contents of the deed so as to make out a case of estoppel against such a person: A.I.R. 1960 Punj. 226.

Though participation in a transaction which *prima facie* would affect the participant's interest can normally amount to his tacit consent to the transaction and the recitals in the deed but there is an exception to the rule; if it is established that he was unwittingly made an attestor to the deed without having opportunity to be acquainted with its contents, he could not be taken as having consented to the transaction: (1977) 90 Mad.L.W. 37 (S.N.) (D.B.).

There can be no doubt that an attesting witness can be shown to have fully understood the particular transaction so that his attestation may support the inference that he was a consenting party and might therefore, be estopped from questioning the effectiveness of the transaction attested by him. It is, however, a question of fact and should be determined with reference to circumstances of the case: 1958 Ker.L.T. 1062: A.I.R. 1959 Ker. 237.

The mere attestation of a deed by a party does not estop him from asserting that he did not have the knowledge of the contents of the document or that he was not bound by the recitals in the document: I.L.R. 9 Lah. 224: A.I.R. 1928 Lah. 432. *See* also A.I.R. 1933 Lah. 551: I.L.R. 14 Lah. 369; 145 I.C. 746: A.I.R. 1933 Lah. 703; (1936) 38 Punj.L.R. 416: A.I.R. 1936 Lah. 978.

Mere attestation of a document will not create an estoppel and it should be proved that the contents of the documents were known to the attestor and that other circumstances were known to him and yet he did not protest against the recitals. [(1972) 1 M.L.J. 317, Disting.; (1987) 100 Mad.L.W. 363, Rel. on]: (1992) 1 M.L.J. 163.

But if the person attesting asserts the facts that are stated in the document he is estopped: 116 I.C. 716: A.I.R. 1930 Lah. 271; A.I.R. 1928 P.C. 20: 54 M.L.J. 254 (P.C.).

Where an attesting witness is present at the transaction and attests the deed, having heard its contents, he is estopped from challenging the right of the transferee: 150 I.C. 765: A.I.R. 1934 Pat. 93. *See* also I.L.R. 15 Pat. 721: A.I.R. 1937 Pat. 119; 1942 O.W.N. (B.R.) 238. Attestation when amounts to estoppel: I.L.R. 49 Cal. 334: A.I.R. 1922 P.C. 20: 42 M.L.J. 434 (P.C.). *See* also I.L.R. 42 Cal. 876; I.L.R. 36 Cal. 780 (P.C.); I.L.R. 37 All. 350; I.L.R. 15 Pat. 721: A.I.R. 1937 Pat. 169; 1981 M.P.W.N. 55.

Attestation of a deed by itself estop a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys neither directly nor by implication any knowledge of contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. Of course, there may be cases in which attestation is made in circumstances when coupled with other evidence of consent and acquiescence in the execution of a document, it is relevant to the question whether the attesting witness had knowledge of the contents and agreed to them: 1937 Pat.W.N. 144: A.I.R. 1937 Pat. 353; A.I.R. 1957 Manipur 32.

Where a person having interest actual or contingent, in the property being conveyed by a third party to another attests the deed as a witness after reciting that he had acquainted himself with its contents, *held*, he ceases to be a mere witness to the executor's identity and signatures; he is, rather, deemed to have concurred to the passing of his interest to the alienee; he is estopped from contending to the contrary: A.I.R. 1972 Mad. 390: (1972) 85 Mad.L.W. 112 (D.B.).

If it is shown to the Court that an attesting witness was a consenting party to a particular transaction, he would be estopped from questioning the effectiveness of the said transaction, on a later occasion on the ground that he was not a party thereto. Thus, where the plaintiff was not aware of the contents of the gift deed executed by her father and she could not be said to be a consenting party to the transaction, *held*, the principle of estoppel could not be applied: (1987) 100 Mad.L.W. 363.

Estoppel by attestation—Plaintiff attesting document with full knowledge of its contents—Plaintiff is estopped from challenging validity of gift made under the document and cannot dispute nature of possession of defendant: A.I.R. 1968 Andh. Pra. 291.

A nearest reversioner cannot be held to be estopped merely because he did not challenge an alienation made by a widow at its inception or merely because he attested the deed of transfer by her. In the absence of any evidence that he had made any representation and the transferee had acted on the faith of it in buying the property, a plea of estoppel is not tenable in law: A.I.R. 1948 Nag. 236: I.L.R. (1948) Nag. 662: 1949 Nag.L.J. 22.

The attestation by the reversioner of an alienation by the widow cannot be taken as presumptive proof of necessity where the document contained no recital of the purpose for which the money was required: 145 I.C. 862: A.I.R. 1933 Mad. 637: 65 M.L.J. 282.

Where members of the joint family agreed not to sell their shares to outsider after partition, of the joint family property and a condition was incorporated in the partition deed that in case any alienation was proposed preference to purchase should be given to the other co-sharers; twelve years thereafter the mother gifted her share by a gift deed attested by the donee's brother to her only daughter who in her turn sold the gifted property for consideration without her brothers' knowledge to the vendor who, being aware of the right of pre-emption, was not a *bona fide* purchaser; on the brothers' suit for declaration of their pre-emption right and recovery of the properties from the purchaser, *held*, by attesting the gift deed, the plaintiffs had extinguished by waiver their right under the partition deed; they were estopped from pressing their suit: A.I.R. 1987 Mad. 15: (1986) 99 Mad.L.W. 56: (1986) 1 M.L.J. 203.

Where as per the sale deed executed in 1929 in the name of the wife who was shown to have paid half the consideration and the balance, as per recitals and registration endorsement, was paid by the husband and in 1950 the husband executed a settlement stating therein that he had purchased the property *benami* in the name of his wife, he gave a life estate to his daughter on the condition that upon her death, her son would take it absolutely, which settlement was attested by the daughter, *held*, the daughter was estopped from contending, having attested the settlement deed, that her father was not the owner of the property even if he had revoked the settlement subsequently by a will in 1956: (1986) 99 Mad.L.W. 185 (D.B.).

Where the plaintiff-husband himself stated that the mortgages in question were executed by the defendant-wife at his direction, *held*, it could not be contended that he was not aware of the recitals therein and, therefore, the attestation by him would not in any way constitute an estoppel. [(1971) 84 Mad.L.W. 176; A.I.R. 1972 Mad. 390, Rel. on]: A.I.R. 1975 Mad. 278: (1975) 88 Mad.L.W. 54.

Where an uneducated lady had merely attested a partition deed and also stated that she knew its contents, *held*, it cannot be taken as her admission of the properties being joint, especially where no such issue was framed and no evidence was adduced; mere attestation does not amount to release or abandonment of her rights in the property; it has to be a conscious act; and her conduct after attestation did not show that she had given up her rights in the property: (1978) 91 Mad.L.W. 590.

Where the father attests the sale deed of the coparcenery property, his son cannot be estopped from claiming the property as he gets it in his own right by birth and not by succession. The bar created by estoppel is a personal one. Estoppel is principle of law of evidence and does not create substantive rights of absolute character. It only operates to close the mouth of the person who has acted in certain way from setting up what may be the true facts of the case: I.L.R. (1965) 1 Mad. 287: (1964) 77 Mad.L.W. 555.

Attestation by minor—Effect: A.I.R. 1927 Rang. 108. Attestation by legatee—Effect: I.L.R. 8 Lah. 181: A.I.R. 1927 Lah. 404.

Where a muslim father executed sale deed in respect of certain land belonging to his petitioner-minor son and though the sale was against petitioner's interest he did not object to the sale but he in fact attested the sale deed, when his father conveyed the lands as an owner, *held*, petitioner thereby was estopped by conduct and record to assail the impugned sale deed or to claim any interest in land later on: A.I.R. 1995 S.C. 1205.

Where an attesting witness for the vendee in a sale deed contended that the property thereby purchased was for the benefit of the witness as well as of the vendee, *held*, the attestation was for the purpose of binding the witness to the purchase by the vendee; the witness was estopped from staking his claim to the property. [I.L.R. 36 Mad. 564; I.L.R. 38 Mad. 396, Rel. on]: (1975) 88 Mad.L.W. 549.

Where a sale deed standing in the name of the plaintiff's brother had been attested by the plaintiff himself who also contended that the property was nevertheless purchased for the benefit of both the brothers, *held*, the attestation could only be for the purpose of binding the plaintiff to the purchase of property in the name of his brother; the plaintiff's contention rejected: (1975) 88 Mad.L.W. 549.

A making sale deed in favour of *C* and *D*—*C* and *D* attesting subsequent sale deed made by *A* in favour of *Y*—Endorsement on subsequent sale deed showing that sale deed was read over and explained to *C* and *D*—Neither subsequent sale deed produced nor scribe, making endorsement examined—Mere attestation by *C* and *D* does not estop them from claiming title under former sale deed: I.L.R. (1964) Cut. 719.

Sunni Mahomedan conveying more than third of the estate by will—Attestation by heir—Whether estopped: I.L.R. 6 Rang. 542: A.I.R. 1928 Rang. 307.

A, *B* and *C* co-owners of a well—*A* executing compromise deed undertaking not to install pumping set—*B* and *C* merely attesting the deed are not estopped from claiming their own right to install the pump—By their attestation they will be estopped only from pleading that *A* did not give an undertaking not to install the pump: 1963 Cur. L.J. 423 (Punj.).

32. Estoppel by compromise or consent.—Compromise decree and estoppel, *see* A.I.R. 1954 S.C. 82: (1953) 2 M.L.J. 782. The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise must depend upon the answer to the question "Did the parties decide for themselves the particular matter in dispute by the compromise and was the matter expressly embodied in the

decree" "the compromise or was it necessarily involved, in, or was it the basis of, what was embodied in the decree": A.I.R. 1941 Lah. 116.

Consent decree—Estoppel. *See* C.P. Code, 1908, S. 1: A.I.R. 1956 Ori. 210; A.I.R. 1957 Cal. 595.

Consent decree—Judgment by consent acts as effective estoppel. *See* (1956-57) 61 Cal.W.N. 67.

For purposes of estoppel, an order by consent is as effective as an order of the Court made otherwise than by consent. In other words the only difference between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by an order of the Court: The second stands unless and until it is discharged on appeal. A consent order even where it has been obtained by fraud or mistake, is not a nullity. The order stands until it has been effectively set aside: 57 M.L.J. 429.

A judgment by consent or default is as effective an estoppel between the parties as the judgment whereby the Court exercises its mind on a contested case. Even though the matter may have passed from the stage of representation into an agreement, there are cases where the Courts are entitled to entertain a plea of estoppel in order to prevent fraud or circuity of action: A.I.R. 1975 Pat. 58: 1975 Pat.L.J.R. 27: 1974 B.L.J.R. 757 (D.B.). Thus, where an earlier partition suit, filed by the plaintiff, had been compromised, *held*, he was estopped from filing a fresh suit for partition on the ground that the compromise decree was vitiated by fraud, undue influences, etc., when there was no satisfactory evidence in support of such allegations. [A.I.R. 1954 S.C. 352; A.I.R. 1956 S.C. 346, Foll.]: A.I.R. 1974 Andh. Pra. 303 (D.B.).

Consent decree—If creates estoppel—Principle applicable as if the matter is decided after contest: (1968-69) 73 Cal. W.N. 328.

A consent decree, it is equally well settled, does not operate as *res judicata* though a judgment by consent raises an estoppel between the parties as much as a judgment whereby a decree is passed in exercise of Court's mind in a contested case. However, before a consent decree tantamounts to an estoppel, it is necessary that the question raised in the subsequent suit was present to the minds of the parties at the time the previous suit was decided and it was actually dealt with by the consent decree: A.I.R. 1974 Gau. 5.

A party to a consent decree is estopped from going behind the terms to which he has voluntarily submitted on the ground that the decree was wrongly passed: 26 Sind L.R. 395: A.I.R. 1923 Sind 29. Also *see* I.L.R. 13 Lah. 70: A.I.R. 1932 Lah. 281; 1983 B.B.C.J. 433.

Estoppel by judgment or estoppel by conduct in view of a compromise decree is required to be pleaded specifically and is also required to be established by proper materials. Every statement in a compromise decree cannot operate as estoppel by judgment and only such statements or admissions in the compromise decree which in substance constituted the issues involved in the *lis* will operate as estoppel by judgment: (1979) 1 Cal.L.J. 182: (1979) 1 Cal.H.N. 142.

Consent decree raises an estoppel—Consent decree—Section does not in terms apply to consent decree but the underlying principle of estoppel does apply—Whether principle is applicable or not depends upon interpretation of terms of compromise: I.L.R. 45 Pat. 533.

Consent decree containing term contrary to law, or public policy—Unless set aside in proper proceedings will operate as *res judicata* or estoppel: A.I.R. 1968 Mys. 184.

Even one of the parties to an agreement, *held*, is not estopped from, subsequently, challenging its validity on the ground of it being opposed to public policy: A.I.R. 1992 S.C. 248.

Consent decree—Binding nature of—Principle of estoppel by judgment: A.I.R. 1970 Raj. 104.

Proof of knowledge amounts to proof of consent: (1968) 81 Mad.L.W. 531: (1968) 2 M.L.J. 233.

Acceptance of benefit—Compromise decree—Money paid under—Party repudiating other terms—Permissibility: (1933) 35 Punj.L.R. 315: A.I.R. 1934 Lah. 423. *See* also I.L.R. (1940) Lah. 352: (1940) 42 Punj.L.R. 61: A.I.R. 1940 Lah. 100; (1940) 42 Punj.L.R. 249: A.I.R. 1939 Lah. 303.

Where in the case the petitioner has obtained advantage of the consent decree and in fact got the said decree modified from time to time and both the parties acted on the basis of modification and having acquiesced and acted upon such a decree, the parties, have altered their position, it will, therefore, cause prejudice to the other party if such a

decree is held to be a nullity, is set aside and allowed to be re-opened: (1991) 1 Cal.L.T. (H.C.) 182.

Where an agreement was reached between appellant and the Improvement Trust regarding exclusion of certain land from the scheme and to pay compensation to the appellant, with State also joining as one of the parties, relying on which an award was passed by the Collector, *held*, having taken advantage of the agreement in part and having repeatedly agreed to the terms of the compromise between the appellant and the Improvement Trust, the State Government could not be permitted to back out: A.I.R. 1993 S.C. 366: (1992) 4 S.C.C. 243: (1992) 2 U.J. (S.C.) 723.

Consent decree after abandonment of plea by defendant—Effect—Plea in execution—If open. *See* 1970 Ker.L.R. 716.

The Courts can adopt a procedure to settle the dispute departing from the usual course of procedure governing the case *i.e.* "extra *cursus curiae*", provided the parties to the dispute have either consented to the said course or have acquiesced in the said procedure. A party thereto thereafter cannot turn round and say that the Court alone is to be blamed for adopting the said procedure. This is based on the doctrine of estoppel. The parties are bound by the order which in the circumstances of the case partakes the character of a consent decree. [1896 A.C. 136; A.I.R. 1936 Mad. 856; A.I.R. 1957 Mad. 95 and A.I.R. 1961 Andh. Pra. 71 (F.B.), Foll.]: A.I.R. 1987 Ker. 42.

In a case where the matter is adjusted, as a result of a compromise, the parties agree not to try out their titles and rights, but acknowledge and define them for the purpose of the compromise with a view to avoid a determination of their true nature. Even if one or both the parties may have been under a mistake in respect of the title as is subsequently discovered, that circumstance will not detract from the finality and binding character of the compromise. When a matter is compromised, it binds the parties and mistake has no place therein: A.I.R. 1954 Trav.-Co. 128: I.L.R. (1953) Trav.-Co. 770.

So long as a consent decree stands, it is not open to either party thereto to give the go by to it even if it contains clauses which are not strictly legal: (1976) 1 Cut.W.R. 243.

Where a suit had been compromised, without any reservations, on payment of certain sum by one party to the other, *held*, principle of estoppel bars a subsequent suit based on litigation in the said previous suit. [A.I.R. 1956 S.C. 346, Foll.]: A.I.R. 1983 N.O.C. 79 (Del.).

Where the main contesting parties on intervention of lawyers had amicably settled their dispute as to the management of a temple and the High Court had passed its orders on 21-10-1991 on the basis of the joint-memo submitted before it, *held*, three defendants whose interest was protected by the second plaintiff could not impugn that settlement almost two years thereafter that not being signatories to the joint memo, they were not bound by the High Court's order; their silence from the date of order over the years demonstrated their acquiescence; the doctrine of estoppel was attracted: A.I.R. 1994 Karn. 303.

Where the plaintiffs filed a suit for possession of the disputed land on the ground that their brother entered into fictitious transaction of exchange with the defendant whereunder he transferred the impugned land belonging to the three brothers to the defendant and the defendant in turn agreed to give in 1/2 share in certain land to their brother and mutation was also sanctioned in 1963 but the plaintiffs objected to the said transaction only in 1973, *held*, the plaintiffs had in fact accepted the exchange transaction and were consenting parties to the same or at least they ratified the same by their act and conduct. They could not now seek the possession of the suit land after such a long period and they were estopped from filing the suit by their act and conduct: 1988 Punj.L.J. 413.

Where an earlier suit was dismissed on compromise on the defendant's giving up his claim to the suit property and the plaintiff giving up the costs, *held*, though that may not amount to a consent decree but it certainly amounts to a representation by the defendant on the basis whereof the plaintiff gave up his costs; it may not operate as *res judicata* as laid down in A.I.R. 1967 S.C. 591 but it certainly operates as estoppel against the defendant raising his claim to the property. [A.I.R. 1956 S.C. 346, Foll.]: A.I.R. 1973 All. 378.

Where the plaintiff's title to a house was declared by a previous compromise decree

which under law does not require registration, *held*, it does not operate as *res judicata* but only as an estoppel in his subsequent suit for partition; his title cannot be challenged in the subsequent suit. [A.I.R. 1935 Cal. 478; A.I.R. 1954 S.C. 82; A.I.R. 1956 S.C. 548, Rel. on]: A.I.R. 1982 Cal. 222: (1981-82) 86 Cal.W.N. 359: (1982) 1 Cal.L.J. 179 (D.B.).

Where the plaintiffs' ancestors' claim to the suit plots was settled by a compromise whereby they were allotted some other plots and by another compromise the suit plots were allotted exclusively to the defendants' ancestors and others and the rents were also separately fixed for different lands and the decree in terms of the compromise was passed on the same date in the presence of, and without objection from, the parties' representatives on the plaintiffs' subsequent claim to the same old suit lands, *held*, the plaintiffs and their ancestors acquiesced in the recording of the compromise and passing of the decree with full notice and thus induced a reasonable belief in the minds of the defendants and their ancestors that the compromise had been accepted on the basis whereof the defendants also altered their position by undertaking the obligation to pay the entire rents for the plots so allotted to them and their co-sharers, the plaintiffs were estopped from impugning the compromise decree to the defendants' prejudice. [A.I.R. 1965 S.C. 1812, Rel. on]: A.I.R. 1974 Pat. 254: 1974 B.L.J.R. 242 (D.B.).

Where in a previous suit, the plaintiffs gave up their right of pre-emption by entering into a compromise, *held*, subsequently the plaintiffs were estopped from challenging the sale and claiming the right of pre-emption in the disputed property: 1994 D.N.J. 261 (Raj.).

Compromise—Court assuming jurisdiction extra *cursum curiae*—Appeal, when lies Estoppel. *See* A.I.R. 1957 Pat. 16. A party can challenge the validity of the compromise, when he has not taken advantage of the benefit thereunder: A.I.R. 1928 Cal. 334. *See* also I.L.R. (1938) 2 Cal. 266: (1937-38) 42 Cal.W.N. 701: A.I.R. 1938 Cal. 500.

Where under a compromise between a Hindu widow and the reversioners, the reversioners take up the management of the property, agreeing to pay off the debts due to the creditors of the widow, they are not estopped from subsequently denying that the debt due to certain creditors is binding on the estate when the compromise has not influenced the conduct of the creditors in any manner and it cannot be said that they were misled into acting in a particular way which they would not have done but for the compromise: 199 I.C. 425: A.I.R. 1942 Cal. 448.

Where a gift of land by its holder to a distant collateral was sought to be set aside by the reversioners of the donor and a compromise decree was passed whereby one eighth of the gifted land was to be given to the reversioners on the death of the donor, besides some share in land to the donee's brothers, and upon the donor's death the reversioners sought to enforce the decree by a suit but its maintainability was impugned by the donee that the donor's sister, a nearer reversioner, was still alive, *held*, the compromise decree was binding on all the parties therein including the donee; the donee could not wriggle out of its binding effect; having derived benefits under the decree, he was estopped and could not escape from its disadvantages; the donor's sister could have her remedy against the reversioners: A.I.R. 1995 S.C. 395.

Where the defendant executed a sale deed in respect of plaint properties and subsequently plaintiff filed a suit among other matters for cancellation of said sale deed but said suit was compromised and thereafter the plaintiff filed another suit for setting aside the impugned sale deed, *held*, the earlier compromise decree, to which the plaintiff was a party acted as an estoppel by judgment against the plaintiff-appellant from questioning the validity of the sale deed. [A.I.R. 1956 S.C. 346, Foll.]: A.I.R. 1971 Ker. 234: 1971 Ker.L.J. 169: 1971 Ker.L.T. 307 (D.B.).

Where in the consolidation of holding proceedings *A* first did not take inferior land though its area was larger and he knowingly allowed *B* to make improvements in land allowed to *B* on representation that no complaint or appeal shall be made in future against the order passed by the Consolidation Officer, the order being a consent order, *A*, on general principles would be estopped from agitating the question subsequently: 1967 Cur.L.J. 602: (1967) 69 Punj. L.R. 689: A.I.R. 1968 Punj. 267 (F.B.).

The respondent-Improvement trust framed a scheme for development and pavement of streets and acquired shop of the

deceased and heirs of deceased challenged said scheme in a writ petition wherein an order was passed on 13-5-1976 specifically stating that the deceased, was survived by five heirs who were entitled to one plot each for the shop. Though prior to said writ-petition, a civil Court had passed a consent decree on 9-2-1976 wherein it was held that the petitioners were allotted different shops under a family partition, but said consent decree was not referred to in writ proceedings. Subsequently, the petitioners contended that all the 13 heirs of the deceased were entitled to plots in the scheme. *Held*, the consent decree dated 9-2-1976 under which the petitioners claimed to have acquired the right in the property of deceased was in existence on the day when the writ petition was disposed of and the predecessor-in-interest of the petitioners who were claiming additional plots were party to said writ petition but they did not urge that deceased had other heirs also whose right had been recognised under the civil Court decree. Thus, the successor in-interest of those petitioners could not urge that judgment dated 13-5-1976 did not affect their rights: 1991 Punj.L.J. 370.

Existing market—Closure without legal power by Municipality of—Consent to such closure—Consent does not validate closure—No estoppel: 1963 M.P.L.J. 69: A.I.R. 1963 Madh. Pra. 134.

Where on the High Court setting aside the order of extension and directing release of goods, the Customs authorities went in appeal and asked for stay of operation of the order but the appellate Court, on the respondent's resistance put them on terms, *held*, its effect was that the respondents could take advantage of the Court's order on furnishing bank guarantee and to renew the same as and when required till the disposal of the appeal; it was not an order by consent in the strict sense; it could not amount to waiver of any of their rights by the respondents: A.I.R. 1975 Cal. 368: (1979) 4 E.L.T. 313 (D.B.).

Presidency Towns Insolvency Act, 1909, Ss. 8,10—Insolvency petition by creditor against a firm and its partners *A*, *B* and *C*—Debt and acts of insolvency proved—By consent payment of debt in monthly instalments ordered—In case of default, order or adjudication deemed to have been passed—Appeal by *B* and *C* only—Order accompanied by consent of parties—Order cannot be impeached as consent order—Plea that Court did not find as fact that insolvency was committed, is not open to *B* and *C* who participated in proceedings—[C.P. Code, 1908, O. 23, R. 1]: (1966-67) 71 Cal.W.N. 1062.

Consent order regarding fixation of fair rent—Party cannot re-agitate question: I.L.R. (1962) 2 Punj. 108.

The principles of estoppel did not apply to cases, where consent was not lawful and was not free and valid. Thus, where rent was fixed on the basis of consent terms, tainted by fraud, *held*, there was no estoppel for bringing fresh application: (1984) 4 Guj.L.H. 259.

The notice by the sub-tenant to the landlord under S. 17 (2) of the Delhi Rent Control Act, 1958 and the landlord's right to contest it under S. 17(3) thereof create no absolute bar against sub-letting; they do not protect the landlords against themselves; no public policy is involved therein. The landlords may, therefore, waive their right by agreement or conduct; thus, a compromise decree may validly operate as estoppel as well as *res judicata* against them. [A.I.R. 1954 S.C. 82; A.I.R. 1955 S.C. 812; A.I.R. 1956 S.C. 346, Rel. on]: A.I.R. 1973 Del. 9: 1972 Rajdhani L.R. 80.

Tenant filing suit against landlord for declaration that he was entitled to occupancy rights in suit land—Compromise between parties—Tenant agreeing to give up his contention that suit land was situated in darmila inam and that he had rights of occupancy—Landlord granting him lease for ten years—Suit decreed in terms of compromise—Suit by landlord for ejectment of tenant—Compromise held precluded tenant from agitating question of occupancy rights: (1954) 2 M.L.J. 83: A.I.R. 1954 Mad. 739: I.L.R. (1955) Mad. 227.

Where tenants had explicitly agreed to the eviction order and obtained time for vacation on the ground that the landlady required the building *bona fide* for demolition and reconstruction under S. 10 of the Madras Building (Lease and Rent Control) Act, 1960, *held*, the tenants could not contend that the eviction order could not be executed on the ground that the Courts below had not satisfied themselves about the existence of the statutory grounds. [A.I.R. 1970 S.C. 794;

A.I.R. 1970 S.C. 838; (1971) 84 Mad.L.W. 9, Disting.]: A.I.R. 1973 Mad. 47.

Eviction petition compromised—Withdrawal of—Subsequent petition on some cause of action—Effect—*Held*, that there must be a representation made by one party to other and that other party must have acted on such a representation in a way that it altered his position detrimental to his interests. The respondents having failed to bring their case within the ambit of law governing the application of doctrine of estoppel, the contention that the present suit is barred on the principle of estoppel has to be repealed: I.L.R. (1974) 2 Del. 63.

Where a consent decree was passed accepting position of landlord and tenants, *held*, such a relationship cannot be denied in a subsequent suit: 1974 B.B.C.J. 689; 1982 All.L.J. 1419 [Compromise petition filed in prior writ petition, whether can be challenged in subsequent writ petition.]

Agreement not to file appeal, against eviction decree, if tenant given time—Time given—Tenant is precluded from filing appeal: A.I.R. 1969 Bom. 221.

Where a tenant's suit for declaration and for non-interference in his possession and removal of encroachments was decreed against the landlord on contest and after six months' pendency of his appeal the landlord moved the lower appellate Court to decide the appeal on the basis of a three years old compromise between the parties arrived at two months before the filing of written statement by the landlord without a whisper about it in the pleadings or proceedings till then, and even though the lower appellate Court got the genuineness of the compromise confirmed through the trial Court and accepted its finding but did not act on it and affirmed the trial Court's decree on merits, *held*, since for over three years the compromise was not acted upon and both the parties had invited the trial Court to decide the suit on merits on evidence, both the parties had thus given a go-by to the compromise; the lower appellate Court could not have rendered its judgment on a compromise which was not acted upon; the suit not having been adjusted wholly or partially and the suit claim not having been satisfied, O. 23, R. 3 of the C.P.Code was not attracted. [A.I.R. 1961 Madh. Pra. 245, Rel. on]: A.I.R. 1972 Mys. 327: (1972) 1 Mys.L.J. 671.

Where the Additional District Judge had restored a reference under S. 18 of the Land Acquisition Act, with the consent of the Government pleader, *held*, the Government was estopped from seeking its review even if restoration was ordered under an erroneous view of law: 1989 Punj.L.J. 595.

Where the judgment-debtor volunteered himself to a decree and he subscribed his signature to the joint endorsement made on the plaint, when the relief of scaling down the debt was available to him as per T.N. Agriculturists Relief Act, 1938, *held*, just on account of the judgment-debtor subscribing to a compromise he is not estopped from claiming benefits under that Act. [A.I.R. 1967 S.C. 591, Foll.]: (1982) 95 Mad.L.W. 649.

Where a judgment-debtor paid a sum of Rs. 100 to the decree-holder who agreed, by compromise, to deem the decree to be fully satisfied on the judgment-debtor paying another Rs. 350 within three months and on the payment not having been made in time the decree-holder sought to recover full decretal amount in execution to which the judgment-debtor objected to on the ground that he, being an agriculturist, was statutorily protected against execution, *held*, in the absence of evidence of conscious waiver of his rights by the judgment-debtor, he was not estopped from pressing his objection merely because of the compromise between the parties: A.I.R. 1974 Ker. 139: 1973 Ker.L.T. 796.

Where a compromise was entered into between the parties and the compromise decree clearly provided for equal division of property between father and son and it also stated that no party could claim anything against the other and that on the death of the father his share would go to another person, *held*, subsequent suit by son for possession of property of his deceased father on the ground that under Muslim law without his consent his father could not bequeath property to another was barred on principle of estoppel. [A.I.R. 1976 S.C. 807; A.I.R. 1972 S.C. 2069; A.I.R. 1961 S.C. 797; A.I.R. 1973 S.C. 554, Rel. on]: A.I.R. 1984 N.O.C. 8: (1983) 1 An.W.R. 53.

The plaintiff in the present suit took active part in the previous suit by his minor son *H*. The plaintiff had filed a petition to the effect that *H* was the adopted son of *M* and therefore, he also should be made a party to the suit. He swore an affidavit on behalf of his

minor son *H* as his guardian. Later, a written statement was filed on behalf of *H* which was verified by the plaintiff as his guardian. Subsequently, the suit was referred to arbitration, and before the arbitrator a compromise was filed, which was entered into on behalf of *H* by the plaintiff as his guardian, and, the consent decree in terms of the compromise was passed by the Court in presence of the plaintiff, who was a party to the consent decree itself. It was declared that *H* was the adopted son of *M* which position the plaintiff himself took up from the very beginning of the suit. The controversy between the parties to that suit was whether the adoption of *H* was legal and in accordance with law. This was the real dispute between the parties, and a compromise of the dispute was arrived at, which was incorporated in the decree which was passed in terms of the compromise and the award. The compromise declared that *H* was the legally adopted son of *M* and that he should be considered to have been born of the loins of *M*. That *H* was adopted son of *M* was a representation of fact made both by the widow of *M* and *H* through his guardian, and natural father, the plaintiff which induced the ancestor of the defendants to believe it to be true, and to act upon such belief to his detriment, because but for his being induced in this manner, he would not have agreed being the admitted next reversioner to the estate of *M* at least after the death of *M* and his widow, to give any properties out of the properties of *M* to *H*. *Held*, that the consent decree raised an estoppel as much as a decree passed in *invitum* and that the plaintiff was estopped from contending in the subsequent suit that the adoption of *H* was invalid: A.I.R. 1957 Pat. 365.

Where a decree provides that if a smaller amount is paid by a certain date it would be deemed to be satisfied and the judgment-debtor deposits that amount in Court after the due date, the decree-holder withdrawing that amount is not estopped from executing the decree for the balance of the decretal amount, as the judgment-debtor's position has not been worsened in any way and no improper advantage has been gained by the decree-holder by such withdrawal. The fact that the judgment-debtor has stated, in his application for permission to deposit the amount, that he is making the deposit in full satisfaction of the decretal amount, makes no difference. The bare act of decree-holder in withdrawing the amount cannot be interpreted to mean that he impliedly agreed to the condition. The condition is meaningless after the due date has elapsed and therefore, the decree holder is within his rights in ignoring it and in withdrawing the amount, treating it as part satisfaction of his claim: I.L.R. (1949) Nag. 295: A.I.R. 1949 Nag. 385: 1949 Nag.L.J. 513.

In execution of a money decree obtained by *B* the property of the judgment-debtor was attached and brought to sale. *A* intervened and objected to the execution sale. The execution proceeding was compromised whereby *A* promised to pay a certain sum of money in two instalments. The terms of the compromise declared that if there was any default in payment, the sale shall be confirmed. No payment was made and the result was that the sale was confirmed. Later on *A* brought a suit wherein he challenged the title of *B* to the property on the ground that previous to the auction sale the title of the judgment-debtor to the property sold had already been transferred to him (*A*) and that there was no proper and valid attachment of that property. *B* raised plea of estoppel as a bar to this suit. *Held* that the compromise petition did not disclose that any statement amounting to any representation was made by *A* in that execution proceeding, and upon the footing of that representation anything was done by *B* and that the terms in that compromise petition did not stop *A* from challenging the title of *B*, which was quite different from challenging the sale in execution of the decree: 1953 B.L.J.R. 90: A.I.R. 1953 Pat. 383.

Where possession of a premises in the godown whereof were stored oil seeds pledged to the judgment-debtor No. 1 by the other judgment-debtors was delivered in execution by the bailiff to the decree-holder and the oil seeds were put by him in the custody of the decree-holder's employees and the Court on the judgment-debtors' application restrained the decree-holder and the custodian by an interim injunction not to remove or dispose of the oil seeds which was made absolute by the parties' consent till disposal of the injunction application and operation of the permission to remove the goods granted on terms by the Court to the judgment-debtor No. 1 was also stayed by

the Court, *held*, the decree-holder was not estopped from claiming damages for use and occupation of the godown merely because the interim injunction was made absolute by his consent: A.I.R. 1986 Cal. 313.

In the previous proceedings under O. 21, R. 90, C.P. Code, based on the ground that the attachment was invalid, the objector, by a compromise obtained time from the decree-holder, to pay his decretal dues and agreed that on failure to pay, the Court sale in favour of the decree-holder would stand good. The objector failed to pay and the Court sale was confirmed. On the question of estoppel raised in the subsequent litigation: *Held*, that the objector's representation led the decree-holder to a belief that the sale was a good sale and to act upon that belief by forbearing from contesting the objection application under O. 21, R. 90, C.P. Code. Therefore, S. 115, Evidence Act applied and the objector could not be allowed to turn round and contest the legality of the sale or of the attachment in subsequent proceedings: 1959 B.L.J.R. 594: A.I.R. 1960 Pat. 36.

Right to take out procession—Accompanied with music on public highway—Representative suit for declaration of right is maintainable—Hindus have unrestricted right to take out such processions at all hours subject to restrictions put by authorities to prevent breach of peace—Previous compromise, effect of: I.L.R. (1963) Cut. 104: A.I.R. 1964 Ori. 18.

Conduct—Compromise during pendency of suit—Plaintiff continuing to prosecute suit—Effect—Right to invoke compromise later: 1961 M.P.L.J. 322: A.I.R. 1961 Madh. Pra. 245.

33. Estoppel in cases of auction sale.—The principle that where the sale is confirmed, there could be no dispute about validity of the title of the auction purchaser is confined to cases where a party to the suit having had opportunities of questioning the validity of the sale did not do so and take appropriate proceedings to challenge the validity subsequently. Either the principles of estoppel or the principle of *res judicata* would be applicable, and they would be precluded from contesting the validity of the sale, as there are adequate provisions under O. 21, or S. 47, C.P.Code enabling them to contest the validity of the execution sale. But this principle is not applicable to a person challenging auction sale who was not a party to the earlier litigation and was even not aware of such proceedings. [I.L.R. 18 Cal. 164 (P.C.) ; (1964) 77 Mad.L.W. 69, Foll.; (1964) 77 Mad. L.W. 691, Appl.; (1969) 82 Mad.L.W. 349, Disting.]: (1982) 95 Mad.L.W. 708 (D.B.).

Where a property gifted in 1946 was sold in execution of a money decree passed against the donor a decade thereafter and upon the donee's objections having been dismissed and during the pendency of his suit under O. 21, R. 63 of the C.P.Code, the property was sold in auction and resold by the auction purchaser to a third party without the objector having informed the executing Court about the pendency of his suit, *held*, nothing having been brought on record that the donee had knowledge of the auction sale proceedings, he could not be estopped from challenging the auction purchaser's right to the property; the donee's inaction or, to be more precise lack of vigilance in not approaching the executing Court to stay its hands did not amount to implied consent or estoppel against him either under S. 115 or S. 41 of the Transfer of Property Act, 1882: A.I.R. 1975 Raj. 45: 1974 Raj.L.W. 220.

Attachment under O. 21, R. 52 or O. 21, R. 46, C.P.Code—Denial by public officer that he had any money in his custody or denial of debt by garnishee—Provisions of O. 21, Rr. 58 to 63 are not attracted to such case and public officer or garnishee is not precluded from so contending and challenging validity of attachment in spite of order passed in those proceedings: A.I.R. 1970 Andh. Pra. 162.

Whether general principles of estoppel apply to Court auction sale—Plaintiff estopped from challenging the Court sale in favour of auction purchaser: I.L.R. (1979) 2 Karn. 1556.

Statute provides for two very different methods of preparing and issuing proclamations of sale; one under O. 21, R. 66 of the C.P.Code and the other under Ss. 13 and 14 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939; the latter applies to a certain class of cases and the former to all other cases. But even if a decree is subject to be executed under the latter Act, its execution under the Code is not without jurisdiction; therefore, if a judgment-debtor accepts the position that no notice of valuation of the property to be auction sold be issued and the

valuation furnished by him is entered in the proclamation, he is deemed to have waived the requirement of notice; he is estopped from reagitating the objection: A.I.R. 1971 Pat. 27: 1970 B.L.J.R. 481 (D.B.).

Where the second sale proclamation referred to a live lease and occupation of a substantial part of the property by tenants or subtenants as a result whereof the second sale fetched a lower price than the first sale and the first auction purchaser was rendered liable for the deficiency on the ground that, being in possession of a part of the property, he must be deemed to have known about the lease and sub-lease and was, thus, estopped from attributing to the same the lower price fetched in the second auction, *held*, the real question under O. 21, R. 71 of the C.P.Code is whether the deficiency is attributable to the auction purchaser's default or to any other reason arising from other supervening circumstance; the auction purchaser is not taking advantage of his own wrong; he could not be estopped from contending that it is the disclosure of the encumbrance which occasioned the fall in price: A.I.R. 1975 S.C. 1290: (1975) 1 S.C.C. 815.

Where the sale proclamation embodied the statement as to the area of the property as made by the executing decree-holder and the auction-purchaser purchased the property on the faith of that statement acting to his prejudice, the statement in the sale proclamation would operate as estoppel against the decree-holder: I.L.R. (1948) 2 Cal. 284.

Where certain members of a Hindu joint family who were fully aware that the suit mortgages had been attached and put to sale in execution, did not raise any objection to the attachment or sale: *Held*, that the conduct of the members constituted a clear representation to the decree-holder and auction purchasers that they had no objection to the sale and that they could not sue to set aside the sale: 10 O.W.N. 58: A.I.R. 1933 Oudh 166. *See* also 16 Mys.L.J. 32: 42 Mys. H.C.R. 669.

Plea open only to person for whom representation was meant, and hence in respect of declarations in sale proclamation only auction-purchaser can plead estoppel and, not private purchaser from judgment-debtor: A.I.R. 1927 Cal. 34.

Decree for maintenance creating recurring charge on certain property—Sale in execution is not free from encumbrance as in case of mortgage decree—Property can be sold each time future maintenance becomes due—Sale proclamation not stating that property was subject to recurring charge—Whether operates as estoppel: A.I.R. 1964 Mys. 40.

A purchaser of mortgaged property at a sale in execution of a decree is estopped from denying the validity of the mortgage if the mortgagor himself could not be permitted to deny its validity: 139 I.C. 695: I.L.R. 15 Pat. 721: A.I.R. 1937 Pat. 169.

Irregularities in sale proclamation—Judgment-debtor having no knowledge of irregularity applying for adjournment of sale—No waiver—Only deliberate intention on his part to waive his right to object to irregularity in proclamation could constitute waiver, as estoppel must be certain to every intent and not to be taken by argument or inference: A.I.R. 1969 Mad. 5: I.L.R. (1969) 1 Mad. 781: (1969) 2 M.L.J. 421.

Judgment-debtor not objecting to low price advertised in proclamation cannot complain of it after sale: A.I.R. 1929 Mad. 275.

Where the executing Court on the judgment-debtor's application praying the date of sale of his property should not be advertised in local newspapers refrained to do so, *held*, having preventing the Court from thus publicising the date of sale, the judgment-debtor cannot be allowed to contend, after the sale had been affected, that it was invalid for want of proper publication in the local papers: A.I.R. 1972 Mys. 321: (1972) 2 Mys.L.J. 20 (D.B.).

No objection to undervaluation in sale proclamation—Even though notice under O. 21, R. 66 was served personally on judgment-debtor—Sale at inadequate price—Judgment-debtor is estopped from raising objection that inadequacy of price was due to under valuation in sale proclamation: I.L.R. (1964) 14 Raj. 216: A.I.R. 1964 Raj. 84.

Application for setting aside sale held under provisions of Partition Act—Who can apply—Provisions of O. 21, R. 89 are attracted in view of S. 7 (*b*) of Partition Act—Estoppel: I.L.R (1963) 2 Punj. 665: A.I.R. 1963 Punj. 531.

Judgment-debtor's right to dispute executability of decree—Adjournment of

sale at his instance on waiver of fresh proclamation—Estoppel: I.L.R. 3 Luck. 214: A.I.R. 1928 P.C. 162: 55 M.L.J. 545 (P.C.).

Where a property auction purchased in execution of a money decree was in possession of a tenant who gave, on the basis of the sale certificate, symbolic possession with promise to give actual possession thereafter, as endorsed by him on the warrant, to the auction purchaser which the tenant failed to do and on the auction purchaser's suit for possession, the tenant impugned the maintainability of the suit for non-impleadment of the decree-holder, a necessary party to whom the tenant claimed to have already given the possession to the decree-holder, his landlord, *held*, having made the endorsement on the warrant of possession, the tenant was estopped from denying the title of the auction purchaser; the decree-holder was not a necessary party: 1984 Raj.L.W. 433.

The decree-holder respondent put up a property for sale in execution of a decree which he held against a judgment-debtor. That property was purchased by the petitioner and the sale was duly confirmed by the Court. Later an application was made by the respondent under S. 151, C.P. Code, asking that the sale be set aside on the ground that by a mistake the decree-holder had sold his own property in execution of the decree. *Held*, that in putting up the property for sale in execution of his decree the respondent represented that the property was property saleable in execution which could be purchased by any person as the property of the judgment-debtor sold in execution. There was a clear representation to that effect and the petitioner acted on that representation and changed the whole of her position by purchasing the property. It was not therefore, open to the respondent to say that what he represented was not the true state of facts: 89 Cal.L.J. 209: A.I.R. 1953 Cal. 125.

In a suit for declaration of title and for possession, it was contended that the plaintiff No. 3 was estopped from challenging the sale held in execution of rent-decree because he held out his wife as the owner of the tenure and she was a party to the rent-decree. It was not, however, shown what declaration, act or omission on the part of plaintiff No. 3 intentionally caused or permitted the superior land-lord or the auction-purchasers to believe that the wife was the owner of the tenure and act upon such belief. No issue was raised on the question. *Held*, in the circumstances, that there was no estoppel: I.L.R. 36 Pat. 381: A.I.R. 1957 Pat. 442.

Where on an application to set aside execution sale under O. 21, R. 90, C.P. Code, the Court declined to accept the personal security offered by the petitioner and required him to furnish either cash security or the security of immovable property and dismissed the application on the ground that the security as ordered was not furnished, it would not be right to say that there is any estoppel against the petitioner and his appeal against the order dismissing his application under O. 21, R. 90 is not barred on that ground: (1955) 2 M.L.J. 99: A.I.R. 1955 Mad. 486.

When a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit, or proceedings between himself and such person or his representative to deny the truth of that thing. This is estoppel by conduct.

Where the proceedings in execution of a money decree against the assets of the deceased judgment-debtor were regularly gone through after notice to the legal representatives and in spite of every opportunity provided under the code itself for objecting to the sale, the property was allowed to be put up for sale, the conduct of the legal representatives attracted the rule of estoppel by conduct and, hence, a subsequent suit by them for declaration of their title to the property against the auction purchaser must be held to have been barred. A bidder at the auction would, in the circumstances quite properly infer that the legal representatives of the judgment-debtor, who were parties to the execution, had no objection to the property being sold as liable for the decree amount. It would be unjust if this manifestly misleading conduct should be allowed to have its way and a *bona fide* purchaser in a Court auction defeated. If they had any idea of asserting their own title, they were duty bound to speak before the sale: (1969) 82 Mad.L.W. 401: (1969) 2 M.L.J. 609.

Where in an auction of a property ordered to be sold by the District Judge, the State

Government sought to participate and applied for and granted permission by the said Judge but a third person, being the highest bidder was allowed to purchase the property, whereafter the State Government contended that the auction was invalid as the District Judge had no jurisdiction to sell the property, *held*, the State Government's unqualified participation in the auction amounted to a representation to all concerned that the property could be sold in auction by the District Judge and if on the basis of such representation a person *bona fide* acting on such representation of the State Government participated in auction and being the highest bidder was allowed to purchase the property, thereafter it was no longer open to the State Government to contend that the said sale made by the District Judge was void and illegal: A.I.R. 1990 N.O.C. 39 (Cal.).

Setting aside of sale—Application by person other than owner of house, when owner has not applied—Estoppel: A.I.R. 1968 Cal. 90.

Where the disputed land was sold in auction by the revenue Court for arrears of rent after the plaintiff's objection against the sale was rejected and the plaintiff receives the balance of the sale proceeds after adjusting the arrears of rent, it is not subsequently open to the plaintiff to say that she was not bound by the sale. She is estopped from challenging the propriety of the Court auction sale: (1960) 2 Ori.J.D. 82.

Where the Government never represented during the auction proceeding to the transferee that the impugned building was included in the lot for which he was bidding though there was an apparent discrepancy between the description of the property by name and its delienation by boundaries in the sale certificate and the transferees failed to enquire as to whether the property proposed to be transferred to them was indeed the property of the transferor, and the Government thereafter claimed said property from the petitioner, *held*, the sale certificate was void to the extent that it included within the boundaries set out therein the property comprising the impugned building. Therefore, the plea of estoppel could not prevail: A.I.R. 1976 Him. Pra. 29 (D.B.).

34. Estoppel in execution proceedings.—Where in the revision proceedings, the petitioner represented the entire estate of the deceased judgment-debtor but subsequently contended in the same execution proceedings that in the absence of other representatives of the deceased the execution proceedings were liable to be dismissed, *held*, he was estopped from raising the said contention: A.I.R. 1991 Ori. 88.

Decree against undischarged insolvent passed *ex parte*—Execution of—Judgment-debtor having allowed the decree to be final against him, cannot be allowed to question validity and enforceability of decree in execution proceedings: A.I.R. 1967 Andh. Pra. 188: (1966) 1 An.W.R. 281.

Where a suit on *hundis* executed by the Managing Director of a Company in his personal capacity as well as for the Company was *ex parte* decreed as the order of stay under S. 4 of the T.N. Relief Undertakings (Special Provisions Act, 1969 had expired earlier and the fresh notification of further stay was not placed before it and the Managing Director's application for setting aside the decree was dismissed, *held*, it was his duty to place the order of further stay before the Court on the expiration of the earlier stay order; he had not done so either on that day or with the application for setting aside *ex parte* decree or even during the earlier stages of execution; he is deemed to have waived the benefit of stay; besides, stay was for the benefit of the Company, not his person: A.I.R. 1983 Mad. 264: (1983) 96 Mad.L.W. 317: (1983) 2 M.L.J. 382.

Decree transmitted for execution directly to subordinate Court in different district—Proceedings in transferee Court are without jurisdiction—Decree-holder taking no steps under R. 10 in transferee Court—No occasion for judgment-debtor to raise objection against jurisdiction of transferee Court—No waiver: A.I.R. 1964 Ori. 88.

Where the judgment-debtor contested the suit for the properties mentioned in the decree and put forth the claim for reimbursement of money spent for their improvements, he cannot be permitted to say in the execution proceedings that the property is not identifiable under O. 20, R. 9 of the C.P.Code: 1961 Raj.L.W. 128.

If in a proceeding under O. 21, R. 58, C.P. Code, the decree-holder omits to raise the

plea that the proceeding ought to be under S. 47, C.P. Code and not under O. 21, R. 58, he is not thereby estopped from pleading that in defence in a regular suit filed under O. 21, R. 63: A.I.R. 1934 All. 699.

The question as to what is the proper basis for the valuation of a suit under O. 21, R. 63 of the C.P. Code by an unsuccessful claimant, whether it is the amount of the decree sought to be executed or value of the property against which the decree was sought to be executed, is one of law and a party who has acted in the lower Court on one basis is not precluded from maintaining the contrary in the appellate Court: I.L.R. 55 All. 315: A.I.R. 1933 All. 249 (F.B.).

Where a judgment-debtor's resistance to execution proceedings of a mortgage decree on the ground of his being entitled to benefit given in the Tamil Nadu Debt Relief Act (13 of 1980), was not allowed and said order became final between the parties, *held*, subsequently, the judgment-debtor was barred from claiming benefit of the 1980 Act, which he claimed by virtue of order of discharge passed by Tehsildar subsequent to civil suit, in which said mortgage decree had been passed by having recourse to S. 47 of the C.P.Code, 1908: A.I.R. 1994 N.O.C. 326 (Mad.).

Where the averment in the plaint of the defendant not being an agriculturist was neither specifically denied nor gone into during the trial which ended in a compromise money decree against the defendant, *held*, the defendant was not estopped from seeking stay of execution under S. 20 of the Madras Agriculturists' Relief Act, 1938: (1975) 88 Mad.L.W. 663.

Where civil Court declared the petitioner to be the owner of land, *held*, non-execution of decree for 3 years would not divest the petitioner of land's ownership and the respondent is debarred from challenging the ownership: 1980 Punj.L.J. 579.

Where a decree by making an arbitration award a rule of the Court was sought to be declared null and void under S. 47 of the C.P.Code in the Delhi Court which had passed the decree and which later on dismissed the objections, *held*, the objectors were estopped from impugning the validity and executability of the decree in the Court at Gurgaon to which the decree had been transferred for execution: 1991 Punj.L.J. 521.

Where on an application under O. 21, R. 97, C.P.Code, the executing Court declared that the appellant who was a sub-tenant of the respondent in suit premises had become direct tenant of landlord in view of S. 20 of the Delhi and Ajmer Rent Control Act, 1952 and thus, there could be no question of payment of rent by the appellant to the respondent and said order of executing Court was not challenged in appeal or revision by the decree-holder or by the respondent and nor was any suit filed by them for setting aside the said order but subsequently in a suit filed by the tenant for eviction of sub-tenant the respondent contended that said order was a nullity as the executing Court had wrongly applied the provisions of S. 20 of the Delhi and Ajmer Rent Control Act, 1952 which stood repealed and were not applicable, *held*, as order of executing Court was not challenged it became final and was binding on the respondent who was a party to those execution proceedings. Therefore, the respondent was estopped from contending that order of executing Court was a nullity: A.I.R. 1989 Raj. 24: (1988) 1 Raj.L.R. 844: 1988 Raj.L.W. 631.

Where decree-holder filed execution petition to recover decretal dues by attachment and sale of property belonging to judgment-debtor and the decree-holder asked the executing Court to secure the permission of competent authority for sale of the property as the judgment-debtor belonged to Scheduled Tribe and permission was later obtained by the appellant with whom judgment-debtor was negotiating for a private sale of his property and said permission was produced by the decree-holder in the execution proceedings as if the permission was granted in his favour, *held*, the decree-holder was estopped from contending that the judgment-debtor did not belong to Scheduled Tribe and, therefore, permission of the competent authority was not needed to validate the sale: A.I.R. 1978 S.C. 1820.

Plea of limitation not raised in previous application for execution—Plea in subsequent execution at late stage—Estoppel—*Res judicata*: A.I.R. 1959 Punj. 521.

35. Estoppel by election.—Where a man is entitled to one of two inconsistent rights and he has with full knowledge done an unequivocal act indicating his choice of the one, he cannot afterwards pursue the other which

after the first choice is by reason of the inconsistency no longer open to him. Such case do not require detriment to the other party as foundation for their application: A.I.R. 1956 Mad. 301: (1956) 1 M.L.J. 276.

Where a person, having two alternative courses of actions mutually exclusive chooses to adopt one and rejects the other expressly or impliedly then he is said to have elected to choose one. He is subsequently precluded from adopting the course which he intended to reject. It is known as doctrine of election. Like estoppel it is also child of equity. It is founded on the principle that one should not be permitted to approbate and reprobate, that is, blow hot and cold in same breath. It has been extended and applied as an aspect of estoppel to prevent a person from falling a victim to what would have otherwise resulted in injustice to him and unfair advantage to other. A lessor may after expiry of period for which lease is granted renew the same or resume that is re-enter. But if out of the two that is re-entry or resumption, the two divergent courses, he chooses to grant fresh lease or at least creates that impression by his conduct spread over long time it results in abandonment which is an aggravated form of waiver, he cannot subsequently turn round and claim that he intended to re-enter: A.I.R. 1987 All. 56: (1987) 13 All.L.R. 92 (D.B.).

The maxim that a person cannot "approbate and reprobate" is only one application of the doctrine of election, and its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The principle of election does not forbid a party from claiming the same relief against different persons in different suits in respect of the same property though the grounds of relief are different and inconsistent: A.I.R. 1956 S.C. 593.

In order to establish estoppel by election all that is necessary is that the party should have sufficient information and knowledge to be able to recognise that he has two rights inconsistent with each other and knowing that if he chooses one of those two rights and enforces that right, it necessarily is an act of election and necessarily precludes him from contending that the act adopted and ratified by him is invalid and that he should be allowed to change his position thereafter and say that the other remedy and right is the proper one. Where the plaintiff, who was entitled to a sum of money under a compromise entered into by his mother on his behalf during his minority, withdraws that money with the knowledge of the compromise under an order of the Court at a time when suit on his behalf challenging the very compromise was pending and with knowledge of the contentions in the suit, the plaintiff clearly elected to abide by the compromise and accept it. He thereby precludes himself on the broad principles of estoppel from challenging the compromise subsequently on the ground that it was brought about wrongly and against his interests. It is not necessary that all the details and facts leading up to the compromise should be known to a party, nor is it necessary that the party should be aware of the implications that may follow upon his election: A.I.R. 1956 Bom. 721.

Where a man has an election between several inconsistent course of actions, he will be confined to that which he first adopts; the election if made with the knowledge of facts, is in itself binding. The election must be, however, a voluntary act, not forced upon him by circumstances over which he had no control and notwithstanding his protest: I.L.R. 59 Cal. 1464: (1931-32) 36 Cal.W.N. 955: A.I.R. 1933 Cal. 39.

Double remedies—Election of one—Estoppel as to the other remedy: A.I.R. 1928 Sind 40.

Where a person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both, and he adopts the one he cannot afterwards adopt the other: I.L.R. (1961) 1 Punj. 271: A.I.R. 1961 Punj. 157.

Reliefs claimed in alternative interlinked —Plaintiffs could not be put on election to choose between reliefs: 31 Cut.L.T. 61: A.I.R. 1965 Ori. 108.

Doctrine of election is doctrine of equity—Election under void transaction—Effect: A.I.R. 1968 Mad. 207.

The doctrine of election belongs to the species of estoppel; the test is whether a party has chosen one of the alternative remedies and drawn its benefit and, if so, it should not be allowed to seek the other remedy. Thus, where the judgment-debtor in a decree for specific performance in execution for recovery of costs stated that there were

large deposits in the Court (*i.e.*, money deposited by the decree-holder as consideration for sale) and therefore his moneys with the third parties need not be attached, *held*, it did not mean that he had elected to abide by the decree when he was in fact vigorously persuing his appeal against the decree in the appellate Court; it did not amount to approbation and reprobation; he had exercised no election: (1981) 94 Mad.L.W. 591 (D.B.).

Estoppel by election—Basis of—Order winding up a banking company—Party accepting dividend thereunder cannot appeal against it—Banking Companies Act, 1949, S. 38: 1965 B.L.J.R. 558: A.I.R. 1965 Pat. 502.

Where a State Financial Corporation had obtained a mortgage decree from the Court, it was precluded from taking recourse to S. 29 of the State Financial Corporations Act, 1951 by seizure and sale of the mortgaged property, as that would put the debtor to "double jeopardy"; by obtaining the Court decree, the Corporation had elected and availed of one remedy out of the two; it was precluded from seizing and selling the mortgaged goods otherwise than by execution of the decree. [A.I.R. 1963 Cal. 132, Expl. and Disting.]: A.I.R. 1987 Ori. 119: (1987) 63 Cut.L.T. 151 (D.B.).

In the case of a usufructuary mortgage, as the mortgagee's interest in the property terminates on redemption, a lease granted by him also comes to an end at the same time under S. 111 (*c*), T.P. Act. The lessee then in possession, would, on happening of that event become a trespasser and therefore cannot by any act of his own create the relationship of lessor and tenant between himself and the mortgagor. But where the mortgagor has treated the tenant as holding under him and sought relief on that footing in the eviction proceedings before the Rent Controller, he cannot thereafter turn round and assert that he was not his tenant and claim to treat the mortgagee as continuing in possession and therefore liable to pay him *mesne profits* by reason of wrongful occupation. He is precluded by his election in so doing: A.I.R. 1956 Mad. 301: (1956) 1 M.L.J. 276.

A Government servant was given the option to retire voluntarily on proportionate pension as an alternative to dismissal. The Government servant chose voluntary retirement and the Government passed the order accordingly. Subsequently he challenged the order of the Government. *Held*, that the Government servant was estopped from impugning the order of the Government to which he had himself agreed. He had taken full advantage of the order of the Government granting him the pension for which he applied and it would be quite unfair and inequitable subsequently to allow him to repudicate the order. He could not be allowed to blow hot and cold in the same breath. The principles of waiver and estoppel clearly applied to the circumstances of the case: A.I.R. 1957 Assam 77. *See* also A.I.R. 1957 Madh. Bh. 100, cited *infra*.

In a subsequent suit for rectification of the instrument of guarantee: *Held*, that having elected to take their chance of succeeding upon the terms of the instrument as it stood, the sureties were estopped from reagitating the question on the basis of the very ground which they had waived on the former occasion: I.L.R. 59 Cal. 985: A.I.R. 1932 Cal. 889.

Hindu widow—Alienation by reversioner—Election—Minority of Hindu reversioner—Principles applicable. *See* A.I.R. 1955 Andhra 68: (1954) 2 M.L.J. (Andh.) 162 *Obiter*.—In order to constitute election or ratification it is not essential that a reversioner should assent to the transaction impeached only when he is in titulo. The ratification can be effected even during the lifetime of the widow and before the reversion falls. There is no justification for limiting this doctrine to cases of alienation by Hindu widows. It applies to awards as well: A.I.R. 1960 Andh. Pra. 222: (1960) 1 An. W.R. 340 (Estoppel by accepting benefit under transaction).

Where the appellant had an option either to consider himself, under the T.N. Debt Relief Act, 1972, a non-agriculturist debtor and claim benefits conferred as a debtor under the said Act, or treat himself as an Agriculturist within the meaning of the T.N. Agriculturists Relief Act, 1938 and claim benefits on that basis, and he chose to claim the benefit under the former Act, claiming that he was non-agriculturist debtor, *held*, having taken that stand and availed the benefits on that basis , it will not be open to him, in appeal to change the position and say that he was an agriculturist entitled to the benefits of stay under S. 3 of the T.N. Agriculturists Relief Act, 1938: (1984) 97 Mad.L.W. 562 (D.B.).

To constitute an abandonment or waiver, it must be a voluntary act on the part of the person possessing the rights; if by force of circumstances, he is compelled to adopt one of the two courses, it cannot be said that he adopted the one and abandoned the other. Thus, where under a consent order of eviction passed on 14-10-1968, the tenant was required to vacate the premises by 30-6-1973 but as law then stood, such an order could not be passed without the Court being satisfied about the genuineness of the landlady's claim and the landlady, withdrew her review petition for modification of the consent order on the tenant's objection and filed a second eviction petition but meanwhile in view of a later Supreme Court decision, the consent order became valid and executable and she sought execution thereof, *held*, at the time of her second eviction petition, she had no inconsistent rights and no inconsistent courses open to her; she could not be said to have abandoned one of her rights or courses; there was, thus, no abandonment or waiver on her part to estop her from executing the consent decree: A.I.R. 1975 Karn. 225: (1975) 2 Karn.L.J. 316.

Compromise petition—Widow of deceased brother relinquishing her right under her husband's will and accepting in lieu maintenance allowance made charge on family Lands—Document not merely reciting past event but itself creating right in immovable properties of the value of Rs. 100 or more—Absence of registration—Document inadmissible in evidence—Widow whether estopped by election from claiming partition of family properties—Evidence Act, 1872, S. 115: (1965) 1 An.W.R. 134.

Where a property with a charge for maintenance of the estranged wife was agreed to be sold and upon the husband's refusal to execute the deed, its specific performance was decreed and upheld by the single Judge whereunder the sale price was deposited in the Court and in execution of the grant of costs, when the husband's Letters Patent appeal was still pending, the husband prayed to the executing Court that the decree-holder could realise the costs from the deposit in the Court whereupon the decree holder challenged the maintainability of the Letters Patent appeal on the ground that the husband, having claimed the Court deposit as his own, was estopped from prosecuting the appeal, as he could not approbate and reprobate, *held*, since the appellate jurisdiction is statutory and contains no restriction which could stultify his right to appeal for such conduct, the husband's appeal is not rendered incompetent; it could not be said that he had abandoned his right to appeal with full knowledge of his legal rights; the rule of election is a rule of equity; the decree holder's contention does not advance either equity or justice: (1981) 2 M.L.J. 110 (D.B.).

Where the plaintiff in an earlier suit invited the jurisdiction of the authorities of the Hindu Religious and Charitable Endowment Department for declaring that he was the hereditary trustee on the ground that the suit temple was a public temple and thereafter he filed another suit for the declaration that the suit temple was a private temple, *held*, the plaintiff was entitled to choose one of the two inconsistent remedies, namely, for a declaration that it was a private temple and for a declaration that the office of the trusteeship was hereditary, and since he elected one remedy, namely for a declaration that he was holding the office as hereditary trustee and pursuing the same, he could not thereafter turn round and come forward with a prayer for the relief that the suit temple was a private temple; he was bounded by his election: (1991) 1 M.L.J. 67 (D.B.).

Where during the pendency of an appeal under S. 28 of the Mysore (Personal and Miscellaneous) Inam Abolitions Act, 1954 preferred by an Inamdar against registration of lands in the name of the tenant and not his own, the Deputy Commissioner awarded to him compensation under S. 17 of that Act which he received without preferring an appeal against the same separately provided under S. 31 of that Act, *held*, the Inamdar's right of appeal under S. 28 cannot be said to have come to an end; he was certainly a "party aggrieved"; the right of appeal is not confined to mere presentation of the memorandum of appeal but extends to its hearing and disposal on merits; the order of registration and award of compensation are different orders; there is no scope for invocation of the principle that one who takes benefit of the one must suffer the detriment of the other; there is no question of putting the Inamder to election as between the two orders which are not in the alternative and are governed by separate statutory provisions:

A.I.R. 1971 Mys. 66: (1970) 2 Mys.L.J. 425 (D.B.)

Proceedings under Bihar Act (XV of 1956)—Principle of election—Applicability: A.I.R. 1968 Pat. 476.

Petitioner given option by Tribunal either to amend petition, or to supply particulars or to strike off the particular para, as being vague—Petitioner choosing to amend, loses his right to adopt the alternatives: A.I.R. 1965 S.C. 1243.

36. Estoppel by conduct.—*See* (1955) 1 M.L.J. 422: A.I.R. 1955 Mad. 187: I.L.R. (1955) Mad. 1248; A.I.R. 1957 Cal. 617; 80 I.C. 994: A.I.R. 1924 Sind 97; I.L.R. 15 All. 119; I.L.R. 22 All. 83; (1913-14) 18 Cal.W.N. 429; I.L.R. 46 All. 214; (1910-11) 15 Cal.W.N. 741: I.L.R. 34 Mad. 257 (P.C.); A.I.R. 1927 Mad. 1066: 29 Mad.L.W. 220; I.L.R. 55 Mad. 40: A.I.R. 1932 Mad. 198: 62 M.L.J. 116. *See* also A.I.R. 1940 Bom. 242: (1940) 42 Bom.L.R. 443; (1939-40) 44 Cal.W.N. 240: A.I.R. 1940 Cal. 60; I.L.R. (1940) Lah. 352: A.I.R. 1940 Lah. 100; (1940) 42 Punj.L.R. 61; (1932) 34 Bom.L.R. 1252: I.L.R. 56 Bom. 501: A.I.R. 1932 Bom. 386; (1940) 42 Punj.L.R. 249; A.I.R. 1939 Lah. 303; 1939 M.L.R. 229 (Civ.); 10 O.W.N. 58; A.I.R. 1933 Oudh 166; 10 O.W.N. 201; I.L.R. 11 Rang. 79: A.I.R. 1933 Rang. 52; 131 I.C. 669: A.I.R. 1931 Mad. 354.

Estoppel by conduct—Applies to corporations as well as to individuals: (1979) 2 Karn.L.J. 318.

Estoppel by conduct is of the very essence of the rules of estoppel embodied in Ss. 115, 116 and 117 of the Evidence Act, but since the acts of the parties which come in for consideration in a litigation the acts, that is, of the party sought to be estopped, and those of the other who has been led thereby to change his position and who therefore pleads the bar of estoppel against the former must necessarily be acts performed prior to the commencement of the litigation. The conduct of a party in the course of the litigation, while it may affect the question of costs should be wholly irrelevant for judging those acts: A.I.R. 1958 All. 54 (D.B.).

To found a plea of estoppel by conduct there should be precise pleadings setting up the facts constituting the estoppel: A.I.R. 1953 Trav.-Co. 447.

No person can be estopped either by attornment, pleading or other conduct, where the conduct constituting the estoppel was founded on a mistake of facts: A.I.R 1964 Cal. 439.

A party having, by his conduct, induced the other party to make an immediate payment of the decretal amount and having entered into an engagement with him which makes it impossible for him to question the decree, is estopped from acting contrary to his undertaking: A.I.R. 1934 Pat. 644. *See* also A.I.R. 1949 Nag. 385.

Legitimacy—Treatment of defendant as member of family—No representation acted upon by defendant—Plaintiff not estopped from questioning legitimacy: 142 I.C. 606: A.I.R. 1933 Lah. 412: unless the act which the plaintiff did to his own prejudice is referable to the defendant's representation, no estoppel arises: I.L.R. 61 Cal. 64: A.I.R. 1934 Cal. 441.

Estoppel by conduct—Estoppel against law—Representation on matter of law—Facts rendering adoption by Hindu widow devoid of legal force known to person alleged to be adopted—Conduct of widow treating adoption as valid cannot operate as estoppel against widow: 1963 Jab.L.J. 817: A.I.R. 1963 Madh. Pra. 348.

Where a property was sold on behalf of a Hindu minor through his *karta* or guardian on the condition of repurchase, *held*, the purchaser cannot repudiate the condition of repurchase; he is estopped by his conduct: A.I.R. 1960 Cal. 65: (1958-59) 63 Cal.W.N. 436.

Estoppel by conduct—Purchaser of share of property—Subject to mortgage—No objection raised to the mutation of name in Butwara proceedings—Patti also granted—Mortgage not estopped. *See* A.I.R. 1951 Pat. 274.

Sale of property mortgaged by a co-partner as security for advances made to him independent of partnership business by his partner—Partner-creditor not a consenting party to sale—Receipt of the amount due by partner-creditor from out of sale proceeds, does not estop him from relying upon the sale as an act of insolvency: (1964) 1 M.L.J. 99: A.I.R. 1964 Mad. 106.

First application for eviction made in April, 1963 on ground that tenant was in arrears of rent from October, 1959—Part of arrears of rent paid together with interest and

costs on first day of hearing—Pending first application, second application for eviction made in April, 1964 also on ground of arrears of rent from October, 1959—On entire arrears of rent together with interest and costs being paid according to S. 13 (2) (*i*), proviso, statement made by landlord that he withdrew second application and application dismissed by Rent Controller on same day—*Held*, that conduct of landlord estopped him from pursuing it and in any case only inference would be that he had waived his claim under first application: 1966 Cur. L.J. 862 (Punj.).

Sale deed by widow and daughter of last male holder executed in 1947—Suit by plaintiff daughter's son for declaration that sale deed by widow was not for legal necessity—Death of widow during pendency of litigation in 1960—Daughter held became absolute owner because of Act—Plaintiff's suit was not maintainable—Daughter estopped from challenging alienation being co-executant: A.I.R. 1963 Pat. 335.

Agreement to sell—Sanction of military authorities conditions precedent—Title passes after sanction—Attachment of goods for recovery of income-tax arrears due from vendor, after passing of title is illegal—S. 26 (2) and S. 46, Income-tax Act held did not apply—Auction sale for recovery of income-tax arrears—Vendee purchasing property is not estopped from challenging attachment: A.I.R. 1963 All. 346.

Where though the respondent purchased the suit property in an auction from the custodian, Evacuee property in the year 1964 but he never took possession thereof and subsequently, said land was allotted in favour of another person and mutation was also sanctioned in his favour and, thereafter in favour of his son "*S*", who sold the suit land to the appellants who had been in possession of the suit land since its purchase and after 11 years from the date of alleged sale in favour of the respondent, he filed a suit for possession thereof, *held*, the respondent did not get the mutation sanctioned in his favour after its allotment to him right from 1964. His conduct was responsible for the appellants in believing that "*S*" was the owner of the suit property. Therefore, the respondent was estopped from filing the suit: (1993-1) 103 Punj.L.R. 86.

Judgment-debtor applying to set aside sale under R. 89—Auction purchaser on receiving its notice not depositing full amount under R. 85—His action being on belief created by judgment-debtor he does not forfeit his solatium amount—Estoppel of judgment-debtor: (1963) 2 An.W.R. 241: A.I.R. 1964 Andh. Pra. 423.

By reason merely of an application which they filed for extension of time to file the amended plaint in accordance with the finding of the Court, the plaintiffs would not be estopped from coming up in revision against the order of the Court: A.I.R. 1953 Him. Pra. 123.

Suit by *A* against *B*, *C*—On death of *A* during pendency of suit, *D* applying for substitution of his name in place of *A* on basis of Will—Subsequent suit by *X* against *B*,*C* and *D* on basis of khata executed by *A* filed long after *D*'s application in previous suit—*Held*, by omission to take plea on basis of Will in *X*'s suit, it could not be said that *D* made *B* to believe that he was not sole heir of *A*: 1952 Raj.L.W. 492: I.L.R. (1952) 2 Raj. 431.

Widow—Surrender by—Only father taking benefit under it—Son, claiming through him, not receiving benefit under it—No estoppel against son to challenge surrender: A.I.R. 1965 Pat. 47.

Where a kobala is executed by the Hindu mother on behalf of the minor on the footing that she is competent to transfer the property of the minor and this position is accepted by the alienee who has obtained an advantage by the transaction of sale and has got the entire property, including the share of the minor and has agreed to reconvey the property in its entirety, the alienee cannot turn round and repudiate the authority of the mother to effect the sale on behalf of the minor, or to repurchase the property of the minor upon refund of the consideration money. The alienee will be estopped by her conduct from doing so, and she must fulfil her part of the obligation by reconveying the property in favour of all the alienors including the minor: (1958-59) 63 Cal.W.N. 436: A.I.R. 1960 Cal. 65.

The plaintiff and the first defendant were sisters. In the suit for possession of half share of the suit property, the plaintiff alleged that the suit property was the absolute property of her mother and upon her death this property devolved on her and the first defendant as her mother's heirs. Since according to her, the first defendant did not want to join her as co-plaintiff in the suit for possession and *mesne profits* she was joined as a defendant.

In a notice sent to the first defendant before filing the suit by the plaintiff it was stated that the plaintiff and the first defendant were joint owners of the suit properties which were in the possession of their father, and requested for her co-operation in order to effect the division of the properties. A copy of this notice was sent to the father and he sent a reply of it to the plaintiff. No reply, however, was sent by the first defendant. In the suit filed by the plaintiff, it was contended by the father that the first defendant by her conduct in not replying to the notice and in not co-operating with the plaintiff in filing the suit, was estopped from claiming possession of her alleged half share of the properties. *Held*, that the conduct of the defendant did not justify the inference of estoppel. It did not mean that she impliedly admitted that she had no interest in the properties: (1965) 2 S.C.W.R. 644: A.I.R. 1965 S.C. 1812.

Instrument of guarantee—Alteration on instrument while in custody of guarantor and principal debtor—Alteration to benefit of guarantor—Alteration whether substantial—Guarantor if can avoid instrument of guarantee. *See* (1964) 1 M.L.J. (S.C.) 137: A.I.R. 1963 S.C. 746.

Conduct—Co-operative Society—Election of Directors—Previous approval of Registrar—Estoppel: A.I.R. 1958 Pat. 154.

Conduct—Gift to members of tarwad—Estoppel against tarwad: A.I.R. 1957 Trav.-Co. 77.

Joint family—Conduct—Estoppel by: A.I.R. 1960 Mad. 388.

C.P.Code, 1908, O. 41, Rr. 1 and 2—New point—Question held mixed question of law and fact—Defendant held estopped from raising it in appeal: A.I.R. 1965 Pat. 300.

A person who has acted as a trustee of a public temple as evinced by his own admissions and conduct and who has obtained decrees of the Courts in that capacity cannot subsequently turn round and claim the temple to be a private temple, or the properties as his absolute properties: (1964) 2 An.L.T. 270: (1964) 2 An.W.R. 457.

Where the Head of a Muth was not empowered but nevertheless granted permanent lease of the Muth property and upon his demise the new Head continued to realise rent, as the agent as well as the successor of the first Head, *held*, no estoppel could be invoked against the new Head in his suit for recovery of property on the ground of the lease being illegal: (1986) 99 Mad.L.W. 9.

Fire insurance—Damage to property caused by fire—Suit relating to claim of compensation in respect of—Clause in fire insurance policy stipulating period within which such suit is to be brought—Suit not brought within that period—It is barred—Conduct of insurance company *held* did not amount to estoppel: (1963-64) 68 Cal.W.N. 638.

If the owner of the Railways allows the Railways represented by its manager to deal with third person as a legal entity and to enter into a contract on that footing, he cannot, when a suit is brought on such contract, assert his position as the proper party nor can the Railway Administration repudiate its liability to be sued: I.L.R. 56 All. 828: 1934 All.L.J. 1093: A.I.R. 1934 All. 740.

Wife's succession not affected by estoppel arising out of husband's action: 1962 Jab.L.J. 286: 1962 M.P.L.J. 30.

Succession suit—Frame of plaint settled in a manner and using such expressions as are usually and commonly used in claims under customary law—Issue very widely worded and at the trial the parties knowing that they were litigating according to customary law and leading evidence accordingly—Defendants themselves attempting to support their title according to customary law—Defendants having themselves relied upon customary law cannot at later stage say that such law does not apply to the case: 1970 Cur. L.J. 195 (Punj.).

Assam Panchayat Act (XXIV of 1959), S. 3 (1) and (2), provisos—Gaon Sabha created by State Government recommending creation of another Gaon Sabha out of its area—Is estopped from challenging creation thereof by State Government. (*Obiter*): A.I.R. 1969 Assam 61.

Where in a suit to perpetually restrain the Municipal Corporation from interfering with the plaintiff's possession and construction over a plot, the Corporation contended that there was no such plot but as per the Town Planning Scheme there was a street at the suit site, *held*, since no street existed at the site and houses had already been allowed without objection from the Corporation to be built indiscriminately with no regard to the alleged public street, the Corporation was estopped from objecting to the construction of building on the plot: 1992 Punj.L.J. 273.

The defendant participated in the proceeding and all the witnesses examined on his side were brought to the Court on several dates after the default had occurred. The plaintiff cross-examined the witnesses and the suit has already reached the stage of argument. It was only at that stage that the defendant put in an application for dismissal of the suit. The defendant's conduct has been rightly relied upon by the trial Court for estopping him from raising the plea at such a belated stage: (1982) 53 Cut.L.T. 206.

An agreement between the Government and a grantee under a sanad was based on the assumption that the lands granted were Kadim Inam. The grantee led the Government by his conduct to believe that he accepted the assumption and obtained the benefit of a lower jodi.*Held*, that the grantee was estopped from contending that the lands were not Kadim Inam: (1934) 36 Bom.L.R. 1055: A.I.R. 1935 Bom. 47.

Defendant making payment of revenue and cess in excess of his liability in property and to the advantage of plaintiff—Later taking advantage of same—Payment by plaintiff of amount in excess of his liability in other property—Right to contribution from defendant—Estoppel: A.I.R. 1950 Pat. 255. Estoppel is purely personal: I.L.R. 14 Cal. 406; I.L.R. 50 All. 885: A.I.R. 1928 All. 459. *See* also A.I.R. 1937 All. 701 (F.B.) [Agreement to abide by statement of third party—Binding nature of such statement—Right to challenge—Estoppel]; 20 Nag.L.J. 209 [Non-enhancement of assessment of Government land, if operates as estoppel against Government]. The fact that the Government based the assessment of a Zamindari on charges actually, though illegally, levied in the past does not give rise to the inference that they consented to the levy of similar charges in the future and the Government are not, therefore, estopped from disputing the legality of levies in the future. Basing assessment upon actual charges made in the past does not amount to affirmance that charges of a similar nature will be allowed in the future: I.L.R. (1949) Nag. 263: A.I.R. 1949 P.C. 140.

Where the order passed by the Collector confiscating a truck under S. 6-A of the Essential Commodities Act, 1955 was set aside in review as owner had not been impleaded as a party and after making him a party and considering the case on merits order of confiscating the truck was again passed in review, *held*, the owner, even if not filed an appeal against the earlier order, was not estopped from filing an appeal against the confiscation order passed in review: 1978 All.L.J. 118: 1978 All.Cr.R. 150: 1978 All. W.C. 316.

A drawee who clearly makes the representation of acceptance not only by signing the bill but also by his conduct in accepting the documents and taking delivery of the goods, *held*, is estopped from denying the acceptance after having taken advantage of the documents. In such a case, there would be acceptance by conduct by virtue of estoppel and this conduct is in addition to the signature on the face of the bill. [A.I.R. 1961 Cal. 653, Rel. on]: A.I.R. 1983 Del. 240: (1982) 22 Del.L.T. 326.

37. Waiver—General.—"Waiver" is the abandonment of a right in a way which entitles the other party to plead abandonment by way of confession and avoidance if that right is asserted thereafter; a waiver may be express or implied by conduct, and it may as well be without consideration: (1994) 3 Karn.L.J. 493.

Waiver may be express or implied. It may be intentional or due to inaction or gross carelessness or absence of diligence on the part of the party having the right or advantage in his favour. The party having such right or privilege has a discretion to exercise the same: A.I.R. 1975 Cal. 436.

The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. One can waive any benefit conferred upon him by Act of Parliament, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy: (1991) 2 Cal.H.N. 234: (1991) 2 Cal.L.J. 188.

"Waiver" arises in a situation where the person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to the alternative rights and acts in a manner which is inconsistent only with his having chosen to rely on one of those rights, the law holds him to his choice even though he was unware of

what would be the legal consequence of what he did. This is also sometimes described as Election rather than "Waiver". There is another type of waiver which debars a person from raising a particular defence to a claim against him. It arises when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising it: (1987) 1 Cal.L.J. 188: (1987) 1 Cal.H.N. 220: (1986-87) 91 Cal.W.N. 971.

The essential element of waiver is that there must be a voluntary and intentional relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right. It means the forsaking the assertion of a right at the proper opportunity. Waiver is distinct from estoppel in that in waiver the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. The necessary condition is the detriment of the other party by the conduct of the one estopped. An estoppel may result though the party estopped did not intend to lose any existing right. Thus, voluntary choice is the essence of waiver for which there must have existed an opportunity for a choice between the relinquishment and the conferment of the right in question: A.I.R. 1989 S.C. 1834; A.I.R. 1990 Ker. 261.

A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights: A.I.R. 1968 S.C. 933; 1970 Lab.I.C. 614: 1970 Serv.L.R. 134.

Waiver means abandonment of a right; it may be express or implied from conduct; but it must be, "an intentional act with knowledge". There can be no waiver unless the person concerned is fully informed, and has full knowledge, of his right; and it must be an intentional abandonment. Thus, where a sugar mill sought full exemption of sales tax granted by statute and the State contended that it had waived its right by a letter, *held*, it could not be said that the mill was aware of its right to exemption under law; though ignorance of law in a certain context is no excuse but, as Lord Acton said, there is no and never has been a presumption that every one knows the law; on facts, waiver not established: A.I.R. 1979 S.C. 621.

Waiver is a matter of agreement, express or implied. In order to hold that the plaintiff must be deemed to have waived his rights, the Court must come to the conclusion that the plaintiff was aware of his right: I.L.R. (1955) 2 Cal. 365.

A waiver is an intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right. The party waiving must have knowledge of the rights which he waives. A person cannot be held bound by any waiver unless he is aware of what exactly he is waiving and what rights he is giving up: A.I.R. 1961 Cal. 65.

There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right he intentionally abandons it: (1983) 2 Serv.L.J. 462.

Waiver means abandonment of a right and its basic requirement is that it must be an intentional act with knowledge of one's rights. There can be no waiver unless the person who is said to have waived is fully informed as to his rights and with full knowledge about the same he intentionally abandons them: A.I.R. 1984 Pat. 61: 1984 Pat.L.J.R. 238.

A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted upon it is sufficient consideration. Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right. Where the plaintiff was permitted to withdraw the suit but he was to pay the costs of the defendant within two months of the date of the order or before the institution of the second suit but the plaintiff failed to do so and the defendant withdrew the costs deposited by the plaintiff after the disposal of the second suit, *held*, this conduct clearly showed that he could not have any intention to waive his right; if he wanted to waive, he could have withdrawn the deposited costs before the disposal of the suit. [A.I.R. 1950 Bom. 113; A.I.R. 1931 Bom. 257, Rel. on; A.I.R. 1955 Punj. 97, Disting.]: A.I.R. 1971 Bom. 220: 1971 Mah.L.J. 315.

There is a distinction between statutory provisions (*i*) conferring jurisdiction and (*ii*) regulating procedure; jurisdiction can neither be waived nor created by consent but procedure, on the other hand, may be waived by conduct or agreement. Waiver arises where a party is entitled to inconsistent alternative rights; if he knows the facts on which the alternative rights are founded and acts in a manner inconsistent with one set of right, the law holds him to the choice even if he was unaware of its legal consequences; "waiver" is sometimes described as "election": A.I.R. 1975 S.C. 2065.

Rules of Courts—Rules of procedure can be waived in the interest of justice: 1983 Ker.L.T. 457: I.L.R. (1983) 2 Ker. 271: 1983 Lab.I.C. 1388.

Cases relating to waiver: I.L.R. 11 Rang. 79: A.I.R. 1933 Rang. 52 ; A.I.R. 1933 Lah. 546. *See* also 171 I.C. 461: A.I.R. 1937 Pat. 399 ; 20 Nag.L.J. 209.

Question of waiver is a mixed question of law and fact: (1979) 1 L.L.J. 478: 1979 Serv.L.J. 433: 1979 Lab.I.C. 506 (Cal.).

The plea of waiver being a plea of fact, it has to be pleaded and proved. Thus, where the State had raised the plea in its affidavit in reply to a writ petition which did not have even a vague indication thereof, *held*, it could not be allowed to be raised for the first time at the hearing: A.I.R. 1979 S.C. 621.

Waiver of privilege conferred by statute: A.I.R. 1968 Pat. 211.

It may be stated as a general rule that if the statute is solely for the benefit of a person, he may waive his right or the benefit, if he thinks fit, or give up the rights of personal or private nature created under an agreement, but he cannot waive a benefit, conferred by a statute which has public policy for its object. Therefore, where a prohibition or interdiction is absolute in respect of a provident fund standing to the credit of a subscriber, it is not open for a person to circumvent the provisions of law by entering into an agreement. It is not, therefore, open for the dependent to waive his right and agree to have the amount brought into the Court for payment to the decree-holder in satisfaction of his decree: (1966) 1 L.L.J. 361: A.I.R. 1965 Mys. 303.

Where though at the time of filing written statement, the defendant had sought scaling down of the mortgage debt under the T.N. Indebted Agriculturists Relief Act, 1972, but he gave it up at the time of passing of preliminary decree and even paid some amount thereafter and even after passing of final decree and he only sought extension of time for further payment, *held*, subsequently, he could not seek relief under the aforesaid Act once again: (1979) 92 Mad.L.W. 753 (D.B.).

Protection granted to agriculturists against attachment of their dwelling houses is not intended to confer any personal benefit on them; it is based on public policy so as to avoid interruption of agricultural operation which is against the national interest. Thus, the plea of waiver or estoppel is not available to the decree-holder against the agricultural judgment-debtor objecting to the attachment of his dwelling house. [A.I.R. 1942 Mad. 391; A.I.R. 1950 Bom. 155; A.I.R. 1952 All. 680, Rel. on]: A.I.R. 1975 Kam. 84: (1974) 2 Kam.L.J. 108.

Houses, etc.—Judgment-debtor's only residential house—Before passing order of attachment, the Court must decide that the property is not exempt from attachment—Failure to do so renders the order null—Sale effected in pursuance of such an order must be set aside—Benefit of section cannot be waived and more so by constructive *res judicata*: 1966 Cur. L.J. 921.

Attachment—Exemption from—Provision is mandatory—Property not liable to attachment—Judgment-debtor agreeing to its attachment—He cannot waive protection given under S. 60: 1961 Raj.L.W. 261.

Protection given under S. 60(1), proviso (*c*) of the C.P.Code, exempting house of an agriculturist from attachment, *held*, cannot be waived: A.I.R. 1983 Andh. Pra. 136 (D.B.).

Principle of waiver—Applicability and scope—Applies to mandatory provisions also—Limitations are (*i*) that party cannot waive a statutory requirement which has been inserted by Legislature in public interest as distinguished from the interest of the parties, and (*ii*) parties cannot by waiver invest Tribunal with jurisdiction which it does not have—Requirement of Cl. 2 of First Schedule to Arbitration Act, 1940 is capable of being waived—Thus, where two arbitrators did not appoint an umpire though it was one of the terms of the reference, but the plaintiff waived that non-compliance by appearing before the Tribunal, he could not

later on object to the award being invalid on the ground of non-compliance with Cl. 2 of the First Schedule to Arbitration Act—[Arbitration Act, 1940, First Schedule, Cl. 2]: (1967) 69 Bom. L.R. 237: 1967 Mah.L.J. 532: A.I.R. 1967 Bom. 373.

Waiver of non-compliance with a provision of an Act—Effect: A.I.R. 1967 Bom. 373: (1967) 69 Bom.L.R. 237: 1967 Mah.L.J. 532.

Laches—Waiver: A.I.R. 1957 All. 91.

Mere waiver, acquiescence or laches not amounting to an abandonment of his right or to an estoppel against a person cannot disentitle that person from claiming relief in equity in respect of his executed and not merely executory contract: (1953) 1 M.L.J. 374: 1953 S.C.R. 351: A.I.R. 1953 S.C. 98. There can be no waiver of the ground of limitation. [A.I.R. 1920 P.C. 139; I.L.R. 47 Pat. 226, Foll.]: A.I.R. 1991 Bom. 35.

Where an application for bringing on record the legal representative of a deceased party (tenant in an eviction proceeding) was moved beyond 30 days of the party's death, *held*, the legal representative is not estopped from contending that it be dismissed under S. 3 of the Limitation Act, 1963 even if the legal representative had participated in the proceedings; mere participation does not amount to waiver: A.I.R. 1976 All. 15: (1975) 1 All.L.R. 580: 1976 All.L.J. 178 (D.B.).

Mere delay of the plaintiff in enforcing his right is not itself sufficient to refuse him relief. Since waiver is contractual, there must be an agreement under which the plaintiff released his rights or agreed not to assert such right: I.L.R. (1973) Mys. 790.

Proceeding under Employees' Provident Funds and Miscellaneous Provisions Act (1952)—Initiation of—Delay in—Does not amount to waiver: 1983 Lab.I.C. 940 (Pat.).

The case of waiver and implied agreement involves questions of law and fact and in the absence of specific pleading and specific issue such pleas cannot be allowed to be raised in appeal: A.I.R. 1960 Cal. 146.

Plea of waiver not raised before trial Court nor question to that effect was framed by Court—*Held*, waiver was largely question of fact and first appellate Court was wrong in entertaining question of waiver for first time in appeal before it: 1967 All.L.J. 371.

Obiter.—Where a man with the knowledge of the irregularity of particular course nevertheless concurs in it, he cannot afterwards take advantage of the irregularity: 1956 An.L.T. 781: 1956 An.W.R. 868.

Vesting of estate cannot be divested by acts of waiver or estopped by State or its Officers: A.I.R. 1964 Pat. 387.

An agreement to waive all illegality is void on the ground of public policy: A.I.R. 1959 S.C. 689.

38. Waiver of statutory notice.—A notice under S. 80, C.P. Code is for the benefit of the State or the public officer concerned and the requirement of the notice can be waived by the person entitled to the notice. Thus, where plaintiff sustained injuries on account of an accident caused by negligence of defendant, a driver in police department, and in a suit for damages filed by plaintiff no notice under S. 80, C.P.Code was issued to defendant-driver who chose to remain *ex parte* and filed no written statement, *held*, the defendant-driver would be deemed to have waived the requirement of notice under S. 80, C.P.Code and suit was not defective for want of notice. [A.I.R. 1973 P.&H. 339, Dissent. from]: A.I.R. 1983 Ker. 46: 1982 Ker.L.T. 962: 1982 Ker.L.J. 585 (D.B.).

Intention is a purely subjective matter and, therefore, it is the surrounding circumstances and the proved facts from which the Courts gather the intention of a party. Whether certain proved and admitted facts in law amount to waiver or not has necessarily to be held to be a question of law. Intention has to be assumed, for the purpose of waiver, from the conduct of the parties. Where the State Government decided to associate itself with the proceedings and thus it did not object to the validity of the notice under S. 80 of the C.P. Code, *held*, the waiver was intentional on the part of the State Government. [I.L.R. 40 Cal. 503; I.L.R. 21 All. 496, Rel. on]: A.I.R. 1971 P.&H. 437 (D.B.).

Where a suit was instituted against the State Government as well as the Land Reforms Deputy Collector to restrain them from settlement by auction of his fishery rights but without serving them with the notice under S. 80 of the Code of Civil Procedure as that would render the suit infructuous, *held*, the suit was not maintainable for want of notice; though the requirement of the notice was for protection of the Government and the public servants and they could, thus, waive it, but it is difficult to

cull out the principle of waiver from the facts of the case. [A.I.R. 1963 Pat. 190, Overruled; A.I.R. 1962 Pat. 303, Rel. on]: A.I.R. 1971 Pat. 141: 1970 Pat.L.J.R. 387: 1970 B.L.J.R. 343 (D.B.).

Objection to maintainability of suit for want of proper notice under S. 80, C.P.Code overruled—In appeal, State not taking objection—State deemed to have waived it—Private party not entitled to take objection, it is open only to State: A.I.R. 1969 Ker. 280.

Objection about defect in notice under S. 80, C.P.Code, not raised in written statement—Inference that objection has been waived can be drawn: (1969) 82 Mad.L.W. 451.

Waiver postulates a voluntary and deliberate mental act, mere negligence or delay *per se* in raising the plea of want of notice under S. 80, C.P.Code, by the defendant does not constitute waiver. Non-adoption of the plea of want of notice in the written statement may conceivably be attributable to ignorance of law or sheer negligence on the part of either defendant or his Counsel. It would be extremely unfair in such circumstances to ascribe waiver of notice to the defendant. It follows that the plea of waiver can be sustained only on the basis of evidence, direct or circumstantial, that it had been consciously given up by the defendant. [A.I.R. 1947 P.C. 197; A.I.R. 1958 S.C. 274; A.I.R. 1949 Nag. 25; A.I.R. 1964 All. 471; A.I.R. 1957 Madh. Bh. 108; A.I.R. 1943 Bom. 160, Disting.]: A.I.R. 1971 Tripura 51.

Waiver of notice by the Chief Commercial Superintendent of Railway—Validity. *See* A.I.R. 1957 Cal. 17 (D.B.).

Goods consigned on Railway *A* for delivery on Railway *B*—Goods destroyed by fire in godown of *A*—Notice by consignor under S. 77 to *A*—Consignor directed to contact Railway *B*—Further notice under S. 80, C.P. Code given by consignor to *B* and suit brought against *B* by both consignor and consignee—*Held*, that there was no compliance with S. 80, C.P. Code—Suit also held bad for non-joinder for no cause of action and dismissed—Railway *A* also held not estopped under S. 115, Evidence Act: A.I.R. 1964 Andh. Pra. 172.

Arbitration proceedings—Requirement of service of notice to Government pleader—Government pleader whether could be said to have waived requirement and State if estopped from challenging award. *See* 1979 B.L.J.R. 720.

39. Waiver of objection to admissibility of evidence.—Where a document has been admitted without objection, *held*, it cannot be challenged in appeal; but if the evidence was received without objection in direct contravention of an imperative provision of law, whether by acquiescence, or waiver or estoppel, its admission could be challenged as being in positive violation of a legislative enactment: A.I.R. 1990 Ker. 146: (1989) 2 Ker.L.J. 349: (1989) 1 Ker.L.T. 813.

Admitting a document to go in trial without challenge or protest cannot take the place of proof of execution which would establish it, what it purports to be. Where evidence has been received without remonstration or demur, in direct contravention of an imperative provision of law, the principle of acquiescence, waiver or estoppel can never be imported to cure the defect, for none of these principles is available against a positive legislative enactment. [A.I.R. 1922 Cal. 160, Rel. on]: 1984 Ker.L.T. 855.

When the parties themselves have allowed certain statements to be placed on the record as a part of their evidence, it is not open to them to urge later either in the same Court or in a Court of appeal that the evidence produced was inadmissible. To allow them to do so would indeed be permitting them both to approbate and reprobate: (1969) 71 Punj.L.R. 908.

The admissibility of any evidence may be challenged at any stage, even though it is not objected to at the time of admission. The mode of proof, however, is a different matter: A.I.R. 1959 Pat. 515.

Evidence—Inadmissibility of, by reason of prior decision—No estoppel by reason of: I.L.R. 7 Pat. 85: A.I.R. 1929 Pat. 32.

Objection to admission of additional evidence not raised before lower Appellate Court—Estoppel against raising the same in revision: A.I.R. 1969 Guj. 110.

Secondary evidence—Insufficiently stamped documents not produced before Court—Secondary evidence as to contents of such document—Admissibility—Opposite party not objecting to admission of such secondary evidence—Effect: (1967) 2 An.W.R. 444.

The party by its own conduct may waive the objection about the production of secondary evidence by not raising the relevant contention at the time when the secondary evidence of the original is sought to be tendered before the trial Court. Thus, where no objection was taken to the production of secondary evidence in trial Court, *held*, waiver of objection may be inferred: A.I.R. 1984 Guj. 69: (1984) 4 Guj.L.H. 831 (D.B.).

Termination of service—Notice of discharge—Necessity—Waiver—Effect of. *See* A.I.R. 1956 Tripura 33.

Where the Municipal Board, having leased out a *nazul* land, had terminated the lease by quit notice under S. 106 of the Transfer of Property Act, 1882 of which the clerk receiving rent thereafter was not aware, *held*, it would not amount to waiver of notice by the Board; there can be no waiver unless the Board was shown to have full knowledge of the facts enabling it to enforce its rights: A.I.R. 1977 All. 386: 1977 All.W.C. 651.

Affidavits filed by assessee—Department not objecting to their being taken in evidence by High Court—Appeal to Supreme Court—Objection must be taken to have been waived: A.I.R. 1968 S.C. 339.

40. Waiver—In case of remand.—Inherent power of remand—Remand to admit fresh evidence from parties for reasons not covered by O. 41, R. 27—Respondent accepting pecuniary benefit under order of remand, cannot say that order of remand was wrong in law: (1960) 2 Ori.J.D. 82.

Where at the time the case was remanded back to the Surplus Land Determination Tribunal by the Revenue Tribunal, no objection was taken by the petitioner to the order of remand, *held*, subsequently, after the Surplus Land Determination Tribunal had passed its revised order, the petitioner could not challenge the validity of order of remand: A.I.R. 1986 S.C. 1192: (1986) 3 S.C.C. 349.

Where in second appeal arising from a suit for eviction, the tenant had argued that the Courts below were right in not deciding the question of title and accepting his argument, the second appellate Court, while remanding the matter, did not give any direction to the Court below to investigate into the question of title and decide it finally, *held*, in appeal arising from the order of remand Court, the tenant could not be allowed to turn round and say that the Court below should have decided finally on its merit, the question of title: A.I.R. 1974 Pat. 195.

Deputy Commissioner remanding case regarding fixation of fair rent for disposal—Rent Controller recording evidence and fixing fair rent—Appeal dismissed by Deputy Commissioner and also application for review—Party not prevented from challenging order of remand: 1958 Nag.L.J. (Notes) 2.

Where the High Court in revision remitted the case for eviction for decision in accordance with law and the special leave petition against that order was dismissed by the Supreme Court, *held*, the remand order continued to exist; merely because in another case the Supreme Court declared that in matters relating to eviction proceedings the High Court has no jurisdiction to interfere in exercise of revisional power under S. 115 of the C.P.Code would not *ipso facto* render the order of remand a nullity; by sitting on the fencing, not challenging the remand order on the strength of the Supreme Court's subsequent authority and participating in the proceedings, the tenant had waived his rights and was estopped from impugning the final order on the ground that the remand order was a nullity: A.I.R. 1991 Ker. 102: (1990) 2 Ker.L.J. 263: (1990) 2 Ker.L.T. 454.

The assessee, a Bar Council, deriving income from securities (interest) and other income by way of enrolment fees, contended that its income by enrolment fees was exempt under S. 10 (23-A) and interest on securities was exempt from tax under S. 11 of the Income-tax Act, 1961. The Income-tax Appellate Tribunal allowed its claim regarding exemption under S. 10 (23-A) and remanded the matter in respect of claim for exemption under S. 11 for examining the purpose for which the securities were held by the assessee. The Department did not challenge the order of remand on the ground that by reason of exemption having been obtained by the assessee under S. 10 (23-A) exemption under S. 11 was ruled out and thus remand was unnecessary. *Held*, as the Revenue acquiesced in the view taken by the Tribunal that the claim for exemption under S. 11 could not be said to be ruled out by reason of the provisions of S. 10 (23-A), the doctrine of estoppel would come in the picture and the Revenue would be estopped from raising the said point subsequently: A.I.R. 1981 S.C. 1462: (1981) 3 S.C.C. 308: 1981 U.J. (S.C.) 507.

41. Waiver—Illustrative cases.—The right to challenge a decree can be waived even by conduct after the passing of the decree: I.L.R. (1961) 11 Raj. 76: A.I.R. 1962 Raj. 12.

Where a car carrying smuggled goods was seized and the Customs Authorities knowing that the person in charge of the car was not its owner but only a hirer continued with the seizure proceedings without mandatory notice under S. 124 of the Customs Act, 1962 to the car owner, *held*, merely because the owner with knowledge of the proceedings did not participate could not amount to the "waiver" of his right to contest the adjudication proceedings; he could not be estopped from doing so: A.I.R. 1973 Cal. 131: (1971-72) 76 Cal.W.N. 746.

Where even though the defendant-Life Insurance Corporation accepted the 3rd, 4th and 5th premiums payable in terms of policy and granted receipt and it even accepted belated payment of second premium along with interest without any demur but claimed that no amount was payable to plaintiff nominee of deceased assured as policy had lapsed because 2nd premium was not paid in time, *held*, Life Insurance Corporation would be deemed to have waived its right to withhold payment under said policy on account of non payment of 2nd premium: A.I.R. 1989 Pat. 269.

Where the Life Insurance Corporation had not demanded interest from the assured in respect of some periods while realising interest for other periods, *held*, the Corporation could be taken to have waived its right to interest for those other periods; that was the reason it never demanded interest for those periods; and it continued to accept premium from the assured for those periods without interest; all essentials of waiver stand satisfied: A.I.R. 1979 Pat. 124: 1979 B.L.J.R. 225 (D.B.).

Decree-holder not claiming interest in execution application—Waiver—Interest cannot be claimed by subsequent application: 1958 M.P.L.J. (Notes) 17.

Non-raising of objection as to non-joinder of party, at earlier stage, must be considered as waived: 19 Law Rep. 22: (1969) 2 Mys.L.J. 23.

It is open to plaintiff to waive his right of getting vacant possession of the property on execution of the decree and to seek specific performance of the contract by compelling the defendant to execute the document conveying his right under the decree, without insisting on getting vacant possession: A.I.R. 1991 Ker. 288: (1991) 1 Ker.L.J. 339: (1991) 1 Ker.L.T. 787.

A decree-holder who had obtained a charge for maintenance applied for execution but omitted to mention the charge in the execution petition. Subsequently, she applied to enforce the charge in subsequent execution. *Held*, that the omission of the decree-holder to disclose the charge in the first application could hardly be treated as a waiver on her part for all time. At best, it was a waiver on her part in the first execution case. *Held*, further, that the mere fact that she omitted in her first application for execution to mention the existence of the charge would not estop her under S. 115, Evidence Act from enforcing the charge in subsequent execution in absence of anything to indicate that by her omission she intentionally caused or permitted the auction-purchaser to believe that the property in question was not subject to a charge and to act upon such belief: (1955-56) 60 Cal.W.N. 1080: A.I.R. 1957 Cal. 204.

For a plea of waiver there must be a proper pleading and sufficient evidence to bound it. The person said to have waived his right must know his rights and then only the question of waiver can arise. There must also be a contract or an agreement. Where, in execution proceedings, the judgment-debtor merely asked for a month's time to deposit the decretal amount expressing his willingness to withdraw his application under O. 21, R. 90, and the decree-holder and the auction-purchaser had no objection, that was far from an agreement which gave rise to a waiver: (1962) 64 Bom.L.R. 731: I.L.R. (1963) Bom. 45: A.I.R. 1963 Bom. 230.

In a suit instituted by a firm through its partner, a mere certificate of registration of the firm was filed and it was not averred or shown that the said partner was shown as such in the Register of Firms. Though the defendant's plea in the written statement was one of non-compliance with the prerequisite condition under S. 69(2) of the Partnership Act, 1930 but he did not join, nor pressed for raising and trying the issue nor sought from the plaintiff the names of its

partners. *Held*, the defendant had waived the right to raise the objection; he was precluded from calling upon the Court to dismiss the suit for non-compliance with the statutory pre-requisite: A.I.R. 1971 Andh. Pra. 63: (1971) 1 An.W.R. 287.

In order to constitute a waiver it must be found that the writ petitioner had any previous adequate opportunity to raise an objection effectively and had not done so: (1981) 1 Cal.L.J. 305.

Natural justice—Rules as to—Principle of waiver: A.I.R. 1965 Mad. 316: (1965) 2 M.L.J. 98 (D.B.).

The delay of either party in not performing the terms of the contract for sale on his part, or in not prosecuting his rights through the inference of the Court by the institution of an action will constitute such laches as will disentitle him to the aid of the Court. Such delay would even amount to an abandonment on his part of the contract: 1953 Ker.L.T. 397: I.L.R. (1953) Trav.-Co. 1011: A.I.R. 1953 Trav.-Co. 377(F.B.).

Where the plaintiff failed to complete the work within the stipulated period and no action was taken by the Chief Engineer in terms of Cl. (2) of the agreement and he allowed the plaintiff to continue the work and accepted the performance of the contract work and prepared the final bill and after that he recommended the penalty to be imposed in terms of Cl. (2) of the agreement and the plaintiff pleaded estoppel, *held*, the Chief Engineer was the person to determine the compensation for delay in work. Obviously he did not do. In the circumstance of the case, it would amount to a waiver of his right to fix the compensation and to recover the same from the plaintiff: A.I.R. 1971 Raj. 229: 1971 Raj.L.W. 194 (D.B.).

Waiver of right to pre-empt—Evidence—Receipt executed by vendor in favour of vendee and signed by pre-emptor is no evidence to prove that pre-emptor had signed it as an attesting witness—An attesting witness merely testifies that the executant of the document signed that document in his presence—He is not supposed to know the contents of the document which is executed by the executant: A.I.R. 1963 J.&K. 14.

One *A* sold his land to *B*, *C*, brother of *A* was present at the time of mutation and raised no objection to the sale effected by his brother. *C*, however, asserted that he would file a suit for pre-emption in respect of the sale. The vendee *B* never objected to the right of pre-emption claimed by *C* in his suit. *Held*, that the conduct of *C* could not amount to any representation to the vendee that he had in any way precluded himself to bring a suit for pre-emption in future. If any person could defeat *C* on the ground of waiver it was the vendee and no one else. The plea of a waiver could only be raised by a party who had accepted the representation of another and had acted to his detriment in relying upon it. Such a plea was not available to the rival pre-emptor *D* and more so when *C* had filed the earlier suit for pre-emption. All that could be said was that *C* admitted the sale and did not object to it. That by itself could not constitute waiver. *C*'s claim for pre-emption could not therefore, be defeated by the rival pre-emptor *D*: A.I.R. 1960 Punj. 308.

A right created by contract, for example in a consent decree, may be waived. This waiver can be either express or implied. Such a right can be created only where it is agreed between the parties that the right created by consent shall be given up and the other side as a result thereof has altered its position. Where a party has two rights, the mere exercise of one right does not amount to waiver of the other but there are alternative rights, the exercise of one right might imply that the party has waived the exercise of the other. The nature of the rights and liabilities created by the consent decree must be clearly borne in mind. Where by a consent decree in a suit for possession and arrears of rent, the decree-holder is entitled to the payment of *mesne profits* in certain instalments and in default to execute the decree for possession, when there is default in payment of instalments it is not that the decree-holder has two alternative rights, namely, either to get the money or get possession. Upon default, he is entitled to both. Clearly therefore, the acceptance of money after the default cannot by itself amount to a waiver. In order to amount to an abandonment of a right, parties must agree that the right should no longer be enforced or there should arise an estoppel which prevents the decree-holder from enforcing the right. For an estoppel to arise, it requires a representation on behalf of the judgment-creditor and a change of position on behalf of the judgment-debtor consequent thereto. *Held*, that the onus was upon the judgment-

debtor to prove waiver on the part of the decree-holder to exercise a right which had arisen under the decree and that the judgment-debtor had not been able to establish waiver which would estop the judgment creditor from demanding execution of the decree by recovery of possession: A.I.R. 1963 Cal. 473.

Requirements—Indian firm entering into contract with foreign State-owned trade enterprise for supply of machinery—Firm suing enterprise on such contract—Enterprise entering unconditional appearance and not reserving right to claim immunity of foreign State—No waiver by such conduct of enterprise: (1968-69) 73 Cal.W.N. 192.

Merely because a person had waived his remuneration for earlier periods, it does not follow from it that he waived his remuneration for period subsequent to such waiver: (1964) 1 M.L.J. 18: A.I.R. 1964 Mad. 191.

Waiver—Scope and applicability—Agent of owner is not entitled to benefit of liability of carrier under S. 8 of the Carriers Act, 1865—Suit by agent on basis of S. 8 is not maintainable even though no objection to maintainability is raised in written statement: (1963) 2 An.W.R. 190: A.I.R. 1964 Andh. Pra. 71.

Past maintenance—Widow of deceased coparcener has legal right to claim arrears—Defeasance of such right—Express allegation and proof of waiver, abandonment and estoppel essential—Demand by widow for such arrears and refusal, not necessary to support her claim: (1966) 1 An. W.R. 57.

Representation — Waiver — Letter by Government of India to the contractor stating that in order to avoid hardship to the contractor, the Government, after consideration, had decided to undertake the initial liability for the payments to the contractor for goods supplied relating to areas now included in Pakistan and to recover Pakistan's share through debt settlement. *Held*, that the letter did not constitute waiver on part of Government of India of their position under Indian Independence (Rights, Property and Liabilities) Order 1947, S. 8 (1): (1961) 63 Punj.L.R. 186: A.I.R. 1961 Punj. 5.

Defect in or lack or basic incompetence in jurisdiction can never be waived. Defect in procedure only can be waived. Where the constitution of an arbitration Court by the Secretary of the Calcutta Grain, Oilseed and Rice Association was not in accordance with the Rules of the Association, the appointment went to the root of the matter and the constitution of the Court was a nullity. Therefore, if an application is made to set aside the award challenging the jurisdiction of such an arbitration Court, the fact that the applicant appeared in the arbitration and took part in the proceedings does not amount to waiver. Nor could the appearance before the arbitrator be considered as a fresh agreement in absence of any averment in affidavit that there was fresh agreement between the parties: A.I.R. 1960 Cal. 547.

Jurisdiction of High Court—Question of fact—Notice of ejectment—Question of waiver raised for first time in writ petition—Decision necessary for disposal of petition—High Court could decide it in the circumstances: I.L.R. (1963) Bom. 629: A.I.R. 1963 Bom. 179.

Where the Supreme Court had directed the transfer of a criminal trial under Ss. 161, 165, 384, 420, 164, 165-A of the Indian Penal Code and S. 5 of the Prevention of Corruption Act of the Chief Minister from the Court of the Special Judge to the High Court *per incuriam* and against Ss. 6 and 7 of the Criminal Law Amendment Act, 1952, *held*, merely because no objection was then raised against the transfer on this ground would not amount to waiver; earlier direction of transfer revoked: A.I.R. 1988 S.C. 1531.

Convening of a meeting and the resolution passed at such meeting being invalid the person thereby affected cannot be said to have waived the illegality by his allowing the proceedings to take place without any objection from him: (1967) 1 Mys.L.J. 405: 9 Law Rep. 174.

Where the Chief Conservator of Forests was one of the members of the Selection Board and was also a candidate, and none of the candidates offering for selection had any opportunity of appearing before the Selection Board nor were they aware of the procedure followed by the Board as the selections were made on consideration of records of candidates only, the mere fact that the unsuccessful candidate did not register with the Board in time their objections as to validity of the constitution of the Board did not amount to acquiescence. They could, therefore, agitate the validity of constitution of Selection

Board in the writ petition filed by them: 1970 Serv. L.R. 134: 1970 Lab.I.C. 614 (Mys.).

Initiation of proceedings under taxing statute—Irregularity in procedure—Jurisdiction of Taxing Officer to assess—Waiver and acquiescence by assessee—Effect of. *See* A.I.R. 1957 Assam 103. Failure to appoint umpire—Waiver of irregularity—Estoppel. *See* A.I.R. 1954 All. 673.

When no objection to the constitution of the R.T.A. on the ground of bias of one of its members was taken by the petitioner when the R.T.A. considered his renewal application or, when it decided the matter, *held*, that he was now estopped from raising this objection in an application under Arts. 226 and 227 of the Constitution: 1956 B.L.J.R. 607: A.I.R. 1957 Pat. 732.

Failure to raise objection—Constitution of Tribunal of Bar Council—Allegation of bias against member—Objection raised for first time before High Court—When amounts to waiver. *See* A.I.R. 1957 S.C. 425: 1957 M.L.J. (Cr.) 254.

Where plaintiff sought to recover certain amount from the defendant on the basis of a pro-note and in reply to notice sent by plaintiff, the defendant refuted the factum of execution of any agreement or pro-note and any obligation thereunder but subsequently he took the stand that there was no presentment of pro-note, *held*, in view of his reply to notice sent by plaintiff, the defendant must be deemed to have waived the right of presentment of pro-note in view of the S. 76 (*c*) of Negotiable Instruments Act, 1881. [A.I.R. 1966 Mad. 297, Rel. on]: A.I.R. 1983 P.&H. 197.

Where an allotted site together with the building raised thereon was resumed for non-payment of instalments and the Chief Commissioner in revision under S. 10(4) of the Capital of Punjab (Sale of Sites and Building) Rules, 1960 had finally confirmed the order of resumption but allowed the allottee the option of its repurchase and the allottee thereafter sent Rs. 70,000 to the Estate Officer and asked for the balance amount including interest payable by the allottee, *held*, the acceptance of the money by the Estate Officer was in the context of the allottee's right to repurchase and not as unpaid instalments; it did not constitute waiver on his part of the order of resumption: (1990-2) 98 Punj.L.R. 289: 1990 Punj.L.J. 444: (1990) 2 Rev.L.R. 148.

Where a show-cause notice was issued to the appellant, who had a mining lease, by the Collector for not complying with certain conditions and thereafter the State Government cancelled his lease and forfeited the security deposit but a day after the State Government had cancelled the lease, the Collector issued another notice and directed the appellant to rectify the breaches within 60 days from the receipt of notice, whereupon the appellant pleaded a case of waiver of the first notice on account of the issuance of the second notice, *held*, when the State Government cancelled the licence, the lease came to an end. Obviously, without knowledge of this termination of the lease, the Collector sent the second notice. There was no intentional abandonment which is essential for "waiver". Indeed, the Collector could not have had even knowledge of the cancellation of the lease by the State Government. Moreover, once the lease had been cancelled, it was beyond the Collector's powers by any act of his to bring the lease back to life. Therefore, the doctrine of waiver was not applicable: A.I.R. 1977 S.C. 1691: (1977) 2 S.C.C. 741: 1977 U.J. (S.C.) 331.

42. Estoppel against estoppel.—Estoppel against estoppel sets matter at large—This principle applies equally in case of admission so that admission against admission also sets matter at large: 1969 Raj.L.W. 507.

Where the case is one of two competing estoppels, one arising out of the execution of a mortgage and the other arising out of a judgment in the previous suit, the latter estoppel should prevail. In the words of Lord Coke estoppel against estoppel sets the matter at large: I.L.R. 7 Luck. 73: A.I.R. 1931 Oudh 263.

Where the widow after her re-marriage as also the brother of her deceased husband knew that she had no right in the property of her deceased husband, *held*, it cannot be said that either of them had made a representation to the other for founding the plea of estoppel against each other: A.I.R. 1972 Him. Pra. 20: (1971) 1 Sim.L.J. 1 (D.B.).

43. Estoppel in cases of fraud.—Fraud and estoppel have a number of features in common though the doctrine of estoppel is more broad based. The essential elements of actionable fraud are: (*1*) that the person alleged to have committed fraud has made a material representation to his victim; (2) that the representation made is false to the

knowledge of the maker or was made recklessly without knowledge of its truth and as a positive assertion ; (3) the representation has been made with the intention that it be acted upon by the party to be defrauded; (4) that that party acted in reliance upon such a representation and that (5) he thereby suffered injury. The absence of any one of these elements is fatal to an action based on fraud. To constitute an estoppel, the following elements must be present: (1) either a representation or concealment of material facts; (2) such a representation must have been made with the knowledge of real facts; (3) the party to whom it was made must have been ignorant of the matter; (4) the intention of the person making the representation was that the other party should act upon it; (5) the other party was thereby induced to act upon it ; and (6) did so to its detriment.

The common feature of both estoppel and fraud is that law will not come to the rescue of a person who has not suffered deception, as, where he has not been led to believe in the truth of the representation. Similarly, omission to disclose facts which are known to exist, cannot furnish a ground for an action on the basis of fraud. No redress is available to a person who with full knowledge of the falsity of the representation, acts to his detriment as the injury in such a case will be of one's own inviting.

Held, on the facts of the case, that the principles of estoppel could not be invoked by the Official Liquidator or the Company so as to pin down the Managing Director to the false averments made by him. The person sought to be defrauded was not the Company but the Inspector of Insurance. With a view to satisfy the insurance administration, false entries had been made in the books of the Company as to the receipt of certain moneys by way of free gifts and false credits were shown which had no factual existence. Once the Inspector of Insurance had been hoodwinked by the Directors as a result of false entries on the Company's credit side, later on by making debit entries in order to cancel the credit entries, the Company cannot be said to have been deprived of the benefit which it had never actually received in the first instance: A.I.R. 1962 Punj. 543.

Colourable and fraudulent transaction of lease brought about to defeat Income-tax law—Fraud perpetrated and lessor deriving benefit before he transferred that property—Transferee from him cannot avoid the lease by setting up the plea that it was a sham and nominal transaction: A.I.R. 1954 Trav.-Co. 10. As between parties in *pari delicto* there can be no estoppel: I.L.R. 23 Cal. 962; I.L.R. 33 Cal. 967; I.L.R. 35 Cal. 551 (P.C.); I.L.R. 31 Mad. 27. But *see* (1903-4) 8 Cal.W.N. 623; 32 M.L.J. 488; 36 Cal.L.J. 391.

G sold his share of the suit house to *R*: Thereafter *G* and his mother sold the entire house including *G*'s share to *A* and *B*. In the suit instituted by *R* for possession of portion sold to him by *G*, it was found that at the time of the second sale *R* had represented to the defendant's vendee (*A* and *B*) that one-third share in the house had been mortgaged to him and that he had completely suppressed the fact of sale in his favour with respect to that share and that by concealment of this latter fact *R* induced the defendant vendees to pay him money on behalf of vendors and also to have the sale deed completed in favour of the vendees which they would not have done had they knew that one-third of the house had already been sold to *R*. *Held*, that all the ingredients of S. 115 were present and the principle of estoppel fully operated against *R*.: 1963 Raj.L.W. 177: I.L.R. (1963) 13 Raj. 552: A.I.R. 1963 Raj. 141.

Where plaintiff, an illiterate woman and entirely dependent on the defendant, was persuaded to subscribe her signature to a partition deed in the belief that it was to avoid tax, *held*, such a partition deed could not operate to estop the plaintiff from claiming her legitimate share. [A.I.R. 1937 P.C. 50, Rel. on]: A.I.R. 1988 Ker. 133 (D.B.).

The marriage of a girl with a fickle-minded and lacking in worldly wisdom boy was solemnised on the condition agreed to between their respective fathers that the groom's father would settle a substantial part of his property in favour of his son and daughter-in-law. But later on, the groom's father backed out and in litigation in the revenue Court, a compromise was arrived at and power to sell the properties was granted to the attorneys named but the groom's father nevertheless sold the lands to third parties which sales were challenged by the wife and her minor daughter as null and void being in breach of the trust said to have been created by the compromise. *Held*, though the documents did not create any trust, express or constructive and the suit was liable to be dismissed but the doctrine of promissory estoppel was attracted. But for the promise made as aforesaid by the boy's father, the girl and her father would not have changed their positions to their detriment and there would have been no marriage. The impugned sales

made by the boy's father who became smart and took advantage of helpless condition of his daughter-in-law and minor grand daughter as also of his own son, the purchasers having stepped into the shoes of the boy and his father were bound in equity to make good the promise made by the boy's father for the benefit of his daughter-in-law; invoking its powers under Art. 142 of the Constitution, the Supreme Court directed the purchasers to pay to the wife and her daughter a sum of Rs. 60,000 in full and final satisfaction of their claim; a decree for that amount passed in their favour and rest of the suit dismissed: A.I.R. 1995 S.C. 1624.

One's own fraud cannot be pleaded: A.I.R. 1929 All. 237. Fraud committed upon creditors—Judgment-debtor is estopped: A.I.R. 1930 Mad. 298.

Doctrine of estoppel cannot be invoked by the defendant claiming from her husband, through whose concealed fraud the plaintiff was kept in ignorance of his real rights and was in consequence induced to execute a release of all his claims: (1931-32) 36 Cal.W.N. 758: A.I.R. 1933 Cal. 353. *See* also 4 O.W.N. 1019; A.I.R. 1937 Pat. 280.

A person who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself: (1969) 24 Law. Ed. 2nd 275: A.I.R. 1970 U.S.S.C. 78.

44. Estoppel by judgment/decree.—(*See* also Note 7, *supra*). There can be no estoppel by judgment or decree apart from the doctrine of *res judicata* unless the same matter is found to be in issue in the former trial as that now in question and unless the judgment was rendered on the merits: 1938 Mad.W.N. 224 (2): 47 Mad.L.W. 374. *See* also 1940 Nag.L.J. 1: A.I.R. 1940 Nag. 163.

Judgment not *inter partes* whether operates as estoppel. *See* A.I.R. 1957 Ker. 86 (D.B.). The essence of estoppel by judgment is that a party cannot be allowed to say one thing at one time and another at later time. A judgment can be an estoppel only as between the parties to it unless it is a judgment *in rem* which is binding against all the world. That a judgment *in personam* cannot be construed as being conclusive against persons not parties thereto is borne out by the scheme of the Evidence Act from Ss. 40 to 44. Only judgments referred to in S. 41 constitute conclusive proof of what they contain and S. 40 in terms provides that judgments not referred to in Ss. 40, 41 and 42 are irrelevant unless the existence of such judgments is a fact in issue or relevant under some other provisions of the Act. Even if they are relevant this would not be conclusive. When the subsequent suit is not between the parties to the prior litigation, no question of estoppel would arise: 1958 An.L.T. 938: A.I.R. 1959 Andh. Pra. 280.

A judgment not only creates a right, it also works as an estoppel. A judgment creating a charge on immovable property binds not only the parties to the suit but also their privies. The term "privy" is a term of the law meaning a partaker who is not a party, that is in this connection, it includes all who derive title to the land the subject of the charge from one who was a party to the suit by the decree in which the land was charged. It follows, therefore, that the charge is effective against a *bona fide* purchaser of the land for value without notice by reason of the law of estoppel by record: I.L.R. (1938) Nag. 431: 172 I.C. 949: A.I.R. 1938 Nag. 129.

Estoppel by judgment — *Res judicata* creates estoppel by judgment: A.I.R. 1969 All. 504.

Persons represented in prior suits—Estoppel by judgment: (1957) 3 All E.R. 559.

A judicial decision, during the pendency of an appeal against it, does not attain finality; it cannot, therefore, operate either as *res judicata* or estoppel: A.I.R. 1981 Ker. 52.

Party contending that a decree for damages may be granted and not specific performance—Court accepting the contention and granting decree for damages—He is estopped from contending in appeal that the lower Court erred in granting damages: 1979 All.L.J. 1018.

Where the civil Court granted a declaration that the Government was the owner of the suit land but the decree was not executed and the occupants continued to remain there as trespassers, *held*, the occupants were estopped from asserting that the Government had ceased to be the owner: 1981 Rev.L.R. 26 (P.&H.).

Where an *ex parte* decree under S. 63 and S. 180 of U.P. Tenancy Act was passed without summons having not been served on the opposite party and the decree was never given effect to in revenue records and the opposite party had no knowledge of the decree, the decree would not give rise to estoppel against the opposite party: 1979 All.W.C. 357: 1979 All.L.J. 659.

There is no estoppel in so far as the duty of all concerned to enforce and comply with the directions of the Supreme Court is concerned: A.I.R. 1995 Pat. 144 (D.B.).

Estoppel as to valuation of suit—Suit for declaration that property not liable to attachment and sale under a decree—Valuation of suit in trial Court not corrected at proper stage—Plaintiff estopped from pleading under-valuation for changing the forum of appeal: (1963) 65 Punj. L.R. 664: A.I.R. 1963 Punj. 400.

Suit for declaration, accounts and injuction in Court of second class Sub-Judge—Objection to valuation—Finding that valuation beyond Court's jurisdiction—Suit sent to first class Subordinate Judge and tried there—Appeal to High Court by defendant—Objection to forum not competent: 189 I.C. 836: (1940) 42 Bom.L.R. 443: A.I.R. 1940 Bom. 242.

Where in a suit for partition and separate possession the main contention was the validity of the adoption and the plaintiff's valuation of the suit properties right upto the Supreme Court stage was never objected to as less than their market value when they were in the defendant's own possession, *held*, it was not open to the defendant to plead estoppel on the ground that he was misled about their true valuation because of the plaintiff's representation in the plaint; it could not in the circumstances be presumed that the defendant was actually misled by the plaintiff's representation and had for that reason altered his position to his prejudice: A.I.R. 1971 Mys. 174: (1971) 1 Mys.L.J. 154.

Where letters of administration were granted on payment of full Court-fee as then determined but they were revoked for non-filing of the inventory and accounts within six months and a second application was made subsequently, *held*, the applicant could not be required to pay the Court-fee afresh; the first payment of the Court-fee operated as estoppel and *res judicata*: A.I.R. 1978 N.O.C. 303 (Pat.).

Value of subject-matter in dispute—Suit for declaration of title and possession valued at Rs. 5,500—Defendants alleging that value exceeded Rs. 20,000—Question left undetermined—Estoppel. *See* A.I.R. 1955 Assam 126.

46. Estoppel by acceptance of costs.—Costs are within the discretion of the Court. The Court is not debarred from awarding costs to an unsuccessful respondent, if the facts of a particular case justify such a course. Where the costs are granted on an unconditional order, the respondent can have no opportunity to waive his right to question the validity or correctness of the order and therefore, the acceptance of costs cannot operate as estoppel against him in the absence of proof of waiver: A.I.R. 1965 Mys. 102.

Where an amendment of plaint is allowed by the Judge on payment of costs, the acceptance of the costs by the defendant without protest precludes him from contesting the validity of the order: I.L.R. 61 Cal. 433: (1933-34) 38 Cal.W.N. 488: A.I.R. 1934 Cal. 554.

Where amendments were allowed and costs were awarded not by way of a conditional order but in the Court's discretion, *held*, acceptance of costs by the opposite party does not preclude the other party from impugning the validity of the order allowing the costs; the doctrine of estoppel is not attracted: A.I.R. 1994 S.C. 2562.

Where the amendment of the plaint was allowed subject to payment of cost and the defendant accepted the cost but under protest, *held*, the cost having been accepted with reservation, the defendant was not estopped from challenging the order allowing amendment: A.I.R. 1992 Ori. 168. *See* also A.I.R. 1975 Ori. 173: (1975) 1 Cut.W.R. 63. But *see* A.I.R. 1989 P.&H. 229: (1989) 1 Rev.L.R. 517 (D.B.) [Acceptance of costs, even though under protest, for allowing amendment, estops him from challenging the order allowing amendment].

Where amendment of plaint as demanded by the plaintiff was allowed subject to payment of costs and the defendant accepted the costs, *held*, he was estopped later on from challenging the amendment: A.I.R. 1994 N.O.C. 191 (Madh. Pra.).

Where the landlord amended his eviction petition to add the plea of also being the owner of the demised premises on payment of costs accepted by the Counsel for the tenant, *held*, the tenant was estopped from challenging the order allowing amendment of the petition: A.I.R. 1982 Del. 352: (1982) 1 Ren.C.J. 342: (1982) 21 Del.L.T. 112.

Where amendment of a written statement was allowed subject to conditional costs which was accepted by the plaintiff, *held*, the plaintiff was estopped from impugning the order allowing amendment in revision. [A.I.R. 1926 Lah. 637; A.I.R. 1927 Lah. 55; A.I.R. 1928 Lah. 813; A.I.R. 1934 Lah. 974;

A.I.R. 1965 Punj. 463; A.I.R. 1956 S.C. 593, Rel. on]: A.I.R. 1972 P.&H. 272: 1972 Punj.L.J. 151: 1972 Rev.L.R. 319; A.I.R. 1976 Andh. Pra. 205 (D.B.).

Where plaintiff failed to pay adjournment cost as directed by the Court and the defendant participated in the proceedings after the default had occurred and when the suit was at the stage of the argument, the defendant applied for dismissal of the suit on the ground that adjournment cost as directed had not been paid by the plaintiff to the defendant, *held*, the defendant was estopped by his conduct from raising the plea at such a belated stage: A.I.R. 1982 Ori. 80: (1982) 53 Cut.L.T. 206.

Where an application purportedly instituted under S. 8 of the Sikh Gurdwaras Act, 1925 for which the prescribed period of limitation is 90 days was allowed to be amended several times by the Sikh Gurdwara Tribunal so as to conform it to the requirements of S. 8 when under law, prior to such amendments it was a nullity, *held*, merely because the Counsel for the opposite party had accepted costs of amendment, despite vehement opposition, it could not be said that the opposite party had acquiesced in the amendments and was estopped from impugning them in the appeal against dismissal of the main application; the Tribunal had no jurisdiction to entertain the application as it did not satisfy the requirements of S. 8; no jurisdiction can be conferred by waiver or acquiescence; there is no estoppel against statute: A.I.R. 1978 P.&H. 273 (D.B.).

Where an *ex parte* decree passed against a defendant is directed to be set aside on payment of costs, the mere acceptance by the plaintiff's Counsel of a portion of the costs paid by the defendant will not preclude the plaintiff from filing an application in revision against the order setting aside the *ex parte* decree, unless a conscious decision to abandon the plaintiff's right of filing such an application has been taken by his Counsel after a full comprehension of all the facts: I.L.R. (1944) Nag. 436: A.I.R. 1944 Nag. 461: 1944 Nag.L.J. 134.

Where the application for restoration of a suit dismissed for default was allowed subject to the payment of the costs, *held*, the defendant who accepted the costs either directly or through his Counsel, is precluded or barred from attacking the validity of the said order. [A.I.R. 1959 Cal. 19; A.I.R. 1976 Andh. Pra. 205, Rel. on]: A.I.R. 1990 Gau. 12 (1989) 1 Gau.L.R. 53.

Where the party has accepted the costs that were awarded for restoration of the proceedings dismissed for default, which were compensatory costs in relation to the wastage of time that was involved in the proceedings that came to be set aside, *held*, that fact can, under no circumstances, legally debar the party accepting the costs from raising a challenge on a point of law to the correctness of the order on merits. [A.I.R. 1989 P.&H. 229, Dissent. from]: A.I.R. 1991 Bom. 296: (1991) 2 Bom.C.R. 658.

Where the plaintiffs accepted the costs in connection with a separate order passed in the proceedings which followed in compliance with the order of remand passed by appellate Court and subsequently the plaintiffs filed an appeal against the remand order, *held*, the right of the plaintiffs to file appeal against the order of remand was not at all affected by the benefit derived by them in connection with a subsequent independent order passed after the order of remand: A.I.R. 1974 Raj. 43.

47. Estoppel between landlord and tenant.—(*See* also Notes under S. 116). *See* A.I.R. 1939 Pat. 296 ; (1953) 2 M.L.J. 478: A.I.R. 1954 Mad. 161. Landlord or tenant accepting or paying rent—Right to have fair rent determined, if lost—Acceptance of payment, if amounts to waiver of right. *See* 1957 Jab.L.J. 256 (M.B.).

The acceptance by the landlord of rent at a uniform rate does not by itself raise any estoppel against the landlord, because there is no representation thereby that it would confer permanent tenancy on the lessee: I.L.R. 58 Bom. 419: A.I.R. 1934 Bom. 194.

Agreement to pay enhanced rent—Failure to register as required by Agra Tenancy Act—Tenant continuing to pay rent—No estoppel from asserting in a subsequent proceeding that rent was payable only on the old scale: 13 R.D. 859.

Landlord's acceptance of rent does not amount to waiver: 1969 All.W.R. (H.C.) 185: 1969 All.L.J. 365: 1969 Ren. C.J. 418.

The acceptance of rent without objection or grievance by the landlord after the

forfeiture of a lease or in the event of failure to do a statutory obligation by a tenant would amount to waiver. An acceptance of rent to operate as a waiver of forfeiture, must be in respect of rent which had accrued since the breach of the covenant or failure in compliance with a provision of the statute which resulted in the forfeiture: A.I.R. 1980 Cal. 155: (1980) 1 Cal.H.N. 203: (1980) 1 Cal.L.J. 588: (1979-80) 84 Cal.W.N. 455.

Mere acceptance of money order for money less than agreed rent will not amount to waiver on part of landlord: (1961-62) 66 Cal.W.N. 414: A.I.R. 1962 Cal. 608.

Deposit of rent beyond the due date—Withdrawal of deposited rent by landlord—Has no effect on question of default by tenant: A.I.R. 1969 Assam 66 (F.B.).

The landlord filed a suit for eviction against tenant from the tenanted portion as well as from the portion which was trespassed upon by the tenant. The High Court granted conditional stay of execution proceedings relating to delivery of possession of untenanted portion of the suit premises to the landlord subject to payment of arrears of rent and damages for trespass. The landlord withdrew arrears of rent deposited by the tenant. Thereafter landlord filed a fresh suit for eviction in respect of tenanted portion on ground of default in payment of arrears of rent and tenant pleaded waiver. *Held*, the acceptance of rent could not amount to waiver as it was in a different proceeding altogether. Further, once a default had occurred, mere acceptance by itself would not amount to waiver: A.I.R. 1984 Pat. 184: 1984 Pat.L.J.R. 135: 1984 B.B.C.J. (H.C.) 61: 1984 B.L.J.R. 244 (D.B.).

The landlord had instituted a suit for eviction of the tenant on the ground that he was a defaulter within the meaning of S. 11(1)(*d*) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, having failed to pay rent for two months. In that suit the tenant obtained an order under S. 11-A of that Act for deposit of the arrears of rent and accordingly deposited the same and the landlord withdrew the said amount. But as the said suit was found to be premature, the landlord withdrew it with permission to file a fresh suit to which tenant did not object. But when a fresh suit was filed for same cause of action the tenant objected contending that the withdrawal of rent in the earlier suit would amount to a waiver of the cause of action. *Held*, under the provisions of the said Act, a tenant continues to be a tenant after the tenancy is determined and he continues in occupation of the premises and, thus, the landlord has no option but to treat him as such and accept rent from him. Further, S. 11-A of that Act specifically provides that acceptance of rent deposited under said provision will not wipe out the cause of action that a landlord might have against a tenant. Accordingly, tenant's contention merited rejection: A.I.R. 1976 Pat. 223: 1975 B.B.C.J. 738

Where the landlord had withdrawn the rent deposited in the Court by the tenant beyond the time permitted under S. 26 of the M.P. Accommodation Control Act, 1961, *held*, the landlord is not estopped from agitating that the tenant's deposit is not in accordance with law; the landlord could not be deemed to have waived his right to proceed against the tenant for non-payment of rent: A.I.R. 1979 N.O.C. 71 (Madh. Pra.). *See* also 1984 B.L.J.R. 244: 1984 B.B.C.J. 61.

Waiver of notice to quit—Deposit of rent in Court by tenant—Under Rent Control Act—Withdrawal by landlord does not constitute waiver: A.I.R. 1965 Assam 55. *See* also 1965 All.L.J. 249.

Where the plaintiff obtained a temporary injunction on the condition of depositing monthly damages in the Court which the Court permitted the defendant to withdraw "without prejudice", *held*, the withdrawal by the defendant by itself could not affect the parties' rights; it could not create any equity in favour of the plaintiff; the defendant is not estopped for in India estoppels are treated as rules of evidence founded on the representation of one party to the other; there is no such representation: A.I.R. 1983 Cal. 343: (1981-82) 86 Cal.W.N. 759: (1982) 2 Cal.L.J. 74 (D.B.).

Notice to quit—Waiver of—Acceptance of rent when amounts to waiver—Act showing landlord's intention to treat lease as subsisting is necessary: A.I.R. 1960 Madh. Pra. 16.

Where a landlord after service of notice to quit immediately sued the tenant for eviction, *held*, mere acceptance of rent could not amount to a waiver, especially when the rent was accepted as compensation for use and occupation: A.I.R. 1990 Ker. 261.

Where landlord sent a notice to the tenant-Company terminating the lease but

allowed time of four months for removal of machinery, etc. and later on tenants contended that as landlord accepted rent after notice was given it amounted to waiver, *held*, there was no evidence to show that the rent was accepted at any time after the notice was given to the Company. Further, any rent which the appellants accepted was really not rent but mere compensation for wrongful use and occupation of the land as there was no intention on the part of the lessor to treat the lease as subsisting. Thus, there was no waiver of notice: A.I.R. 1981 S.C. 170: (1980) 4 S.C.C. 430: (1981) 1 S.C.R. 815.

Where even after the service of first quit notice, the defendant-tenant tendered rent for the post notice period by money order to the plaintiff and continued in possession and thereafter the second notice was served by the plaintiff, *held*, there was waiver of the notice by both the parties who treated the tenancy as continuing after the service of the first notice and, thus, the second notice was valid: A.I.R. 1991 Cal. 291: (1991) 1 Cal.L.T. 380.

Where an eviction suit was dismissed in second appeal on the ground that the notice to quit was invalid with a further observation that the form of permission to sue granted by the Rent Controller was highly unsatisfactory and the landlord's plea for modification of the form of permission ultimately failed at the highest forum on the tenant's plea that there was nothing wrong with the previous permission but thereafter on the landlord instituting the second suit for eviction on the fresh notice to quit but on the previous permission, the tenant sued the landlord for a declaration that the previous permission was invalid because of the High Court's observation in the second appellate judgment, *held*, the High Court did not hold the permission to be invalid; its observation as to the highly unsatisfactory form could not operate as *res judicata*; and it was the tenant who was approbating and reprobating as to the validity of the permission: A.I.R. 1976 All. 216: 1975 All.L.J. 333.

Where in a suit for eviction, the tenant had sub-letted the premises without previous consent of the landlord under S. 13(1)(*a*) of West Bengal Premises Tenancy Act and the landlord accepted the rent even though he had knowledge about sub-letting, *held*, acceptance of rent would not operate as waiver of notice to quit given to the tenant [A.I.R. 1965 Cal. 408; A.I.R. 1977 Cal. 122 (D.B.); A.I.R. 1980 Cal. 70 (F.B.), Rel. on]: A.I.R. 1981 Cal. 61: (1981) 1 Cal.H.N. 55.

Tenant sub-letting accommodation only with oral permission—Sub-letting is unlawful—Oral permission by landlord cannot operate as waiver of benefit of prohibition—He is not estopped from pleading that sub-letting is unlawful: 1968 M.P.L.J. 251: 1969 Jab.L.J. 157: A.I.R. 1969 Madh. Pra. 130.

It is necessary for the tenant to obtain the consent in writing to sub-let the premises. The mere permission or acquiescence will not do. The consent must be to the specific sub-letting and must be in writing. [I.L.R. (1974) 1 Del. 389, Affirmed]: A.I.R. 1988 S.C. 145: (1988) 1 S.C.C. 70: (1988) 1 U.J. (S.C.) 345; 1979 Rajdhani L.R. 7: I.L.R. (1979) 1 Del. 84.

Written consent of landlord necessary—Acquiescence of landlord no substitute for such written consent: (1964) 2 M.L.J. 288.

Where in a suit for ejectment of a tenant on the ground of sub-letting by tenant without the consent of the landlord, the landlord has admitted that the sub-tenancy had lasted for four years with his knowledge and the rent has been paid by the sub-tenant in the presence of the landlord and on several occasions passed on to him by the tenant, a presumption of acquiescence will arise. Such a presumption which will be strengthened by the fact that the landlord offered no explanation why he had waited for four years before filing the suit for ejectment on the ground of illegal sub-letting and will not be displaced by a bare denial of the landlord that he had not acquiesced: 1965 All.W.R. (H.C.) 504: A.I.R. 1966 All. 214.

Waiver is of a right based either on contract or statute; the terms of a contract are subject purely to the parties' agreement. Courts are, therefore, inclined to uphold reasonable arrangements between the parties for relaxation of the contractual terms. The waiver of a contractual right is, therefore, close to acquiescence. The parties to a lease containing the mode of its termination may vary it and the tenant may if he so wishes altogether abandon his right to a notice to quit; that right is not inherent but contractual or customary and in the absence thereof S. 106 of the Transfer of Property Act, 1882, which

is not mandatory, prevails; that right may be waived by the tenant's conduct either in not raising the objection or not insisting on the notice and if the landlord acts upon such representation, the tenant is estopped from raising the objection subsequently: A.I.R. 1971 Del. 98 (D.B.).

Where a tenant in an eviction proceeding had raised no objection as to the want of notice to quit under S. 106 of the Transfer of Property Act in his written statement, *held*, he is deemed to have waived the same; he cannot be allowed after expiry of more than two and a half years when he had lost on merits to amend his written statement in appeal to incorporate the objection therein by way of amendment; such an amendment would be justified if the tenant had come forward with utmost *bona fides* and on showing that he could not possibly have taken the objection at the initial stage or had some other strong justification for leave to amend. Merely because the law as then interpreted did not deem the quit notice as a necessary pre-condition for seeking eviction is no such ground. [A.I.R. 1969 Punj. 110, Expl.; (1968) 70 Punj.L.R. 672, Foll.]: A.I.R. 1971 P.&H. 269.

Where in a suit for ejectment, the tenant had not put forward any plea of waiver by the landlord of the demand for surrender of possession made as per a notice, *held*, in the absence of specific pleadings trial Court rightly did not go into the question of waiver: A.I.R. 1981 S.C. 1726: 1981 All.L.J. 1028: (1981) 4 S.C.C. 117.

The principle of waiver connotes issuance of notice and non-response thereto. Everyone has a right to waive an advantage or protection which law seeks to give him/her. Undoubtedly, if a notice is issued and no representation was made by either the owner, tenant or a sub-tenant, it would amount to waiver of the opportunity and such person cannot be permitted to turn round, to say that they were not afforded an opportunity to state their views: A.I.R. 1991 S.C. 2130.

Where subsequent to issuance of notice of eviction by the landlord, damages for use and occupation of tenanted land were demanded by him and the landlord also accepted said damages, *held*, it would not amount to waiver of notice of eviction by the landlord: A.I.R. 1990 N.O.C. 64 (Madh. Pra.) (D.B.).

The failure or omission of the lessee to reply to a defective quit notice is no waiver, the lessee may well ignore it; he is thereby not estopped from pleading in the Court that the suit was bad for want of a proper and valid notice; he is under no obligation to point out the defect to the plaintiff. (*See* A.I.R. 1947 P.C. 197). Besides, the validity or legality of the quit notice, being a question of law, can be raised even at a late stage if no further investigation of facts is required; thus, the lessee's failure to question the validity of the quit notice in the original written statement could not be deemed to be a waiver of his right to question its validity. [A.I.R. 1959 S.C. 559; A.I.R. 1949 P.C. 297; A.I.R. 1972 S.C. 2526, Rel. on]: A.I.R. 1976 Andh. Pra. 205 (D.B.).

Tenant cannot be permitted on the one hand to say that there is no partition and on the other hand to say that one of the brothers had no right to give quit notice on behalf of the others when the joint family is still subsisting: (1966) 2 An.W.R. 21: (1967) 1 An.L.T. 340.

Merely because after service of the notice of demand for payment of arrears of rent and on failure for surrender of possession, the tenant stood surety for the landlord for the payment of sales tax arrears due from the landlord, *held*, waiver of said notice could not be inferred when no amount whatever had been paid by the tenant to the sales tax authorities on behalf of the landlord and the landlord had refused to make any endorsement in the rent deed adjusting the proposed payment of sales tax against the arrears of rent: A.I.R. 1981 S.C. 1726: (1981) 4 S.C.C. 117.

A tenant who was under an obligation to vacate the land without any notice at the expiry of the term of the lease did not do so and the landlord brought a suit for his ejectment after giving 15 day's notice. The defendant tenant denied the validity and receipt of notice but the validity of the notice was not questioned on ground that 15 day's notice was not sufficient in law. The trial Court decreed the suit on ground that notice was sufficient and valid. The appellate Court dismissed the suit observing that six months' notice was necessary. In second appeal, the plaintiff for the first time contended that in law no notice was at all necessary. *Held*, that the conduct of the plaintiff in giving 15 days' notice and not raising the plea in the lower

Courts could not operate in the circumstances as a waiver or estop him from pleading that in law no notice was at all necessary: I.L.R. (1954) 6 Assam 95: A.I.R. 1954 Assam 102.

Where in the coupon of money order sent to the landlord, the tenant stated that he would vacate the premises within 6 to 8 months, *held*, even if such a quit notice was defective for want of specific date by which the tenant would vacate the premises, but as the landlord had accepted it, the tenant would be estopped from challenging the validity of such a notice given by him. [A.I.R. 1968 S.C. 471, Foll.; (1977) 2 Cal.L.J. 586, Affirmed]: A.I.R. 1987 S.C. 759: (1987) 1 S.C.C. 562: (1987) 100 Mad.L.W. 635: (1987) 1 U.J. (S.C.) 527.

Though the striking out of the tenant's defence for non-deposit of rent under S. 13 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 certainly works to the landlord's advantage but the landlord is entitled to give up that advantage for that will not be opposed to public policy. Thus, where the landlord neither objected to the maintainability of the tenant's application under S. 13(4) of that Act nor to the Court's order passed thereon, *held*, the landlord is deemed to have waived his right by conduct. [1979 Raj.L.W. 170, Overruled]: A.I.R. 1984 N.O.C. 24 (Raj.) (D.B.).

Even if there is any mandatory provision which confers any right or privilege or advantage to any of the parties to the litigation, such right, privilege or advantage may be waived by the party in whose favour the provision of law stands. Thus, where in a suit for eviction, the tenant had been allowed by the Court to deposit rents month by month during the pendency of the suit but there was a delay of about 11 days on his part in depositing the rent for a particular month, which gave a right to the landlord to have the tenant's defence struck out under S. 17(3) of the W.B. Premises Tenancy Act, 1956, but the landlord did not exercise that right, *held*, the conduct on the part of the landlord clearly indicated that he did waive his right given to him under S. 17(3) of the West Bengal Premises Tenancy Act: A.I.R. 1975 Cal. 436.

Where the landlord failed to impugn the maintainability of the tenant's application for deposit of admitted arrears of rent under S. 17(2) of the W.B. Premises Tenancy Act, 1956 in the appeal and the case was remanded, *held*, had he done so in the Court of appeal it would have defeated the order of remand; he could not raise the contention after remand (*Obiter*): A.I.R. 1976 Cal. 73.

Where the Court in its discretion under S. 11-A of the Bihar Buildings (Lease, Rent and Eviction Control) Act, 1947 directed the tenant to deposit rent for each month by the 15th day of the succeeding month, the non-compliance whereof results under the statutory mandate in striking out of his defence and the tenant deposits rent beyond time which the landlord withdraws, *held*, the landlord has thereby waived his right to ask for striking out of the tenant's defence. [A.I.R. 1974 Pat. 211, Approv.]: A.I.R. 1981 Pat. 1: 1980 Pat.L.J.R. 208: 1980 B.L.J.R. 592 (F.B.).

The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus, the maxim which sanctions the non-observance of the statutory provision is *cuilibet licet renuntiare juri pro se introducto*. If there is any express prohibition against contracting out of a statute in it then no question can arise of any one entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy. S. 1-A of U.P. (Temporary) Control of Rent and Eviction Act, 1947 exempting buildings constructed after 1-1-1951 from the operation of the Act was meant for the benefit of owners of buildings which were under erection or were constructed after January 1, 1951, if a particular owner did not wish to avail of the benefit of that section there was no bar created by it in the way of his waiving or giving up or abandoning the advantage or the benefit contemplated by the section. No question of policy, much less public policy, was involved and such a benefit or advantage could always be waived: A.I.R. 1971 S.C. 2213: 1971 Ren. C.R. 320: 1971 U.J. (S.C.) 343.

A ground for eviction under S. 14(1)(*d*) of Delhi Rent Control Act, 1958, is created for the benefit of landlord providing that when the suit premises is not occupied by tenant

for six months immediately before the filing of the application for recovery of possession, a right accrues to the landlord to claim eviction, but where the landlord himself creates situation which forces the tenant not to live in the disputed premises for particular length of time, such a landlord cannot be permitted to take advantage of his own wrong and will be estopped from filing a petition for eviction relying on aforesaid Cl. (*d*): A.I.R. 1986 Del. 23: (1985) 27 Del.L.T. 399.

Where residential premises were used by the tenant for running a hotel and the landlord raised no objection thereto, *held*, it would not invariably erect an estoppel against the landlord; the breach of the covenant for user is a continuing breach; any acquiescence in the breach or receipt of rent with the knowledge of the breach would constitute waiver upto the time of acquiescence or receipt of rent; the landlord could not be taken to have given an irrevocable sanction to such breach: A.I.R. 1972 Andh. Pra. 335: (1972) 1 An.W.R. 152.

Where though the premises were let out for residential purposes but for seven years no objection was raised by the landlord for change of user by the tenant, *held*, as the landlord had accepted the user to be other than residential, he was estopped from subsequently seeking eviction on the ground of change of user: A.I.R. 1992 S.C. 184.

Where a building constructed for residential purposes was let to the Government for non-residential use and the new owner, after its purchase, sued the Government for eviction on the ground of his *bona fide* requirement for personal use, the plea of estoppel was raised against the new landlord, *held*, since the non-residential use by the Government was without the Rent Controller's permission in writing, the building did not lose its residential character; even if the Government could invoke doctrine of estoppel against the original owner, the second owner could not be estopped from contending that it was a residential building liable to be vacated on the ground pleaded. [A.I.R. 1952 Mad. 413 (F.B.), Disting.]: A.I.R. 1976 Andh. Pra. 90: (1975) 2 A.P.L.J. (H.C.) 40 (D.B.).

Where the landlord was staying in the flats adjoining the one let out to the tenant who was a medical practitioner, and the landlord knew that the tenant was using for 20 years major portion of the flat for his professional purposes and the landlord never objected to it, the landlord is estopped from raising the question that the flat was let out for residential purposes only: (1957) 59 Punj.L.R. 355: I.L.R. (1957) Punj. 1564.

Where in a suit for eviction on the ground of change of user of suit premises, the tenant had taken a categoric stand during the enquiry that he had taken the suit premises on rent only for running his clinic and not for his residential needs as well, *held*, having taken up such a stand, the tenant could not reprobate and subsequently contend that the lease of the suit premises was of a composite nature and as such the benefit of the enlarged definition of a "non-residential building" as amended by East Punjab Urban Rent Restriction (Chandigarh Amendment) Act, 1982 which provided that a building let out for residential and also for non-residential purposes would constitute a non-residential building, would enure to his benefit: A.I.R. 1987 S.C. 2179: (1987) 3 S.C.C. 711.

Where landlord sought eviction of the tenant on account of change of user of impugned premises and though the premises were let out for tailoring purposes the tenant was using the premises for cycle repairs almost since the inception of lease, *held*, the landlord must be deemed to have waived the infraction of condition as to user of the premises as provided in rent note and must be deemed to have acquiesced in change of user of premises: A.I.R. 1982 Guj. 1: (1981) 1 Guj.L.H. 287: (1981) 22 Guj.L.R. 1264.

Where the original landlords did not object to the erection of barbed wire fencing or the locking of gate of suit premises by the tenants for nearly 13 years but the successor in title of interest of original landlords filed a suit for possession on the ground that said action of tenants amounted to trespass, *held*, as the previous landlords clearly waived the so-called breaches on the part of the tenant, it was not open for the successor-in-title of interest of original landlords to initiate legal action. A.I.R. 1988 Bom. 354: 1987 Mah.L.J. 917.

Where the landlord filed an application seeking eviction of his tenant on the ground of *bona fide* requirement and the tenant contended that after retirement the landlord did not take any action for eviction of the tenant but instead joined a service on daily wages and, thus, the landlord was not entitled to an

order of eviction under Chap. III-A of the M.P. Accommodation Control Act, 1961 as his requirement was not *bona fide* , *held*, seeking a stray employment and not filing an application immediately after retirement cannot be said to be *mala fide*. Further, no period is prescribed under the Act for filing an application by a retired Government servant or any other landlord as specified in S. 23-J of said Act nor any delay in filing the application for eviction creates any ban or any impediment or even any estoppel on the landlord. Thus, an order of eviction against the tenant could be passed: A.I.R. 1990 Madh. Pra. 262.

Where in a suit for eviction by landlord on ground of *bona fide* requirement under S. 12(1)(*b*) of the M.P. Accommodation Control Act, 1961, the tenant had contended before the appellate Court that said section did not apply, *held*, the tenant was estopped from assailing eviction order on the ground that as S. 12(1)(*h*) of the Act had not been complied with, decree for eviction passed against him was liable to be set aside: A.I.R. 1984 S.C. 1890.

Where at the request of the landlord, the tenant shifted to another premises on the landlord's assurance that in the new premises, he could live as long as he desired, *held*, taking advantage of the position that to the new premises, the U.P. Rent Control Act was not applicable (though it was applicable to the earlier premises), the landlord could not seek tenant's eviction; the landlord's suit for eviction was barred by principle of estoppel: A.I.R. 1971 All. 297.

Tenant whether contractual or statutory—On facts, *held* that tenant was not statutory tenant on date of his death and that the tenancy was heritable—Conduct of landlord's mukhtor in accepting rent, etc. after determination of tenancy held was evidence of continuation of tenancy: 1965 Cur. L.J. 393 (Punj.).

Waiver of a right cannot be lightly inferred and something more than inaction of the right holder in exercising the right is necessary to establish it. Thus, when permission is granted to a landlord under S. 3 of C.P. (Temporary) Control of Rent and Eviction Act to file a suit to evict the tenant, the mere fact of the landlord not taking any steps to evict the tenant for several months after the permission is granted or his accepting rent for those months cannot amount to waiver A.I.R. 1967 All. 325.

In respect of certain lease of lands given in 1958, the landlord sought declaration that they were invalid being contrary to the provisions of Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 and got it so declared. But during the pendency of writ petition against such declaration, said 1958 Act was amended which provided for validation of illegal transfers on payment of penalty and, thus, the tenant withdrew the petition, paid the amount of fine for validation of lease and got it declared valid from 20-4-1968 on 7-6-1968, the tenant gave a notice under S. 32(*o*) of the Bombay Tenancy Act expressing his intention to purchase the lands under his occupancy. *Held*, the landlord having taken recourse to invalidate the leases on the ground that they were contrary to the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 could not be allowed to turn round and say that the leases were not invalid and, consequently, the notice of the tenant was not proper: A.I.R. 1991 S.C. 486: (1991) 2 (Supp.) S.C.C. 590.

Where plea of void tenancy by tenant was neither raised initially before the Rent Controller who had jurisdiction to decide the legal and valid relationship of landlord and tenant and only on such finding he could proceed to grant permission to give quit notice on the grounds mentioned under Cl. 13 (3) of the C.P. and Berar House Rent Control Order, 1949, nor in appeal, *held*, the finding as to legal and valid relationship of landlord and tenant and permission of the Rent Controller had become final and conclusive and, thus, tenant could not challenge permission obtained by landlord from the Rent Controller on the ground of tenancy being void before the civil Court: A.I.R. 1984 Bom. 65: 1983 Mah.L.J. 1114.

Where buildings constructed after 26-8-1957 were exempted under S. 32 of the A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960 from operation of the Act and the landlord's petition for eviction in respect of an exempted building, having been dismissed by the Rent Controller, he instituted a civil suit for eviction, *held*, the landlord could not be said to have "waived" his right to claim the relief in the civil suit: A.I.R. 1974 S.C. 2089.

A subsequent suit under S. 183 of the U.P. Tenancy Act, 1939 between the same parties is not barred merely because of withdrawal of a prior suit under S. 142 thereof: 1952 All.L.J. (Rev.) 128.

Where a question arose as to the validity of the lease and the plaintiff-landlord had earlier withdrawn proceedings for arrears of rent and for termination of tenancy but he later on filed fresh proceedings, *held*, it could not be said that there was any waiver or estoppel which would prevent the plaintiff from contending that impugned lease was void. [A.I.R. 1959 S.C. 689, Rel. on]: A.I.R. 1980 Bom. 25: 1979 Mah.L.J. 450 (D.B.).

Where a tenant impugned his eviction in revision on the ground that the super-structure belonged to him and not to the landlord for which, however, he had laid no foundation in his written statement before the trial Court, *held*, he could not be allowed to agitate the point in revision. [A.I.R. 1959 S.C. 149, Disting.]: A.I.R. 1971 Mad. 150: (1972) 2 M.L.J. 386: (1970) 83 Mad.L.W. 518.

Monthly tenancy—Rent payable according to English calender—Notice to quit and vacate on last day of English calendar month—Objection that notice was invalid on ground that period of notice should have commenced from day of month in which tenancy was created, not taken in pleadings—Tenant held estopped from contending that notice did not coincide with last day of calender month of tenancy—Notice was held to be valid: A.I.R. 1965 Pat. 311.

In order that a tenant may raise the plea of estoppel as against his landlord, there should be a representation believed in by the tenants and it must be a case consistent with the document under which the tenancy was created. Where the alleged representation was contrary to the terms of the document between the parties *held*, that the plea of estoppel was not available: (1932-33) 37 Cal.W.N. 643: A.I.R. 1933 Cal. 682. *See* also 1937 R.D. 256 ; 1936 R.D. 541 ; 1940 R.D. 488: 1940 O.A. 1017.

Estoppel—Plea not available to tenant: (1961) 2 An. W.R. 312.

Where on an appeal against an eviction order, the Appellate Authority remanded the case to the Rent Controller for amendment of the eviction petition to incorporate the ground of *bona fide* self-requirement with leave to the tenant to disprove the ground by leading evidence and after such trial the Controller passed the eviction order, *held*, the tenant having obtained full benefit of the remand order was estopped from impugning the remand order as without jurisdiction: A.I.R. 1979 P.&H. 132.

Where the transferee-landlord at the proper opportunity sued the tenant for eviction who resisted it on the ground that his was a *thika* tenancy covered by the Calcutta Thika Tenancy Act, 1949 and the predecessor-in-interest of the landlord had so admitted in the earlier eviction proceedings, *held*, as there was no final determination of the tenant being a *thika* tenant in the earlier proceedings, the rule of estoppel was not attracted; it was open for the transferee-landlord to impugn the tenant's contention in the record proceedings: A.I.R. 1989 S.C. 1834.

Under the circumstances of the case the doctrine of estoppel could not operate against the tenant and preclude him from contending at the time of the appeal that he was entitled, in spite of what had happened before, to take up the position that he was a *thika* tenant under the existing law and as such entitled to the benefits conferred upon such tenants by that law as it stood then: 93 Cal.L.J. 52: A.I.R. 1954 Cal. 549.

Where after an order for ejectment under S. 61 of the Oudh Rent Act for arrears of rent, the landlord filed a fresh suit for arrears of rent, it operates as an admission on the part of the Zamindar that the defendant is his tenant in spite of the previous decree for his ejectment and operates also as an estoppel under S. 115 against the landlord seeking execution of his ejectment decree: 1941 R.D. 415: 1941 O.A. (Supp.) 434.

According to the first clause of a lease deed, the lease could be terminated by thirty days' notice and according to fourth clause the lessor could without notice put an end to the lease if there was any default in the payment of rent or breach of any covenant. Thereupon the lessor had a right of entry. The eighth clause was: "the lessee will vacate the land at one month's notice without fuss if it is wanted at any time for building". After giving notice to quit, the lessor brought a suit for ejectment and recovery of arrears of rent.

It was contended by the lessee that the eighth clause in the lease was a bar to the suit

because the lessor could only sue for ejectment if the land is wanted for building. *Held*, that Cl. (8) meant that if the land was wanted for any building, the lessee was not to make any "fuss" ; that clause was not in derogation of the powers which the lessor had under the other clauses of the lease deed and that no question of estoppel could be raised against the lessor: A.I.R. 1953 Punj. 243: I.L.R. (1954) Punj. 249.

The fact that a registered lease was not given does not affect the question: L.R. 3 All. 543 (Rev.). *See* also A.I.R. 1932 All. 437; 1940 R.D. 224: 1940 All.W.R. (B.R.) 85 ; 1940 R.D. 197: 1940 All.W.R. (B.R.) 65.

Lease for term of 10 years with renewal clause—Lessee building house on land leased—Lessor is not estopped from taking khas possession of lease-hold: 1953 B.L.J.R. 304: A.I.R. 1954 Pat. 41.

M obtained a lease of certain premises for the period of ten years and constructs a big shed thereon. Afterwards *M* gave it on lease to a Company. After the termination of the lease of *M*, the Company obtained the lease of the premises from the original lessor. In 1938, that is after the termination of his lease, *M* brought a suit against the Company and the original lessor praying for declaration of his right to pull down and remove the shed. This suit was ultimately compromised between *M* and the Company and one of the terms of compromise was that the Company would continue to use the shed for nine months and thereafter use it at its option for a period of two years, and that if the Company wished to vacate the shed within this period, it could do so on giving two months' notice and removing its machineries and other fixtures. The amount of compensation on payment of which the Company would continue to use the shed was fixed at Rs. 125 per month and the Company actually paid this amount and remained in occupation for nine months and then for the optional period of two years without giving any notice to *M* to remove the shed. In a subsequent suit by *M* against the Company for compensation for use and occupation of the shed: *Held*, (*1*) that by the petition of compromise in terms of which the suit was decreed, the Company admitted the title of *M* to the shed ; (2) that this compromise decree and the payment of compensation thereafter by the Company stood in the way of the Company's contention that *M* had lost title to the shed or that the title thereto had vested in the original lessor and from him in it, even if such were the effect of S. 108 (*h*), Transfer of Property Act ; (*3*) that even if no formal tenancy was created in *M*'s favour by the compromise decree, still estoppel would nevertheless arise, because the position accepted by the Company was virtually that of a tenant and payment of compensation was for use and occupation ; (*4*) that it would make no difference that the Company was already in possession of the shed at the time of the compromise decree, because the rule of estoppel had been extended to cases where a tenant was already in possession: A.I.R. 1956 Cal. 148.

Tenants recorded as occupancy tenants by order of Collector and treated as such for over 28 years—Subsequent suit for declaration that they were only statutory tenants—Non-maintainability: 14 L.R. 135 (Rev.): 17 R.D. 174. *See* also 1941 R.D. 415: 1941 All.W.R. (Rev.) 475.

Landlord and tenant—Estoppel—Suit for rent—Money decree—Execution proceedings taken as if the decree was a rent decree—Objection to the form of execution proceedings not taken by the tenant—Effect—Tenant not barred from contending afterwards that the decree was only a money decree—No estoppel: 119 I.C. 882: A.I.R. 1930 Pat. 150. *See* also 1939 R.D. 135: 1939 All.W.R. (B.R.) 149.

Acquisition of co-tenancy by estoppel: 1964 All. W.R. (H.C.) 458.

Where the Managing Director of a Company originally took the premises on rent in his own name and though some correspondence and documents did show that the rent was paid by the Company and at some stage the Company and the landlord did consider that the Company was the tenant but nothing on record showed the point of time when such relationship came into existence and there was no plea that the Managing Director's tenancy was determined or surrendered to the Company at any time, *held*, the plea of estoppel was not available to the landlord against the Company sought to be evicted as a tenant; the Company was at liberty to plead that it was not the tenant and no eviction petition was maintainable against it: (1989) 38 Del.L.T. 94: A.I.R. 1990 N.O.C. 27: (1989) 1 Ren.L.R. 690.

Landlord and tenant—Defendant admitting to be taken by deity through plaintiff Sarbarakar—Defendant is estopped from challenging Sarbarakar's right to sue him as tenant: 1964 M.P.L.J. (Notes) 73.

A person himself having obtained a lease from power-of-attorney holder cannot question the authority of the power-of-attorney holder to grant a lease in reversion to another person on the principle of estoppel. *See* (1975) 1 Kam.L.J. 262.

Where admissions as to a party's status as a tenant were made in the amendment application, *held*, whether or not they operate as estoppel, they are certainly evidence in the proceedings: A.I.R. 1972 Del. 221.

Where in the rent control proceedings for eviction, the plaintiff had proceeded on the ground that the defendant was a tenant, *held*, in a subsequent civil suit for declaration of title, she could not be allowed to proceed on the ground that the defendant was a licencee merely because the Appellate Authority under the Rent Control Act had incidentally observed that the defendant could be a trespasser or licencee, specially when the defendant had claimed title in himself: A.I.R. 1992 Ori. 183.

Where in a proceeding for possession under S. 58 of the M.B. Land Revenue and Tenancy Act, the defendant claimed to be a sub-tenant and sought protection under the Ryotwari Sub-lessees Protection Act and the Court accepting his claim dismissed the said proceedings, *held*, subsequently, he cannot urge that he was not sub-tenant: 1978 M.P.L.J. (Note) 47.

The plaintiffs, who were the tenants of a land agreed with defendant 3 to buy the land and obtained an extension of time to pay the price and also applied to him to continue them as tenants of the land. Defendant 3 acted in all this as an agent of the heirs of the landlord and all these negotiations took place before the defendants 1 to 5 purchased the land. *Held*, that the acts of the plaintiffs could not amount to an admission of the title of the defendants 1 to 5 neither did they prove the presence of the ingredients necessary to bring S. 115 into play and, therefore, there could be no bar of estoppel or waiver: A.I.R. 1957 Manipur 25.

Where in enhancement proceeding relating to a holding, the landlord, misled by the patwari's entry, described the tenant as also the tenant of an adjacent place of fallow land, he is not precluded from contesting the status of the occupier and from bringing a suit that the defendant was not a tenant of the fallow land: 14 L.R. 68 (Rev.): 17 R.D. 62.

Where the defendants had been receiving deficit grants from the Government on the representation that certain amount had to be paid on account of house rent of the School building, *held*, in a suit for recovery of arrears of rent they were estopped from asserting that no liability for payment of rent could be fastened upon them: A.I.R. 1974 S.C. 1495: (1974) 2 S.C.C. 354.

Persons in cultivating possession under lessee are tenants—Application by landlord against such persons for arrears of rent and in alternative for ejectment—Suit by such persons for declaration of their rights—Landlord is estopped from denying that plaintiffs are not tenants: (1963) 65 Punj.L.R. 526.

Tenancy described as occupancy holding in sale deed and notice under S. 26-C of the W.B. Tenancy Act, 1885—On application for pre-emption vendee disputing nature of tenancy—No estoppel. *See* (1953-54) 58 Cal. W.N. 612.

Covenant against alienation—Transfer recognised by lessor—Effect: A.I.R. 1929 Cal. 228.

Tenant while opposing application for granting permission under S. 3 of the U.P. (Temporary) Control of Rent and Eviction Act (III of 1947) did not object to jurisdiction of the Officer granting permission—Principle of estoppel would be applicable against tenant in objecting such jurisdiction in suit filed after obtaining permission: 1964 All.W.R. (H.C.) 413: 1964 All.L.J. 788.

Where a tenant evicted under the Delhi Rent Control Act, 1958 had obtained extra time from the decree-holder on the promise of his vacating the premises at the end thereof, *held*, he is not estopped from raising the plea, when the landlord applies for leave to execute the decree from the Competent Authority under S. 19(4) of the Slum Areas (Improvement and Clearance) Act, 1956, that he was unable to obtain alternative accommodation and, therefore, the leave to execute the eviction order be declined. [A.I.R. 1972 Del. 206, Appl.]: A.I.R. 1972 Del. 208.

Where a tenant had been inducted as a tenant for a limited period after the Rent Controller's sanction under S. 21 of the Delhi Rent Control Act, 1958 and on the landlord's applying for the tenant's eviction on expiry of the limited period, *held*, it could not be contended that after having taken advantage of the sanction, the tenant was estopped from impugning the legality of the original sanction. [1976 Ren. C.J. 582 (Del.), Overruled]: A.I.R. 1980 S.C. 193: 1979 U.J. (S.C.) 756: (1980) 1 S.C.C. 52: (1980) 1 S.C.R. 281.

Where a limited tenancy under S. 21 of the Delhi Rent Control Act, 1958 was created for 2 years and upon the expiry thereof the tenant refused to quit despite his statement before the Controller at the time of the grant, *held*, in the absence of evidence to the effect that the tenant did not understand or accept what was stated by the landlord before the Controller or that the tenant and the landlord were in collusion or that the tenant was a victim of fraud or the weaker side in the bargain, it could not be presumed that the sanction of the Controller to create the tenancy was nullity; having obtained the benefit of the sanction, the tenant was estopped from impugning the sanction. [1985 Rajdhani L.R. 492, Reversed]: A.I.R. 1987 S.C. 1986: (1987) 32 Del.L.T. 354: (1987) 4 S.C.C. 1.

Where lessees of land for 10 years were sought to be unsuccessfully evicted therefrom under the Punjab Village Common Lands (Regulation) Act, 1961 and the lessees thereafter put in manure and continued to be in its cultivating possession for over 36 years on payment of nominal rent, *held*, their plea of estoppel against the Panchayat had no substance; they had been harvesting crops years after years and earning far more than what they had invested; they had, thus, suffered no detriment. Besides, merely because the Panchayat had lost the earlier eviction case could not amount to a representation to the lessees: 1992 Punj.L.J. 303.

Where in case of a permanent lease which provided for its cancellation on default for non-payment of rent for three years and the predecessors of the current lessors had demanded and accepted rent from the successors of the lessees without impugning their rights to purchase the leasehold rights, the current lessors were estopped from contending that the successor lessees had no right or interest in the land. [A.I.R. 1967 All. 405, Reversed]: A.I.R. 1980 S.C. 575: (1980) 2 S.C.C. 253: 1980 U.J. (S.C.) 361.

Where in proceedings under the Bombay Tenancy Act, the defendant categorically stated that he was not a tenant on the disputed land but he assisted his nieces, predecessor-in-title of the plaintiff-vendors in cultivation of said land as a member of family, *held*, in a subsequent suit of permanent injunction filed by the vendors it was not open for the defendant to contend that he was cultivating the land as a permanent tenant: A.I.R. 1982 Guj. 340: (1982) 2 Guj.L.H. 967.

Where in an eviction petition filed on the ground of wilful default in payment of rent, the tenant specifically pleaded that in spite of the offering of the rent made by her every month it was the landlord who refused to accept the same and was postponing the receipt of it resulting in accumulation of rents, *held*, having raised a specific plea in the counter statement, it was not open to the tenant to change her case in the course of the evidence by stating that she was permitted to pay the rent in the same manner in which she was paying to the prior landlord. It might be that prior landlord failed to take any action for recovery of rent even when there was accumulation of rent but that would not imply that there was an implied contract between present landlord and tenant that the latter could pay the rent as and when she pleased: A.I.R. 1989 Mad. 317.

Where the rented premises in question was put to auction and in the meanwhile the original landlord filed an eviction petition and during its pendency sale was confirmed in favour of the new landlord and an eviction order was passed by the Rent Controller against the tenants but thereafter tenants pleaded want of jurisdiction in Rent Controller on account of subsequent change of the landlord, *held*, as the tenants did not object to the decree being passed against them inspite of the fact that the landlord had changed, they would be estopped in law from challenging the validity of a decree for want of jurisdiction in the Rent Controller. [1969 Ren.C.R. 398 (S.C.), Rel. on; (1966) 68 Punj.L.R. (Del.) 14, Dissent. from]: A.I.R. 1987 Del. 1: (1987) 1 Ren.C.R. 382: 1987 Rajdhani L.R. 626.

Where a tenant of the Port Trust served with a quit notice, on the promise of the Estate Manager—appointed to lease out the Trust properties from time to time or to terminate its lease, that on deposit of certain amount the lease of a portion in the reconstructed property would be given to him, *held*, the Estate Manager not clothed with any such authority, not even an ostensible authority, to bind the Port Trust, his promise was *ultra vires;* no estoppel arises against the Trust: A.I.R. 1991 S.C. 14: (1991) 1 (Supp.) S.C.C. 68: (1991) 1 S.C.C. 761.

Fraudulent assignment of tenancy—Assignee a confederate in fraud—Tenant not estopped to prove his possession as against assignee—Court will not help assignee: I.L.R. (1962) Ker. 681: A.I.R. 1963 Ker. 79.

Though a tenant can never be estopped from claiming occupancy right in respect of land in an estate by reason of the statute, he will be estopped from saying that the land is an estate. If he has previously taken it on the footing that it is not an estate it may be that the estoppel extends only up to his surrendering vacant possession; after the surrenders, he may agitate any question he likes. But he cannot keep the possession which he obtained by representing that he will not claim the land to be an estate: 119 I.C. 577: A.I.R. 1929 Mad. 529.

Landlord allowing ex-proprietary tenant to continue in possession after ejectment is estopped from denying status of the tenant: 14 R.D. 502 ; 15 R.D. 39.

Grant of permanent lease by holder of grant-in-interest—If estopped from saying that he was mere *ryot*—Purchaser at execution sale is not estopped: A.I.R. 1928 Cal. 87.

Landlord and tenant—Forfeiture of lease—Waiver—What amounts to: A.I.R. 1960 Madh. Pra. 132: 1960 Cr.L.J. 605.

Lessee stating that he has leased premises vacant—Statement of whether constitutes relinquishement: (1967) 12 Law Rep. 368 (Mys.).

Where in a suit for eviction, there is no recital in the plaint of any plea of estoppel against the defendant, *held*, that there is no justification for invoking the doctrine of estoppel on the basis of averments in a previously instituted suit by the defendant against the plaintiff, where those averments cannot be the foundation of the theory of estoppel and cannot be said to be consistent only with the theory of any representation by the defendant: (1956) 69 Mad.L.W. (Andh.) 30: 1956 An.W.R. 544.

Where an *ex parte* eviction order is passed on the tenant's defence against delivery of possession or his written statement is struck out, the Court is not relieved of its duty under O. 20, R. 4 of the Code of Civil Procedure, whether or not the suit is contested, and, therefore, the tenant in appeal against the *ex parte* eviction decree is entitled to contend and show, if possible on the plaintiff's evidence on record, both at the trial and in appeal, that the landlord was not entitled to the decree though he could not be permitted to cross-examine the landlord's witnesses *ex parte* examined or by calling his own witnesses; the doctrine of estoppel would not operate against him: A.I.R. 1977 Cal. 110: (1975) 1 Cal.L.J. 1: (1976-77) 81 Cal.W.N. 188 (F.B.).

Permanent tenancy—New agreement—Waiver—Implied surrender. *See* A.I.R. 1957 All. 346.

Where "*A*" obtained an occupancy right under a *patta* but afterwards sold half his holding to *B* and thereafter the remaining half to *C*, a stranger, which was sought to be pre-empted by *B* which was resisted by *C* on the ground that *A* and *B* were not occupancy tenants as they could be created only by the Bengal Tenancy Act, 1885 and not by a contract, *held*, in view of the fact that the *kobala* by which *C* had purchased the holding described it as occupancy tenant, *C* was estopped from denying the status of *A* and *B* as occupancy tenants. [A.I.R. 1944 Cal. 253 and A.I.R. 1948 Cal. 144, Rel. on; (1953-54) 58 Cal.W.N. 612, Disting.]: A.I.R. 1972 Cal. 520 (F.B.).

Tenant making grave on abadi—Zamindar's servants standing by and not objecting—No acquiescence: A.I.R. 1929 All. 386: 115 I.C. 628.

Where a Zamindar took nazarana and admitted the tenant into land pending the execution of a lease deed, he is estopped from denying that he had admitted the tenant into the land with the intention of giving a lease: L.R. 3 All. 543 (Rev.). *See* also 1943 All.W.R. (Rev.) 156.

Where in rent receipts given by the agent of the Zamindar the tenants are described as occupancy tenants, in the absence of evidence to show that the agent had power to confer occupancy rights, the Zamindar is not estopped from asserting that the tenants had no occupancy rights: L.R. 3 All. 517 (Rev.) *See* also 1939 R.D. 135 ; 1941 R.D. 678.

Permanent lease of vatan lands—Succeeding vatandar receiving rent for ratifying lease—Suit in ejectment—Estoppel: (1929) 31 Bom.L.R. 218: A.I.R. 1929 Bom. 174. *See* also A.I.R. 1938 Pat. 435.

48. Estoppel in criminal cases.—(*See* also Note 18, *supra*). Estoppel in matter of defence taken—Falsity of defence—Effect: 1985 Cr.L.J. 1943 (Bom.).

Where the petitioner pleaded promissory estoppel on the ground that the Investigating Officer who was in charge of the relevant investigation had promised him that even though he was recording his statement still he would not be called to give any evidence in Court, but said plea came forth for the first time nearly ten years after the statement was recorded, *held*, as the said Officer did not have jurisdiction to give such a promise, it was impossible to accept that any such promise would ever have been given or in fact was given by the Investigating Officer. Therefore, the doctrine of promissory estoppel was inapplicable to the present case: (1985) 2 Bom.C.R. 469.

Where the prosecution did not examine an Inspector, by no means a material witness, but offered and kept ready him for cross-examination but the Counsel for the accused failed to take advantage thereof, *held*, the accused could not take advantage of the prosecution's failure to examine the Inspector: A.I.R. 1985 S.C. 1092: 1985 Cr.L.J. 1357: (1985) 3 S.C.C. 45: (1985-2) 26 Guj.L.R. 988.

Where the deceased in the medico, legal reports had stated to the Doctor that it was her husband who had poured petrol over her and set her to fire which was relied upon by the prosecution and proved, in the absence of the Doctor who had left service and whose whereabouts were not known, by the record clerk who had in normal course of duty had seen the Doctor writing and signing but finding that in other declarations she had assigned this role to her husband's brother and the prosecution to upheld conviction in appeal, desired to disown the first confession as not having been properly proved, *held*, the prosecution could not be allowed to wriggle out of it to exclude the evidence of inconsistency of dying declarations; conviction set aside: 1991 Cr.L.J. 310: (1990) 42 Del.L.T. 299 (D.B.).

In the absence of proof of the deceased's identity or her being alive when she was taken by the accused to his dispensary or that none else had access to her while inside the dispensary, *held*, there would be no warrant for the inference that the accused had caused her death; the prosecution was estopped from seeking his conviction even if he had raised no such plea in defence: A.I.R. 1991 S.C. 1842: 1991 Cr.L.J. 2666: (1991) 3 S.C.C. 609.

Where as per the written statement filed by the State Government to the earlier writ petition it was mentioned that the prisoner was 16 years of age at the time of the commission of the offence, *held*, in the subsequent writ petition for direction to the State Government to determine his period of detention under S. 34 of the Children Act, 1960, the State Government was estopped from challenging the age of petitioner being less than 16 years at the time of commission of offence in view of its earlier admission: 1992 Cr.L.J. 1897 (P.&H.).

Where by the time the accused started to manufacture an article of food (corn flakes) the final Rules made under the Prevention of Food Adulteration Rules, 1955, prescribing the standard and maximum moisture content had come into force to their knowledge, *held*, clearly they started manufacture with full knowledge of the standard prescribed by the Government for corn flakes and therefore, the accused cannot be permitted to raise the plea that they had no opportunity of expressing their objections to the prescription of a maximum moisture content in the standards and that they had no knowledge that the Government was going to prescribe such a maximum content when there was no indication in the draft Rules published by the Government: 1971 Cr.L.J. 1605 (Del.) (D.B.).

49. Estoppel in case of preventive detention.—Where on the representation of the detenu detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, the detaining authority promised him to supply the

documents which were relied upon in the grounds of detention, but they were not supplied, *held*, the detaining authority after having made that promise could not take the stand that it was "graciousness" on the part of the detaining authority to have promised to supply the documents. That promise was in accordance with the law and, thus, the detaining authority was bound to supply those documents: 1989 Cr.L.J. 1340 (Del.) (D.B.).

Where petitioner a detenu under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 was represented before Advisory Board constituted under said Act through a Counsel and the request of the petitioner as recorded in his representation for the recording of statement of a witness was not brought to the notice of the Board by his Counsel, *held*, the request should be deemed to have been given up by the petitioner and he could not thereafter complain against non-recording of statement of witness by the Board: 1988 Cr.L.J. 1198 (Del.) (D.B.).

Where though a detenu under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, had made a request before the Advisory Board that he might be allowed to be represented by a "friend" but he failed to take the "friend" alongwith him and proceeded to conduct his case all by himself, *held*, the detenu having not, admittedly, taken his friend alongwith him before the Board, he could not fall back on his right to be represented by a "friend" and contend that the Advisory Board did not, on its own, ask him if he had brought his "friend" with him. Thus, he could not claim any breach of due procedure on the part of the Advisory Board. [1982 Cr.L.J. 340 (S.C.), Foll.]: 1994 Cr.L.J. 1291 (Ker.) (D.B.).

50. Estoppel in company matters.— Where a director of a banking company dealt with the shares on the footing that the allottees were holders of the shares with a clear knowledge of the circumstances that he was interested in the particular transaction of the board meeting of the company, in suit by the company against the allottees he was estopped from contending that the allotment was invalid. He could not be allowed to say that he was interested in the allotment and could not vote: (1965) 2 Comp.L.J. 99: A.I.R. 1966 S.C. 170.

Share certificate—Nominal or face value of shares not conclusive—Company not estopped from showing that consideration for issue of shares and failed or that the transaction of particular shares had become illusory or inoperative: A.I.R. 1970 Raj. 36: 1969 Raj.L.W. 473: I.L.R. (1969) 9 Raj. 340 (D.B.).

Applicant under S. 155, Companies Act, proceeding on basis that three persons were originally recorded owners in her petition for share certificate—Order for succession certificate also indicating that Court proceeded on basis that names of three persons appeared as owners of shares—*Held*, there was no question of applicant being misled by representation contained in share certificate: A.I.R. 1967 Cal. 196.

M one of joint share-holders, knowing that original shares belonged to three persons including herself—She also knowing that bonus shares were issued and were meant to be allotted in name of said shareholders—*Held*, that if *M* was person primarily concerned in plea of estoppel she had knowledge of these facts; and her daughter claiming through her could not take advantage of her ignorance—*Held*, further that plea of estoppel did not fall within ambit of S. 115: A.I.R. 1967 Cal. 196.

The question whether certain fully paid-up shares were issued by the company to the State as price of the good-will of the agency owned by the State and which the company took over as price of the assets of the agency or in lieu of grant of monopoly rights by the State to the company depends upon the interpretation of the various documents which passed between the company and the State and is not a pure question of fact but a mixed question of fact and law, and therefore, there cannot be an estoppel in such a matter: 1969 Raj.L.W. 473: I.L.R. (1969) 19 Raj. 340: A.I.R. 1970 Raj. 36 (D.B.).

Rectification of register of shares—Transfer of shares without consideration and without knowledge of owner making use of blank transfer application — Legality — Application by owner for restoring her name as owner—*Held*, application should be allowed—Estoppel: (1964) 2 M.L.J. 309.

Rectification of Register—Powers of directors—Doctrine of estoppel and that of indoor management—Protection under when available—Transfer of shares by member to

non-member—Transferee's name registered in company's register but cancelled subsequently without notice to transferee—Transfer not *ultra vires*—Transferee held was entitled to protection: I.L.R. (1962) 2 Punj. 52: A.I.R. 1962 Punj. 277.

Estoppel against statute—Class of shareholders deprived of their rights under Companies Act by amendment of articles of association—Omission to object to amendment by shareholders concerned not fatal to their plea under Ss. 397 and 398 Companies Act.

Where a public limited company doing forward contracts business, in a special meeting passed a resolution depriving certain class of its shareholders of their right to vote and to declare and receive dividend, etc., *held*, that neither their absence at the meeting nor their failure to object at the subsequent elections held in accordance with the amended articles of association estopped them from raising the plea under Ss. 397 and 398, Companies Act, the rights sought to be deprived being fundamental statutory rights conferred on them under the Companies Act which no shareholder could be permitted to barter away: I.L.R. (1962) 2 Punj. 762: (1962) 32 Comp. Cas. 937: A.I.R. 1961 Punj. 485.

A bank is not estopped from contending that the name of the transferor should remain in the register of share-holders because the bank knew about the transfer by the share-holder's phone call intimating it, and impliedly accepting the transfer of the shares by not sending any notices of meetings or dividend notices or dividend warrants to the share-holder in respect of the shares: (1957) 2 M.L.J. 517: A.I.R. 1957 Mad. 702: I.L.R. (1957) Mad. 1058.

The principle on which the law of estoppel is attracted, is that a person who by his declaration or act or omission caused another person to believe a thing to be true should not be allowed to deny the truth of that thing. Where the contributory making the winding up petition was a party to the statements made in the balance-sheet, the director's report, the board's meetings and directors answers to the auditor's comments and various other documents and does not deny the truth of the things that have happened but only says that those things are unlawful, wrongful, and injurious to the interest of the company and it is on that footing that he has raised the various contentions in the winding up petition, the law relating to estoppel has no application: A.I.R. 1965 Cal. 98.

Where during the course of a winding up of a company a certain person gave an undertaking to the Court that he would pay a certain sum of money to the official liquidator if the assets of the company, namely, a mill, be handed over to him and he obtained possession he is estopped from resiling from it: A.I.R. 1930 All. 330.

Where a winding up petition against a company for its failure to pay accrued interest on fixed deposits made to it was decided by a consent order whereby the company was directed to file a suit within specified time to establish its case of the deposit being fraudulent and not binding on the company failing which it would lose all rights to dispute the validity of the deposit on any ground whatsoever and the company did not file the suit within the time, *held*, the company was thereby estopped from disputing its liability under the fixed deposit or to impugn the maintainability of the winding up petition: A.I.R. 1982 Cal. 71.

A special general meeting of the Central Co-operative Union Ltd., was held on 27th March, 1955, for the election of a new Board of Directors and a Chairman. The validity of this meeting was the subject-matter of an appeal before the Supreme Court and it was ultimately compromised between the parties who agreed to a fresh meeting being called for election. Such meeting was held on 30th March, 1956, at which the petitioner was present and he was elected as a Director of the new Board. The petitioner himself proposed three of the retiring Directors as members of the new Board and also the names of three other persons as office-bearers and both the proposals were passed unanimously. However, the petitioner referred a dispute with regard to the validity of the meeting held on 27th March, 1955 to Registrar who repeated the objection on 24th March, 1956. *Held*, that in the circumstances the petitioner was estopped from contesting the validity of the meeting held on 27th March, 1955, or the order of the Registrar, dated 24th March, 1956: A.I.R. 1954 Pat. 154.

Companies Act, 1956, Ss. 433, 434, 466—Inability to pay debts—Disputed debts—Company Court if can consider legality of a debt—Procedure to be adopted in the event

of genuine dispute regarding a debt in winding up proceedings—Decretal debt stands on the same footing as any ordinary debt: (1967) 1 Comp. L.J. 172 (Cal.).

The Official Receiver is not bound by the admission of the validity of a mortgage executed by the insolvent by some of his creditors nor is he precluded on that account from applying under S. 54 to have it annulled as a fraudulent preference: (1932) 34 Punj.L.R. 436: A.I.R. 1933 Lah. 354.

Where a sale notice issued by the Court in winding up proceedings left it to the discretion of the Court the terms and conditions of sale like the number and duration of instalments for payment of purchase money, interest thereon, the default clause and the bank guarantee and they were in fact determined by the Court, *held*, such a procedure should be avoided; the terms and conditions should be clearly set down in the sale notice; the Court should not countenance a situation where it has to negotiate the terms which is inconsistent with its dignity; the Supreme Court modified the terms on the appeal of financial institutions: A.I.R. 1993 S.C. 1524: (1993) 3 S.C.C. 40: (1993) 2 M.L.J. 14.

Where a retired company employee being tried under S. 630 of the companies Act, 1956 for selling the company flat allotted to him pleaded estoppel on the ground that the company's Managing Director had promised to sell the flat on book value (1/100th of its market value) and it was on that promise that the accused sold the flat believing it to be his property, *held*, apart from there being no evidence on record, no estoppel could be pleaded in such a case; it is the Board of directors, and not the Managing Director who could promise to sell the flat; and even the Board, trustee of the shareholders could not have sold it at such a ludicrously low price; and even the income-tax law would not have permitted such a sale: (1994) 1 Bom.C.R. 3.

51. Estoppel in taxation matters.—(*See* also Note 21, *supra*). Estoppel—Principle does not apply to income-tax proceedings: (1966) 2 I.T.J. 558: (1966) 61 I.T.R. 214 (All.).

Income cannot be taxed on basis of estoppel or any other equitable doctrine: (1965) 1 M.L.J. (S.C.) 142: A.I.R. 1965 S.C. 1216.

The principle of estoppel or *res judicata* has no application to income-tax cases. There is no estoppel against an assessee who makes admissions but the admissions made by him are undoubtedly pieces of evidence in the case which can be considered: I.L.R. 22 Pat. 55: A.I.R. 1943 Pat. 169. Determination of depreciation allowance—Limits for—Original cost accepted for some years—Income-tax Officer can go behind it to find out actual cost for himself—No bar of *res judicata* or estoppel. *See* A.I.R. 1955 Cal. 304: 25 I.T.R. 558. The doctrine of estoppel does not apply in cases of successive assessments. An assessment is complete in itself and the taxing department is not bound by any contention it took up in one assessment when the question arises with regard to a different assessment: (1954) 56 Bom.L.R. 810: A.I.R. 1955 Bom. 53: I.L.R. (1954) Bom. 1260.

Decisions arrived at in one assessment year are binding neither on the assessee nor on the Revenue in respect of subsequent assessment years. The principle of estoppel has no applicability to successive assessments. The Revenue Authorities are not bound by any contention or admission or decision taken up in one assessment when the same issue comes up for decision in a different assessment.

There is no estoppel against a statute. Where the Revenue Authorities take a particular view of the statutory provisions in the income-tax assessment and later on realise that it was a mistaken view, they cannot be estopped from taking a correct view of the statutory provisions later on: (1985) 156 I.T.R. 569.

There is no such principle that the Income-tax Department ought not to be permitted to go back on what it once said. If a *bona fide* mistake had been committed, it is open to the Department to rectify that mistake. It cannot be said that there is any estoppel in regard to this matter. The point though taken in an appeal has to be allowed. Even a pleading can be allowed to be amended in proceedings before a Court and a stand contradictory to that which had been taken earlier can be permitted to be taken. This is so especially in cases where the original stand was on the basis of a *bona fide* mistake: 1973 Ker.L.R. 358: 1973 Ker.L.T. 502 (D.B.).

It is not only the right but the duty of the Assessing Officer to consider whether or not the books disclose the true state of accounts and the correct income can be deduced therefrom. It is incorrect to say, that the Officer is

bound to accept the system of accounting regularly employed by the assessee, the correctness of which had not been questioned in the past. There is no estoppel in these matters, and the Officer is not bound by the method followed in the earlier years. [(1976) 1 Cal.L.J. 102, Reversed]: A.I.R. 1991 S.C. 1338.

A tax levied without the authority of law infringes the assessee's fundamental rights; merely because he had included the exempted item in his return mistakenly and deposited the tax, *held*, he could impugn the same and seek refund; there could be no estoppel against the assessee: 1961 Raj.L.W. 420: A.I.R. 1963 Raj. 51.

An assessee who does not raise any objection to rectification before I.T.O., *held*, cannot be estopped from raising contention that rectifications were without justification: 1983 Tax.L.R. (N.O.C.) 89: 138 I.T.R. 734 (Del.).

Where an assessee was allowed a clearing certificate for leaving India upon his undertaking to pay the income-tax dues by monthly instalments and furnish security therefor, *held*, both the undertaking and the security were meant to be acted upon; the surety was, thus, precluded from contending that the assessee was not, as per S. 220(7) of the Income-tax Act, 1961, in default; the doctrine of promissory estoppel was attracted: (1975) 88 Mad.L.W. 626 (D.B.).

In order to enable a big assessee, who had been found to have evaded huge income-tax and was also liable to be prosecuted, to approach the Settlement Commission, the departmental appeals as well as the assessee's appeals were withdrawn by mutual understanding. But when the assessee moved the Commission, the Commissioner of Income-tax in exercise of his statutory powers raised objection with the result that the proceedings before the Commission, under statutory force, were dropped. However, thereafter the Commission, though having no power, at the assessee's instance reopened the proceedings and ruled that the Commissioner of Income-tax was estopped from objecting to the initiation of the settlement proceedings. *Held*, the doctrine of estoppel could not be attracted; the soul of estoppel is equity, not facility for inequity; nor is it permissible on public policy against statute; the Commissioner of Income-tax cannot enter into a "deal" without betraying his statutory duty; it cannot be accepted that by his conduct and "understandings", he had "irredeemably mortgaged" his statutory power to object, if the case merited objection. Estoppel in such situations is both odious and ominous and discretion, the door to corruption: A.I.R. 1979 S.C. 1725.

Dissolution of partnership by death of partner—New partnership created by fresh deed of partnership—Income-tax Office accepting the position and registering the new firm—Two separate orders of assessment passed—*Held*, Revenue having accepted succession could not for first time before Tribunal put up a case of change in constitution of the firm: 1985 Tax.L.R. 811 (Andh. Pra.).

Protective assessment of firm as registered firm—Income-tax Officer assessing different assessee not estopped from treating firm as *benami* concern: 1985 Tax.L.R. 1404 (Del.).

Notice under S. 34 of the Income-tax Act, 1922—Cannot be waived by assessee: A.I.R. 1961 Assam 35 (F.B.).

Waiver of notice under S. 34, Income-tax Act by Counsel—Client is not bound: A.I.R. 1966 Cal. 438.

No objection to competency of assessing authority to assess raised in Income-tax proceedings—This amounts to waiver of objection and it cannot be raised in civil Court challenging authority of Income-tax Officer: I.L.R. 44 Pat. 22: A.I.R. 1966 Pat. 305.

Hindu undivided family—Subsequent disruption—Member submitting returns of income as individual—Levy of penalty under S. 28, Income-tax Act—Legality challenged by such member on ground that partition was recorded by Income-tax Officer when passing order under S. 25-A (1), Income-tax Act—Members' conduct could not be attributed to Hindu undivided family who could be taxed as distinct legal entity—There was no estoppel by conduct—[Income-tax Act, 1922, Ss. 25-A and 28]: (1969) 72 I.T.R. 212: (1969) 2 I.T.J. 168 (Mad.).

Where all the heirs of the deceased, as accountable persons agreed to abide by the accounts rendered by one of them and also that estate duty assessment may be made on a company in which the deceased had controlling interest and when such assessment was made no appeal was filed against it by any of the accountable persons, *held*, having

acquiesced wholly and completely in the assessment, the appellant, one of the heirs, could not dispute the quantum of liability or the order of assessment. [(1980) 126 I.T.R. 615 (Mad.), Affirmed]: A.I.R. 1989 S.C. 1654.

Where the Revenue Authorities accepted the assessment of disputed land as non-agricultural land, *held*, they were estopped from contending later on that the disputed land should be treated as agricultural land: A.I.R. 1985 N.O.C. 210: (1985-2) 26 Guj.L.R. 865.

Where in an earlier writ petition the objection was taken that the agricultural lands sought to be assessed under the U.P. Agricultural Income-tax Act, 1949 did not fall within the ambit of the Act and the High Court remanded the case to the assessing authorities to determine the point and no objection was raised that the assessment should have been taken against the firm and not the companies which constituted the firm, *held*, that objection could not be allowed to be raised before the assessing authorities after the remand: A.I.R. 1979 S.C. 1104.

Essentials of—Notice issued under S. 25, U.P. Agriculture Income-tax Act, requiring assessee to file return next day—Notice invalid—Assessment consequent to such notice—Validity—Filing of returns if amounts to waiver of right to object to validity of notice: I.L.R. (1964) 1 All. 462.

An assessee under the Mysore Agricultural Income-tax Act cannot take inconsistent positions at different stages of assessment for same year: (1970) 2 Mys.L.J. 76.

Assessment to sales tax—Deductions—Power to decide allowability or otherwise—Delegation by Commissioner of power to Commercial Tax Officer: (1956-57) 61 Cal. W.N. 953.

No estoppel against statute—Sales Tax Authority making consolidated order of assessment for several quarters contrary to provisions of statute—Authority cannot plead that assessee was estopped from challenging validity of assessment on ground that assessee had submitted a consolidated return for those quarters: (1969) 24 S.T.C. 25: (1968-69) 73 Cal.W.N. 728.

Orissa Sales Tax Act (XIV of 1947), S. 21 (2)—Proceedings under—Principle of estoppel not applicable: I.L.R. (1964) Cut. 575: A.I.R. 1965 Ori. 44.

No estoppel without representation. [Case under T.N. General Sales Tax Rules, 1959, R. 18.] *See* I.L.R. (1979) 2 Mad. 76.

New plea as to—Permissibility—Assessee depositing amounts towards taxes on sales inside State—Sales Tax Authorities appropriating same towards liability under S. 8-A(4) of U.P. Sales Tax Act and making demand for further amounts—Such further amounts paid by assessee—On revision, revising authority holding that assessee was not liable to deposit further amounts and directing refund—Plea that the assessee must be taken to have acquiesced in the appropriation of the sum paid originally as sales tax towards the liability under S. 8-A (4) not raised before the Judge (Revisions)—Plea not arising out of the order of the Judge (Revisions) and requiring an investigation into facts—Plea not permitted to be raised before High Court on reference: (1964) 15 S.T.C. 335 (All.).

Where a notice under S. 21 of the U.P. Sales Tax Act was served on a stranger instead of assessee though under said section issue and service of notice on the assessee was a condition precedent and the assessee participated in the proceedings, *held*, the assessee was not estopped from challenging the validity of proceedings. [1978 U.P.T.C. 1: 1978 Tax.L.R. (N.O.C.) 24, Overruled]: A.I.R. 1980 All. 198 (F.B.).

Though the requirement of a prior notice for the proposed levy of property tax on a new building under R. 15(2) framed under the Bombay Municipal Corporations Act, 1949 is mandatory, as it is to put the owner on guard and an assessment of such levy in the absence of the notice is liable to be quashed as illegal but if the owner prefers objections without having been served with the notice and the assessment is made, *held*, it is not liable to be set aside as illegal; the requirement of prior notice is for the benefit of the assessee; having preferred objections without issuance of the notice, he is deemed to have waived the requirement of notice: A.I.R. 1994 Guj. 167 (D.B.).

Where on the Assam Taxation (On Goods Carried by Road or on Inland Waterways) Act, 1954 being declared *ultra vires* by the Supreme Court, a new Act was enacted with retrospective effect from 24-4-1954 which was struck down by the High Court on

1-8-1963 and the Supreme Court granted *interim* stay of the High Court's judgment on 28-10-1964, was made absolute on 29-1-1965 but the appeal was eventually allowed by the Supreme Court on 1-4-1968 and it was only on 29-1-1965 that the demand notice under S. 7 (2) of the new Act were issued which was clearly beyond the expiry of two years from the date on which the returns should have been filed, *held*, the State could not contend that the assessees were estopped from challenging the validity of the notices as the State could not issue the notices within statutory time; merely because the assessees had obtained a stay did not amount to waiver; the State could have sought modification of the stay order; and there could be no waiver of a statutory provision which went to the root of the matter: A.I.R. 1975 S.C. 2065.

Where the respondents in exercise of powers under the Punjab Municipal Act, 1911 imposed the show tax on establishments who were using video for exhibition of cinema films on commercial basis and the petitioner a licence-holder for exhibition of films of video challenged said order on the ground that he had established the Video Parlour on the implied assurance by the State that on deposit of the entertainment tax, no further tax would be levied by any other authority of the State, but the petitioner failed to point out as to what was the undertaking on the basis of which it acted bonafidely and changed its position and could not be reverted back to its original position, *held*, principle of estoppel was not applicable. Further, in matters of imposition of tax in exercise of delegated legislative powers, the principle of estoppel cannot be invoked: 1990 Punj.L.J. 282: (1990) 2 Rev.L.R. 387 (D.B.).

Under the provisions of the A.P. Entertainment Tax Act, 1939 and the Rules made thereunder the impressing of the cinema tickets with the official seal of the Entertainment Tax Officer has nothing to do with the correctness of the amount of the entertainment tax and the additional tax, noted on the tickets. The requirement of such impressing the tickets with the seal is for the purposes of verification of the return. Thus, where the licencing authority raised a demand of additional tax more than what was specified on sealed cinema tickets and the appellant invoked doctrine of promissory estoppel on the ground that break-up of the figures on the ticket duly stamped constituted a representation either by the licensing authority or by the Entertainment Tax Officer, *held*, as the impressing the seal of the Entertainment Tax Officer was not by way of certifying the correctness of the entertainment tax and the additional tax on the tickets, but for purposes of returns and as neither the authorities were obliged to make any representation to determine the tax component in the maximum rate of payment for admission, nor did the authorities make any such representation, the doctrine of promissory estoppel was not attracted: A.I.R. 1993 Andh. Pra. 137: (1993) 1 An.L.T. 188: (1992) 2 An.W.R. 573 (F.B.).

Fees on sale of cattle is tax—Procedure for impost of fees not applicable—Levy of fees is illegal—Right to collect fees transferred—Agreement is illegal and cannot be enforced—Return of benefit—No specific plea—Effect—Benefit received under illegal impost—Party is not estopped: 1963 M.P.L.J. 261: A.I.R. 1963 Madh. Pra. 240.

Provisional assessment to duty—Effect: (1957) 2 An.W.R. 207: A.I.R. 1958 Andh. Pra. 122.

52. No estoppel against recovery of excess duty or price paid.—Where excise duty is voluntarily paid in excess by mistake of law and such excise duty is collected by the State without any authority of law, *held*, it is the duty of the State to refund the tax. The plea of estoppel does not apply to duty or tax which is collected without the authority of law. The excess amount of duty is, thus, required to be refunded: (1987) 3 Bom.C.R. 231; (1977) 1 Cut.W.R. 440 (D.B.).

Where the price of levy rice paid in the crop year 1975-76 under the A.P. Rice Procurement (Ex-Mill) Prices Order, 1975 to the rice millers was by notification extended to the next crop year and it was found that the extension order was invalid for contravention of S. 3 (3-B) and (5-A) of the Essential Commodities Act, 1955 and the Government sought to recover the excess price so paid in the crop years 1976-77, *held*, since the excess price paid was clearly the result of a mistake of law, the rice millers could not invoke the rule of estoppel to resist recovery of the excess price: A.I.R. 1981 Andh. Pra. 350: (1981) 2 An.W.R. 228: (1981) 2 An.L.T. 359 (D.B.).

53. Estoppel in land acquisition matters.—Petitioner who has made application for reference claiming increased

compensation cannot be permitted to challenge acquisition of land itself: A.I.R. 1967 Mad. 118.

Who can apply—Right to challenge proceedings under the Land Acquisition Act—Acceptance of award no bar to obtain relief under Art. 226: (1962-63) 67 Cal.W.N. 647.

Where petitioner-land owners accepted compensation on account of land acquisition without protest but later on they claimed higher compensation and the competent authority pleaded estoppel, *held*, as the objector raised protest within three months of the payment and subsequently carried on the objection in the appropriate forum without any delay, no question of estoppel arose: A.I.R. 1976 Ori. 118: (1976) 42 Cut.L.T. 17: (1975) 2 Cut.W.R. 899 (D.B.).

Where a landowner in response to a notice under S. 9(3) of the Land Acquisition Act, 1894 had preferred claim for compensation, and dissatisfied with the quantum of compensation sought a reference and got the compensation enhanced in the reference under S. 18 of that Act, and preferred no appeal against it because of his full satisfaction with the enhanced compensation, *held*, the landowner was estopped from questioning the award on the ground that the notice under S. 9(3) of the Act being short of 15 days, the award was illegal and void; the estoppel would operate against him even if the 15 days' notice under S. 15 is mandatory: A.I.R. 1982 P.&H. 294: 1981 Punj.L.J. 577 (D.B.).

Where the claimants participated in the acquisition proceedings, filed objections and preferred claim for payment and enhancement of compensation but did not challenge the legality of the notifications by which acquisition was made, before making the award, *held*, he could not, subsequently, be permitted to question the validity of said notifications: A.I.R. 1995 Del. 102 (D.B.).

Where a claimant of compensation for land acquisition by his representations including indemnity bonds and unilateral agreements in the acquisition proceedings clearly stated that the amount of compensation agreed to by him included statutory 15 per cent and it was on that basis that he was allowed to withdraw the amount allowed, *held*, even if there was no agreement between him and the authorities as contemplated under Art. 299 of the Constitution of India, he was nevertheless estopped to contend to the contrary after having obtained the benefit under the agreement. [A.I.R. 1954 S.C. 82, Foll.]: A.I.R. 1973 Cal. 325 (D.B.).

Acquisition of excess property—Both owner and Collector waiving illegality of Collector—Acquiescing in acquisition—State estopped from saying that claimant would not be entitled to compensation as prescribed under the Land Acquisition Act: 1979 All.L.J. 1072.

Where an *assamidar's* (a mere landholder as distinct from a landower's) land was acquired in the nineteenth century which as per the customary law then prevailed extinguished the *assamidar's* right over the land (by remission of land revenue and payment of compensation for standing crops) which vested in the Maharaja, *held*, no proceedings for acquisition of that land over 60 years thereafter could be initiated under the J.&K. Land Acquisition Act; the proceedings as well as the award of compensation are a nullity: A.I.R. 1980 S.C. 1349.

Where the respondents-claimants under the Land Acquisition Act, 1894, agreed to reduce the cost of acquisition if payment was made within specified time and they also agreed not to make any further claim regarding compensation, *held*, the claimants were estopped from claiming any interest on account of delay in payment of compensation: A.I.R. 1981 S.C. 969: 1981 U.J. (S.C.) 189: (1981) 2 S.C.C. 221.

Representation—Necessity for raising estoppel—Claim for enhancement of compensation under S. 18, Land Acquisition Act—Claimant accepting portion of compensation pending final award as advance in pursuance of agreement—No representation as to total amount of compensation payable, made by claimant on which Land Acquisition Officer could be said to have acted believing the same to be true—*Held*, claimant was not estopped from claiming enhancement of compensation: (1969) 18 Law Rep. 467 (Mys.).

Where the petitioner, a rustic villager, accepted the compensation offered to him by the Land Acquisition Collector regarding his land which was acquired by the Officer and thereafter the petitioner sought a reference to the Court but his application was rejected on the ground that the petitioner had received the payment without protest, *held*, as there

was no evidence to establish that the Land Acquisition Collector had explained to him the consequences of his acceptance, if any, of the compensation without protest and there was also no evidence to establish that even otherwise he knew the implications of such acceptance and he still accepted the compensation without any protest. Therefore, the petitioner was not estopped from seeking a reference: 1988 Punj.L.J. 48: A.I.R. 1988 Him. Pra. 39 (D.B.).

Where land belonging to appellant trust was acquired pursuant to an agreement entered into between trust and authority under Land Acquisition Act under which the appellant waived its right to take any steps for claiming anything more than the amount stipulated in the agreement including the right to seek reference to the civil Court but subsequently appellant sought reference to civil Court, *held*, the right to claim enhanced compensation or for that matter the right to seek reference to the civil Court with a view to get the enhanced compensation is a right intended solely for the benefit of the landholder. There is no prohibition in law against waiving the said right. Further, as the amount as stipulated in the agreement was paid to the appellant and the respondents had acted as per the agreement, the appellant was estopped from making a claim contrary to the terms of the agreement and insist upon the enforcement of the rights that he had waived in law: A.I.R. 1992 Andh. Pra. 130: 1991 An.L.T. 598 (D.B.).

Where the Board of Trustees of a Devasthanam had claimed what the Board comprising of new Trustees considered low compensation for land acquisition without alleging *mala fides* against the previous Trustees, *held*, the Board being a continuing body irrespective of changes in its members is not entitled to claim enhanced compensation; no question of estoppel can therefore, arise; succeeding Trustees do not have an individuality of their own as Board members: (1978) 91 Mad.L.W. 151 (D.B.).

Where landowners sought to estop the Government from acquiring their lands on the ground of a Government promise embodied in its letter of not acquiring their fertile agricultural lands, *held*, there was no such promise; but even if the promise had been made, the doctrine of equitable estoppel is not attracted; acquisition of land being undoubtedly for public purpose unless shown to be fraudulent it must prevail over private interest: (1990-2) 10 Guj.L.H. 96 (D.B.).

Where upon quashing of a notification under S. 4 of the Land Acquisition Act, 1894 the proceedings for acquisition were revived under the Land Acquisition (Amendment and Validation) Act, 1967 and the Government had also issued a fresh notification for acquisition of the same land under S. 4 but the Government represented to the claimant that the compensation would be paid to him under the fresh proceedings whereupon he did not pursue his remedies under the earlier but revived proceedings, *held*, the Government was estopped from contending that the earlier proceedings were not abandoned or that it had no power to abandon them; the doctrine of promissory estoppel was attracted: A.I.R. 1971 Del. 170.

Once a part of the area notified under S. 4 of the Land Acquisition Act, 1894, is not included in the notification under S. 6, it cannot be said that the State Government is estopped from issuing a fresh notification in respect of the land which was initially released from acquisition. Thus, where State Government issued a notification under S. 4 of 1894 Act indicating its intention to acquire land of the petitioners but in the notification issued under S. 6 of said Act the petitioner's land was not included whereafter the petitioner sold said land and purchaser made construction thereupon and it was thereafter that the State Government issued fresh notification acquiring the said land also, *held*, merely because the petitioners had raised construction on the said land after its release, it could not be said that the State is estopped from acquiring that land subsequently, at the most, the State is bound to pay compensation for the structure also: 1994 Punj.L.J. 141.

Where a manufacturing company having taken a long term lease of land from private co-sharers to set up a factory and the land was acquired and its possession taken by the State under S. 17(1) of the Land Acquisition Act, 1894, *held*, it was not open to the State to refuse payment of compensation to the company on the ground that the land had already vested in the State under the W.B. Estates Acquisition Act, 1957; the State was equitably estopped: A.I.R. 1976 Cal. 389 (D.B.).

Where the Government acquired certain land for the benefit of a statutory body and the land-owners, not satisfied with the amount of compensation sought for a reference and got it enhanced in the reference Court as well as in the first appeal and in the second appeal before the Supreme Court, the statutory body contended that as the Court of reference as well as the first appellate Court had not issued notice to it, the order of enhancement was not correct, *held*, as there was material to infer that the statutory body had accepted and was satisfied with the award of the reference Court, though no notice was served on it in those proceedings, it was not open to it to assail the correctness of the enhancement made by the Court of Reference: A.I.R. 1991 S.C. 1320.

Act conferring jurisdiction—Reference by Land Acquisition Officer under S. 18, Land Acquisition Act incompetent—Land Acquisition Officer not estopped from contending that reference was invalid—Statutory objection to jurisdiction does not admit of waiver—Consent cannot give jurisdiction—Provision of S. 18 not for benefit of Land Acquisition Officer—Interpretation of statutes: (1964) 2 An. W.R. 225: A.I.R. 1965 Andh. Pra. 25.

Where on acquisition of a leasehold land the lessee accepted the Land Acquisition Officer's offer of its valuation which was enhanced on the lessor's reference under S. 18 of the Land Acquisition Act, 1894 after the award had been passed, *held*, the lessee, having accepted the offer and not seeking the reference, could not seek the lessee's share in the enhanced compensation; he had waived his right to do so by his conduct. [A.I.R. 1919 Cal. 524; A.I.R. 1960 Cal. 506, Foll.] : A.I.R. 1973 Cal. 288 (D.B.).

In a land acquisition proceeding, the owner of land received compensation for use of the minerals under his land by the Government for the construction of a bridge. It is no estoppel against the owner suing for declaration of his right to the remaining minerals after the completion of the bridge: I.L.R. 8 Pat. 742: A.I.R. 1930 Pat. 112.

Grounds of appeal—New point—Claim for compensation in respect of granite within patta land—Land Acquisition Officer proceeding on basis that there was grant of minerals—Same stand taken before District Judge—Plea that minerals did not pass with grant and that regarding onus of proof of that fact—Land Acquisition Officer not permitted to raise those pleas for first time in appeal: (1967) 1 Mys.L.J. 159.

Where the position of the defendant was altered to his prejudice as possession of his land was taken in 1894 by the plaintiff-Government on a positive promise of giving him suitable lands and to honour the undertaking given in 1894, the Collector acquired the lands treating the defendant to be the owner thereof, despite the fact that the plaintiff was in possession ever since 1894. *Held*, that in these circumstances the plaintiff was estopped from putting forward its ownership by adverse possession in order to deprive the defendant of the compensation paid to him: 1966 Kash.L.J. 8: A.I.R. 1966 J.&K. 45.

Owner not estopped from claiming just compensation under S. 8 of the Requisitioning and Acquisition of Immovable Property Act, 1952 merely because they have given low figure of annual rent for purposes of taxation. [A.I.R. 1961 S.C. 908; A.I.R. 1957 Punj. 265; (1965-66) 70 Cal.W.N. 363; A.I.R. 1967 S.C. 1030; A.I.R. 1967 S.C. 1032, Disting.]: A.I.R. 1970 Del. 232.

Where the plaintiff whose property was requisitioned under R. 75-A of the D.I Rules, but on the promise of the plaintiff not to demand any compensation for the period the property was in occupation of the Government after requisition, if the property is released and handed over to the plaintiff and the Government upon this promise derequisitioned the property, the plaintiff is subsequently estopped from demanding compensation: I.L.R. (1961) 2 Punj. 391: (1961) 63 Punj. L.R. 302: A.I.R. 1961 Punj. 314.

Displaced person with verified claim praying for cash compensation instead of adjustment of the value of property—Prayer rejected—Does not render such person ineligible for the transfer of acquired property in his name—Treating his application for cash compensation as a sort of estoppel would be taking a much too legalistic view of the matter: I.L.R. (1963) 2 Punj. 685: A.I.R. 1964 Punj. 87.

Since it is mandatory under S. 127 of the Maharashtra Regional and Town Planning Act, 1966 that non-acquisition by agreement with the owner or under statute or non-institution of acquisition proceedings of any land

reserved, allotted or designated for any purpose specified in a plan under that Act within 10 years of its finalisation and if within 6 months of the service of the owner's notice, no proceedings for acquisition are commenced, the reservation, allotment or designation shall lapse and the land would thereby stand released, *held*, whether such a notice served was valid or invalid is a mixed question of law; the Municipal Corporation had all the requisite particulars about the lands and their owners, etc., on its own record; it could not, therefore, ask the sender of the notice to furnish particulars of the land or his interest therein and in correspondence between the parties, the six months' time from the service of notice lapsed; it could not be contended that the owners had thereby waived off their rights under the notice; notice of acquisition issued after six months, *held*, is invalid: A.I.R. 1988 S.C. 233.

54. Estoppel in arbitration matters.—If the parties to the reference either, agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence. [A.I.R. 1956 Cal. 470; A.I.R. 1975 S.C. 230, Rel. on]: A.I.R. 1988 S.C. 2045.

It is the Court's duty to find out whether there exists an arbitration clause in an agreement or not, which has to be decided with reference to the parties' intention by reading the language of the clause and not on the basis that a party to the agreement by filing petition under Ss. 5, 12 and 20 of the Arbitration Act, 1940, had admitted the existence of the arbitration agreement; mere filing of such petition will not operate as an estoppel against the party: A.I.R. 1995 Del. 111.

Where a party to an arbitration clause providing for the appointment of an officer of the other party as the arbitrator had concurred to his appointment and had also appeared before him and taken part in the proceedings without raising any objection as to his authority or jurisdiction, *held*, that party is estopped from challenging his appointment on the ground of his being an officer of the other party; his appointment shall be deemed to have been valid and in order: A.I.R. 1994 Him. Pra. 153.

Where the Government as well as the contractor construed the arbitration clause as such and the Government named the arbitrator in terms of the clause to whose jurisdiction both of them submitted, *held*, notwithstanding the interpretation of the arbitration clause or the impact of A.I.R. 1980 S.C. 1522, the Government is estopped from abrogating the arbitrator's appointment or directing him to abstain from proceeding with the reference; the remedy of both the parties lies within the four corners of the Arbitration Act, 1940: A.I.R. 1986 Bom. 76: 1986 Mah.L.J. 401.

Where respondent appointed one of its officer as arbitrator in accordance with the agency agreement and the applicant agreed to it but later he raised the plea for appointment of another arbitrator in terms of S. 9(*b*) of the Arbitration Act, 1940, *held*, the applicant was estopped from challenging the appointment of arbitrator made in terms of the agency agreement: A.I.R. 1981 Mad. 367.

Estoppel — Reference to arbitrator — Counter-claim not determined by arbitrator—No separate references can be made: 1966 Cur. L.J. 76 (Punj.).

Where plaintiff filed an application to the Court for referring all disputes between it and the defendant to arbitration and though the defendant did not join in the application nor did he sign the same but he nevertheless participated in the arbitration proceedings, *held*, the defendant was estopped from challenging the legality of the reference: A.I.R. 1975 Cal. 227: (1974-75) 79 Cal.W.N. 349 (D.B.).

Where a party referred a specific question of law to the arbitrator for his decision and also participated in the proceedings, *held*, the party was estopped from contending that its making of reference to the arbitrator was without prejudice to its right to contend to the contrary: A.I.R. 1984 S.C. 1072: (1984) 2 S.C.C. 680; 1981 Jab.L.J. (Note) 3.

Where the conduct of the party indicates that he submitted to an adjudication of the dispute by a particular person appointed as arbitrator, he is estopped from challenging the competency of the arbitrator. [A.I.R. 1958 Cal. 415; A.I.R. 1961 Ori. 145; A.I.R. 1963 Cal. 456; A.I.R. 1968 Pat. 150; A.I.R. 1975 S.C. 230, Rel. on; A.I.R. 1955 S.C. 468; A.I.R. 1959 S.C. 1457; A.I.R. 1969 S.C. 488; A.I.R. 1974 S.C. 303, Disting.]: (1976) 1 Cut.W.R. 232.

Where the plaintiff, on its own accord, willingly accepted a clause regarding the reference of the dispute to a sole arbitrator, who is to be appointed by the defendant and who might even be an employee of the defendant company and thereby obtained the contract, *held*, the plaintiff was estopped from raising the plea regarding the validity of the clause and the appointment of employee of defendant company as arbitrator; and even otherwise the clause is not unconscionable or void or against public policy: A.I.R. 1992 Raj. 82.

Where the award of arbitrator was accepted by the parties and it was also acted upon in part but subsequently one of the parties filed a suit on same subject-matter, *held*, he was estopped from doing so. [A.I.R. 1961 S.C. 1077, Foll.]: A.I.R. 1974 P.&H. 133: (1974) 76 Punj.L.R. 244.

Where a party who had participated in the proceedings before the arbitrator contended that as the contract under the terms of which arbitration was sought was void therefore, the arbitration clause also failed and the other party pleaded estoppel, *held*, plea of estoppel could not be raised: A.I.R. 1984 N.O.C. 111: I.L.R. (1984) 1 Del. 378 (D.B.).

A party who has gone to arbitration under a contract which was void under some Act cannot plead that his opponent having taken part in arbitration proceedings cannot later repudiate the award as void. [A.I.R. 1953 Cal. 458 (S.B.); A.I.R. 1963 S.C. 90, Rel. on]: A.I.R. 1978 Cal. 119: (1976-77) 81 Cal.W.N. 1061.

Where a party participates in arbitration proceedings without protest and fully avails of it but finds the award to have gone against it, *held*, it is estopped by its conduct from impugning the arbitration proceedings as without jurisdiction or the reference as unilateral: A.I.R. 1989 J.&K. 14: 1989 Kash.L.J. 151 (D.B.).

Where both the parties submitted themselves to the jurisdiction of arbitrator and participated in the proceedings for a long time but thereafter respondent challenged the validity of order of appointment of arbitrator, *held*, long participation and acquiescence in the proceeding precluded such a party from contending that the proceedings were without jurisdiction. [A.I.R. 1956 Cal. 470, Approved; (1987) 1 Cal.L.J. 207, Reversed; A.I.R. 1975 S.C. 230; (1876) 3 Ind. App. 209, Rel. on]: A.I.R. 1988 S.C. 205: (1987) 4 S.C.C. 217: (1987) 2 U.J. (S.C.) 445.

Where the parties had participated in arbitration proceedings and also jointly applied for extension of time without raising any objection to the arbitrator's jurisdiction on earlier occasions, *held*, objection to the arbitrator's jurisdiction could not be allowed to be raised for the first time in appeal. [A.I.R. 1961 Ori. 143; A.I.R. 1968 Pat. 150 (F.B.), Rel. on]: A.I.R. 1981 Ori. 166: (1981) 52 Cut. L.T. 63.

Parties agreeing to refer dispute to seven named arbitrators—Only five arbitrators taking part in proceedings and signing the award—*Held*, as party had taken part in proceedings before five arbitrators, he was estopped from challenging validity of award on ground that all arbitrators had not taken part in the proceedings: 1968 Pat.L.J.R. 218.

Where the original agreement did not provide for filling up the vacancy of the arbitrator contemplated under S. 8(1) of the Arbitration Act, 1940 but subsequently by their conduct they consented to the filling up of the vacancy, its recall and appointment of another arbitrator by the Court, *held*, the parties were estopped from assailing the appointment of the arbitrator as without jurisdiction; for they had by subsequent conduct, expressed their fresh intention to provide for the filling up of the vacancy by the Court in the original agreement: A.I.R. 1990 Ori. 116 (D.B.).

Where an agreement provided that all disputes and differences arising between the parties shall be referred only to the sole arbitration of the appointee of one of the parties and if for any reason that was not possible, the matter would not be referred to arbitration at all, *held*, it was clear that even on the concerned party's failure to appoint the arbitrator, the Court had no authority to fill up the vacancy; an arbitrator appointed by Court would have no jurisdiction; a mere appearance before the Court-appointed arbitrator could not estop the concerned party from challenging the award: A.I.R. 1987 Ker. 231: I.L.R. (1987) 2 Ker. 321 (D.B.).

Consent of parties to refer dispute as to title of certain properties to arbitrator—Award accepted by parties—Consolidation officer passing an order on the basis of such award—Order operates as estoppel in

subsequent litigations between parties: 1968 All.L.J. 123: 1968 All. W.R. (H.C.) 350.

A party applying under S. 33 of the Arbitration Act is not estopped by its conduct in appearing before the arbitrators and in taking part in the proceedings before them from questioning the validity of its award: A.I.R. 1962 S.C. 1910: (1963) 3 S.C.R. 183. *See* also I.L.R. (1961) Cut. 278 ; A.I.R. 1961 S.C. 143; A.I.R. 1966 J.&K. 1.

Acquiescence—Party to arbitration asking arbitrators to decide upon implied term in contract—Other party not objecting—Effect—Decision on point given—Subsequent objection to award—Estoppel: (1959-60) 64 Cal.W.N. 616: A.I.R. 1960 Cal. 702.

Omission to object—Arbitration—Clause for reference in voidable contract—Contract treated as valid and reference and award made—Subsequent avoidance of contract—Estoppel: 148 I.C. 372: A.I.R. 1933 Sind 207.

There can be no acquiescence in arbitration proceedings which are clearly beyond the Court's order of reference. A party is not precluded from objecting to the award later, on the ground that the award was in excess of jurisdiction and the entire proceedings were invalidated thereby. Attending and taking part in the proceedings will not cure the defect where the arbitrator lacks inherent jurisdiction. [A.I.R. 1977 S.C. 2014, Foll.]: A.I.R. 1982 Del. 44.

An arbitration agreement under S. 2 (*a*) of the Arbitration Act, 1940 must be in writing; in the absence of that *sine qua non*, the arbitrator would have no initial jurisdiction; it cannot be cured by a party's oral acquiescence or admission of liability before the arbitrator; such a party is not estopped from impugning the existence of the arbitration proceedings. [A.I.R. 1925 Sind 144; A.I.R. 1962 S.C. 1810, Rel. on]: A.I.R. 1982 Bom. 72: (1981) 83 Bom.L.R. 307.

Where a reference was made unilaterally by the plaintiff to an arbitrator which is wholly illegal and confers no jurisdiction on the arbitrator, *held*, merely because the defendant had appeared before the arbitrator at the earlier stages and filed objections against the plaintiff's claim would not operate as estoppel against the defendant; the defendant could raise objection to the arbitrator's jurisdiction even at the stage of revision. [A.I.R. 1963 All. 242; A.I.R. 1931 All. 35 (F.B.); A.I.R. 1962 S.C. 1810; A.I.R. 1963 S.C. 90; A.I.R. 1962 Punj. 412, Rel. on; A.I.R. 1954 All. 673; A.I.R 1966 S.C. 1652, Disting.] : A.I.R. 1973 All. 49.

Filing of arbitration agreement—Sufficient cause for not filing same—What is—Complete abrogation of arbitration agreement or competent reference under arbitration clause necessary—Invalid reference does not amount to waiver or estoppel—Government party to agreement—Art. 299 to be complied with in matter of alteration of agreement: A.I.R. 1962 Cal. 82.

Award under Arbitration Act made beyond time—Applicability of principle of estoppel, waiver or acquiescence: A.I.R. 1968 Pat. 150 (F.B.).

Where by the time the State had filed its appeal against the earlier impugned order within statutory time after obtaining its copy the second arbitrator had passed his award within the time granted by the trial Court, *held*, it could not in any way affect the State's statutory right to go in appeal under S. 39 of the Arbitration Act; there can be no estoppel against statute: A.I.R. 1990 Ker. 42: (1989) 1 Ker.L.T. 757 (D.B.).

The arbitrator has no jurisdiction to make an award after the fixed time. As the award made beyond the time is invalid, the parties are not estopped by their conduct from challenging the award on the ground that it was made beyond time merely because of their having participated in the proceedings before the arbitrator after the expiry of the prescribed period: A.I.R. 1985 S.C. 920: (1985) 2 S.C.C. 629.

Condition as to time—Waiver—Party taking part in arbitration proceedings after expiry of four months—Principles of waiver and estoppel apply: I.L.R. (1964) Cut. 685: A.I.R. 1965 Ori. 17.

Where a party to arbitration proceedings continued to participate therein even after the expiration of 4 months and it was only after receiving the award which it found to be not to its liking that it raised the objection that the four months time having been passed, the arbitrators could not proceed and give the award, *held*, the objecting party had waived its right by its conduct; it was estopped from impugning the award on that score: A.I.R. 1974 All. 296.

A party willingly participating in arbitration proceedings held after the expiration of the statutory period of 4 months is estopped

from later on objecting to the award as having been given beyond that period; but the party's mere presence when no steps are taken by the arbitrator of the aggrieved party in the arbitration proceedings cannot be taken to be a willing participant: A.I.R. 1971 Pat. 37: 1970 B.L.J.R. 400 (D.B.).

Where though the stipulated period for making an award expired, the petitioner without any objection continued to participate in the proceedings before the arbitrator, *held*, it must be presumed that the petitioner by his conduct acquiesced in the proceedings before the arbitrator and he, therefore, could not challenge the validity of award later on: A.I.R. 1977 Raj. 233: 1977 Raj.L.W. 136: 1977 W.L.N. 84.

Where in proceedings under S. 20 of the Arbitration Act, 1940 the parties had agreed to refer their disputes to the Managing Director of one of the parties who entered upon the reference and continued to hold arbitration proceedings even after his retirement and the parties also mutually agreed to extend the time for a further period of four months for making the award, *held*, the parties had acquiesced in his continuing with the arbitration proceedings; they were estopped from challenging his jurisdiction. [A.I.R. 1986 P.&H. 376, Dissent. from]: A.I.R. 1987 Del. 317; A.I.R. 1989 Del. 270: (1989) 37 Del.L.T. 345: 1989 Rajdhani L.R. 139.

Proceedings under U.P. Co-operative Societies Act before arbitrator—Registrar enlarging time for proceeding for two years without raising plea as to legality of extension of time before the arbitrator or appellate authority—Party is estopped from questioning the award of arbitrator: 1979 All.L.J 1197.

Dispute between Co-operative Society and its member referred to arbitration under Society's bye-law—Bye-law making award final and not open to appeal—Society cannot challenge validity of bye-law and claim right of appeal: (1937) 39 Punj.L.R. 460: A.I.R. 1937 Lah. 673.

Where an award for Rs. 1,15,164.13, impugned in appeal to the association, was reduced to Rs. 37,500.00 and interest and the full amount due was sent and received in full settlement by the claimant, *held*, the claimant is estopped from challenging the award. [Appeal No. 32 of 1952, D/-28-8-1952 (Bom.); 1940 A.C. 412 and (1926) 1 K.B. 348, Rel. on]: A.I.R. 1982 Bom. 76.

Where arbitration proceedings between the parties were in progress and the respondent wanted inspection of the documents without prejudice to his rights and contentions and immediately on inspection of the documents filed his suit for a declaration that there was no valid contract between the parties and the appellant contended that the petitioner having participated in the arbitration was estopped from contending that there was no valid arbitration agreement, *held*, the respondent did not file any counter-statement of fact and only asked for inspection of the relevant documents and that too "without prejudice" and, thus, no question of estoppel arose: A.I.R. 1991 Cal. 350: (1991) 2 Cal.L.T. 164 (D.B.).

Under the terms of the contract between the plaintiff and the defendants even if the defendants refused to get the matter settled by arbitration, it was open to the plaintiff to have a sole arbitrator appointed and the decisions of that arbitrator would be final and would be binding upon the parties. In the present case the defendants in their reply to the notice given by the plaintiff regarding a reference to arbitration did not in terms refuse arbitration. What they said was that the plaintiff had no cause of action against the defendants which he could take, either in a Court of law or before an arbitrator. In the suit filed by the plaintiff one of the defendants applied for a stay of suit under S. 34, Arbitration Act, whereupon the plaintiff contended that the defendants were estopped from applying. *Held*, that the defendants were not estopped from asking the Court to grant the relief under S. 34 of the Arbitration Act: A.I.R. 1958 All. 522.

Once a party to the arbitration agreement waives his right to enforce that agreement and takes part in proceedings in suit relating to the matter in dispute between them, it is not open for him to otherwise approach and move a Court for reference to arbitrator. Thus, where the applicants first moved the Court in the pending civil suit for stay of the suit under S. 34 of the Arbitration Act but they withdrew that application and thus consciously abandoned their right to obtain an order staying the suit and, therefore, allowed the suit to continue despite the agreement to get their disputes settled by arbitrator, *held*, by withdrawing the application under S. 34 filed in the civil suit and having participated in further proceedings in the suit, the

applicants had waived their right to get the dispute resolved by arbitrator. [A.I.R. 1957 All. 91, Foll.]: A.I.R. 1991 Madh. Pra. 309: 1991 Jab.L.J. 498.

Application to file award in Revenue Court—Respondent contending that Revenue Court has no jurisdiction—Revenue Court holding that it has no jurisdiction and returning application—Application in civil Court to file award—Respondent is not estopped from pleading that civil Court has no jurisdiction to file award—Arbitration Act, (1940), Ss. 14, 31: A.I.R. 1962 Him. Pra. 10.

Jurisdiction of arbitrator—Failure to object at early stage creates estoppel: A.I.R. 1965 Cal. 42.

Where the two arbitrators appointed by the Electricity Board and the contractor did not give the award within the specified time and though the umpire empowered as per R. 4 in the First Schedule to the Arbitration Act, 1940 to enter upon the reference was reluctant to do so without Court orders as the parties had already moved the Court for extension of time and the Court, on the parties consent, relieved the two arbitrators who themselves were willing to be relieved and the contractor had expressed his lack of confidence in them, and appointed the umpire a sole arbitrator, and he passed the award after hearing both the parties, *held*, the award could not be impugned as without jurisdiction; having consented to his appointment, submitted to his authority and participated in the proceedings held by him, they were estopped from challenging his jurisdiction; at any rate, it could not be contended that the consent order of the Court had deprived him of his statutory jurisdiction under the aforesaid R. 4: A.I.R. 1975 S.C. 230: (1975) 1 S.C.C. 289.

Appointment of umpire—Defect in—Acquiescence—Estoppel against raising objection to such appointment as invalidating subsequent proceedings. *See* A.I.R. 1955 Punj. 240.

Where the petitioners had consented not only to the presence of the umpire but also to his participation in the arbitration proceedings and it was with their consent that the proceedings had gone ahead and at no stage had they complained against the umpire's conduct either in or with respect to the said proceedings, *held*, having, thus, allowed both the arbitrators and the umpire to act without a word of protest, they could not thereafter complain against the agreed procedure when the award had gone against them [A.I.R. 1988 S.C. 205; A.I.R. 1988 S.C. 2045, Rel. on]: A.I.R. 1990 Bom. 276: (1989) 2 Bom.C.R. 332 (D.B.).

Where though a clause in the agreement provided that before entering into reference the two arbitrators shall nominate an umpire but the arbitrators entered into the reference without first appointing an umpire and one of the parties continued to participate in the arbitration proceedings without raising such an objection and it was only when the award was unfavourable that it raised the technical objection of the prior non-appointment of the umpire as a ground to set aside the award, *held*, having waived his right by conduct to raise the objection, the objector was estopped from raising the same: A.I.R. 1977 Guj. 183: (1977) 18 Guj.L.R. 342 (D.B.).

55. Estoppel in recruitment/appointment matters.—Pre-recruitment formalities such as medical examination, direction to deposit security, etc., do not amount to a promise to appoint a candidate. Mere expectancy of being taken in service or the pre-recruitment formalities being gone through does not necessarily create a promise which the employer would be estopped from ignoring or refusing to act upon. It is true that in public service, a candidate who is otherwise fit, able, and appropriate person for appointment, cannot be ignored on any extraneous consideration, but at the same time every applicant or every person who is being considered for appointment cannot claim that he or she is, as a matter of right, entitled to be appointed on the post for which he or she is a candidate just because he or she has gone through some pre-recruitment formalities. It is upto the employer to keep the question of suitability of the would-be employee open up to the last moment before the appointment. A candidate may be dropped from being considered for being appointed on the ground of unsuitability at any stage before appointment: (1984) 2 L.L.J. 375 (P.&H.); (1984-1) 25 Guj.L.R. 383. *See* also 1992 Lab.I.C. 1539 (Cal.).

Where the petitioner who was shown as having first rank in the list of selected candidates was advised for appointment by the Service Commission but the advice memo specifically provided that any advice made by Commission was liable to cancellation if it

was subsequently found to be mistaken and thereafter Commission issued a memo to the petitioner whereunder it was stated that she infact ranked second in selected list but was shown as having first rank by mistake and, therefore, advice of her name for recruitment was wrong, and thus, said advice was cancelled, *held*, petitioner knew that her advice was subject to cancellation if it was found to be mistaken later. Being so, and since the advice by the Commission was subject to this condition, petitioner could not take advantage of the advice, without the burden of the condition and contend that her advice and appointment should remain despite the mistake committed by the Commission. No question of promissory estoppel arose, when the petitioner had been told and she had understood the possibility of cancellation of the advice when advice memo was issued to her: (1993) 1 Ker.L.J. 632.

Where the petitioner, who was taken in service on the implied promise that he would be absorbed permanently and was never told that his appointment was subject to the approval of the Public Service Commission, applied to the Commission in compliance with the orders of his superiors, and was not selected by it, the petitioner did not relinquish or waive all his rights, if any, and accept the position that his service was purely temporary. He was, therefore, not estopped from asserting his previous rights, if any: A.I.R. 1958 Tripura 28.

The authority cannot take a different stand when the appointment was offered to an individual subject to verification of antecedents and the verification when favourable to that individual: (1991) 1 Cal.H.N. 104.

Where the petitioner was selected for the post of part time lecturer applications for which were invited in 1980 but the University enforcing for the first time resolution of 1972 and U.G.C. Guidelines, 1978 withdrew selection of the petitioner, *held*, University was estopped from enforcing resolution and guideline after the selection of the petitioner. [A.I.R. 1968 S.C. 718; A.I.R. 1971 S.C. 1021; A.I.R. 1976 S.C. 376, Rel. on]: (1981) 1 Serv.L.J. 482: A.I.R. 1981 N.O.C. 116 (Ori.) (D.B.).

Where the petitioners after a successful written test and interview were put on the selected panel for the post of Junior Electrical Engineers but as vacancies were less they could not be appointed on that post and instead they were offered a lower job which was duly accepted by the petitioners with a specific undertaking that they would not claim for the post for which they had qualified earlier, *held*, such undertaking could not estop the petitioners from being considered for the future vacancies of Junior Electrical Engineers: A.I.R. 1992 S.C. 1348.

Where *gram sewaks* under the Rules of their appointment were required to appear for a qualifying written test before they could be called for interview for selection, *held*, the selection list prepared without the qualifying written test, even if there were no separate marks assigned for it, was illegal; there is no estoppel against statute: A.I.R. 1982 Guj. 183: (1982-2) 23 Guj.L.R. 22.

Recruitment of Forest Guard—Petitioner over 25 years of age on date of passing selection test appointed to post—Petitioner being backward class candidate and no other suitable candidate within age limit being available, as several candidates failed—*Held*, appointing authority should be deemed to have relaxed age limit in petitioner's favour—Government on principle of promissory estoppel is barred from terminating his services on ground of his being over-aged on date of appointment: 1985 Lab.I.C. 1355 (Guj.).

Negligence of Government in matter of appointing petitioner—Discharge of petitioner—Petitioner becoming over-age at time of discharge—Estoppel—Discharge held illegal: (1965) 2 An. W.R. 437: A.I.R. 1966 Andh. Pra. 59.

Where the State Government abruptly changed the selection criteria but even then the petitioner-candidate appeared in the qualifying examination and subjected herself to the selection process but subsequently she challenged said criteria on the ground that it was violative of Art. 14 of the Constitution and the State pleaded estoppel, *held*, merely because the petitioner subjected herself to the selection process, it did not mean that she was debarred from challenging the legality of the same. Moreover, if any process, criteria or rule offends ones constitutional rights, he cannot be prevented from challenging the same: A.I.R. 1994 N.O.C. 313 (J.&K.).

Where the appellant knew all the relevant facts and neither before the interview nor at

the time of the interview he raised any objection against the constitution of the Selection Committee and he voluntarily appeared before the Committee but when he was not selected he challenged the constitution of the Committee, *held*, he was estopped from questioning the constitution of the Selection Committee. [A.I.R. 1957 S.C. 425, Rel. on]: A.I.R. 1976 S.C. 2428: 1976 U.J. (S.C.) 701: (1976) 3 S.C.C. 585.

Where the petitioner had appeared before the *Ad hoc* Managing Committee as a candidate for the post of the Head Master of the School and seconded the election of respondents as Secretary and President, respectively, *held*, it was not open to him to say that the said Managing Committee was not duly constituted; he was estopped from making such assertion: A.I.R. 1976 Pat. 58 (D.B.).

A person who acquiesced in Rr. 4 and 5 of the Karnataka General Services (Revenue Subordinate Branch) Village Accountants (Recruitment) Rules, 1970 by applying for the post, twice appearing before the Recruitment Committee for interview and taking a chance of being selected, *held*, is estopped from impugning the validity of the Rules by way of a writ petition: A.I.R. 1978 S.C. 28.

Simply because the petitioner came to be regarded as a member of the Scheduled Tribe when he was first appointed in the railway service and continued to be regarded as such till the deletion of his name from the panel selected for promotion on detecting an obvious mistake in treating him as such, that cannot create an estoppel against the Railway Authorities if subsequently, it is found that the petitioner could not be regarded as a member of the Scheduled Tribes. It is a matter of status granted by the President's Order as such and such a status cannot be created by any admission or acquiescence on the part of the Authorities, however wrong or erroneous that might be: 1974 Lab.I.C. 141 (D.B.). *See* also 1985 Lab.I.C. 1481 (Bom.).

Manager of educational agency overlooking respondent's claim to reappointment under R. 5 of Kerala Education Rules, 1959, while making appointment an Educational Officer approving it—Respondent not estopped from putting forward such right in future proceedings in absence of some positive action on his part giving rise to bar of estoppel: I.L.R. (1970) 2 Ker. 24.

Where the notice inviting applications for appointment as a Gynaecologist contained no promise for allowing private practice outside the Hospital and it was only the Director of the Hospital who is claimed to have said so and the Board confirmed it in the interview, *held*, it could not amount to an assurance on behalf of the body corporate; the Director and the Board had no power under the Rules to give such an assurance; thus, where on taking over the Hospital, the Government abolished private practice in lieu of non-practising allowance, it did so in public interest; the rule of estoppel was not invoked: 1980 Lab.I.C. 1140.

R. 8(3) of the Central Health Service Rules, 1963 as amended in 1966 provides for filling in posts of supergrade II by promotion as well as by direct recruitment in the ratio of 1:1 and it could not be gainsaid that whenever an unspecified specialists' post is converted into a specified post assigned to a speciality it can be filled by promotion or direct recruitment as aforesaid, *held*, merely because the Government had understood and acted that it could be filled up only by promotion as admitted in the Government's affidavit, the Government was not estopped from acting on and implementing R. 8(3) in its true construction. [(1971) 2 Serv.L.R. 111 (Del.); A.I.R. 1975 S.C. 2164, Rel. on]: A.I.R. 1980 S.C. 1255: (1980) 3 S.C.C. 29.

Where a Nationalised Bank gave concession, in the matter of appointment to posts of clerks, to the children of its employees in respect of qualifications, etc., *held*, the Bank is not estopped from withdrawing said concession: 1982 Lab.I.C. 1571: (1981-82) 86 Cal.W.N. 823: (1982) 2 L.L.J. 177: (1982) 2 Serv.L.J. 418.

Applications called for by Reserve Bank of India from every citizen of India for Class III posts in Branch at Bangalore—*Held*, Bank is not estopped from selecting candidates passing from a particular University. [A.I.R. 1958 S.C. 538, Rel. on]: 1977 Lab.I.C. 773: (1976) 1 Kam.L.J. 391: (1976) 2 Serv.L.R. 215: (1977) 1 L.L.J. 121.

56. Estoppel in service matters.—Rules requiring particular educational qualification for a post has to be applied while recruiting and not when a person has been made permanent after treating him as qualified for the post—Principle of equitable estoppel is applicable in such a case: (1979) 1 M.L.J. 221: (1979) 1 Serv.L.R. 818.

Where a municipal overseer appointed on a temporary post on its conversion to a permanent post was appointed on that post with the requisite approval of the State Government and four years thereafter in his annual report by competent authority he was found to be qualified under the rules to hold the post, *held*, he could not be terminated after another four years for not possessing the requisite qualification, when persons of his qualifications were serving the State Government in similar or higher posts; at the time of appointment he was 25 years old and could get, if not given the job, another job but not at the age of 34 years. Though estoppel, it is well settled, is a rule of evidence which can be invoked in certain circumstances and it does not create a substantive right nor confers a cause of action, it is capable of being viewed as a substantive rule of law in so far as it helps to create or defeat a right: A.I.R. 1973 Ori. 186 (D.B.).

Where a Field Surveyor on promotion after 20 years' service as a Deputy Surveyor was found not to possess the requisite minimum educational qualifications for initial appointment under R. 12 of the General Rules for State and Subordinate Service was reverted but allowed to continue as a Field Surveyor, *held*, as the Rules allowed relaxation of qualifications, there was no absolute prohibition to his employment; his initial appointment was not *ultra vires*; the authorities because of their inaction or silence for long years after his induction in service were estopped from reverting him for lack of qualifications; however, in case of absolute prohibition in the Rules against appointment for want of the minimum qualifications, the rule of estoppel would not be attracted: (1973) 2 M.L.J. 181: (1973) 86 Mad.L.W. 483.

Where a lower division clerk applied for sitting in the examination for appointment as an accounts clerk and for promotion as an accountant without any mis-statement in his applications which were accompanied by copies of the diploma and certificates issued to him and he had succeeded in both the examinations and was duly posted and promoted but on discovering several years thereafter that it had mistakenly taken the diploma as a degree, the Electricity Board reverted him which would naturally be to the post of a lower devision clerk resulting in his loss of seniority and his passing the examinations all over again as diploma holders were qualified to appear after 5 years of service; he would, thus, suffer an irreparable loss for no fault on his part; the Board was estopped from reverting him: (1990) 1 Raj.L.R. 181 (Raj.).

Where petitioner, after being appointed as *ad hoc* lecturer, continued as that for a period of seven years whereafter his request for regularisation was rejected on the ground that he did not posses the minimum requisite qualification for appointment as a lecturer in English on the date of appointment, *held*, the authorities expected to have acted in accordance with law, must have scrutinised all the application forms and the requisite qualification and if there was *lacuna*, the authorities acquiesced to it and appointed petitioner as a lecturer. The principle of promissory estoppel would apply and authorities were estopped from raising an objection on that point after seven years: 1992 All.L.J. 1258: 1992 Lab.I.C. 2446.

Though the provisions of the Apprentices Act, 1961 and the Apprenticeship Rules, 1991 show that the apprentices are paid stipend, imparted rather exhaustive and elaborate training, subjected to conduct and discipline applicable to the employees of the corresponding category in the training establishment, and treated as akin to other employees in the matter of accidents, leave and hours of work, yet S. 22 of the Apprentices Act does not contemplate making of it obligatory on the employer to offer employment to the trainees at the completion of the apprenticeship unless there is a condition to the contrary in the apprenticeship contract; no promise of employment can, thus, be read in the Government's Circular dated 21 December, 1977 as also in the Memo, dated 21 September, 1977, of Directorate of Training and Employment; they merely state that full efforts should be made to provide employment to the trainees; not being a clear and unequivocal promise to give employment, it does not provide any base for promissory estoppel; but the nation which has spent time, money and energy would be well recompensed—and the legislative object would also be served—if the trained apprentices are given preference to non-trained direct candidates: A.I.R. 1995 S.C. 1115.

It is not permissible to antedate the appointment of an employee by ten years and stepping up his seniority by the same period merely because he had been wrongly held earlier to be lacking in the requisite educational qualification which he had then in fact possessed: 1993 Supp. (2) S.C.C. 262: 1993 S.C.C. (L.&S.) 436: (1993) 24 A.T.C. 255.

Where the appellant was appointed as a clerk in the Punjab Public Service Commission though she did not possess minimum qualification for that post and later on was promoted as assistant and as the appellant did not possess the requisite qualification as

required under Regn. 7 of the Punjab Public Service Commission (State Service Class III) Regulations, 1967, the Commission recommended to the Government that the qualification required under Regn. 7 of the Regulations might be relaxed in the case of the appellant but the Government declined to accede to the request, *held*, as the initial appointment was against Regn. 7, no question of estoppel could ever arise: A.I.R. 1995 S.C. 277.

Where an Assistant Professor's claim of possessing a B.Sc. (Hons.) degree was found after his promotion from the post of Senior Instructor on a purely temporary basis to be incorrect, *held*, the State was not estopped from reverting him to his original post; it was not the State but the employee himself who had made the representation; the employee had not acted to his detriment but had actually obtained a benefit; he must have, besides, known that the degree he possessed was not a B.Sc. (Hons.) degree; the State owed a public duty that the post of Assistant Professor was occupied by a properly qualified incumbent: (1978) 1 M.L.J. 517 (D.B.). *See* also (1987) 2 Cal.L.J. 47 [Where the fact in issue is whether or not a candidate had B.Ed. degree and the State omits to file counter-affidavit challenging the assertion of that candidate that he had such degree, *held*, the State is estopped from challenging it further.]

Where the State Government in a petition regarding constitutional validity of the A.P. Abolition of Posts of Part-time Village Officers Ordinance, 1984 assured the Supreme Court that all erstwhile Village Officers possessing the minimum general qualification as required under the Abolition Act and irrespective of their age would be appointed to the new posts if found suitable but thereafter the Government amended the *Ad hoc* Rules and prescribed a maximum age limit for the absorption of erstwhile Village Officers as Village Assistants in breach of undertaking given to the Supreme Court, *held*, the Government could not be allowed to get round the undertaking given to the Supreme Court by purporting to prescribe a maximum age limit which would have the effect of eliminating the majority of the erstwhile Village Officers: A.I.R. 1987 S.C. 1467: (1987) 3 S.C.C. 5: (1987) 1 U.J. (S.C.) 711.

Confirmation only after passing examination—Confirmed packer officiating as clerk but not passing confirmation examination—His reversion unquestionable: 1982 Lab.I.C. (N.O.C.) 15 (All.).

Petitioners were promoted on purely *ad-hoc* basis to officiate as Assistants Grade I in accordance with quota rule—After availing the benefit, petitioner challenged the quota rule in the writ petition—Petitioners are not estopped from challenging the same: (1983) 2 Serv.L.J. 462.

Appointment to post in quasi-permanent capacity—Reduction in post—Temporary appointment to another post—Allegation of violation of constitutional guarantee under Art. 311(2) of the Constitution—Estoppel. *See* A.I.R. 1958 S.C. 419.

Seniority list—Preparation of—List prepared without following R. 7 of Goa Government (Seniority) Rule (1967)—Fresh list according to R. 7—Preparation of subsequent list valid—Government not estopped from making a fresh list in accordance with Seniority Rules: 1984 Lab.I.C. 328: 1983 Mah. L.J. 593.

Employee of State Road Transport Corporation—Right to seniority and promotion—Cannot be whittled away by any law or contract forced upon him—Transfer on request of employee with allowance to protect seniority—Corporation is bound by it on principle of estoppel: (1979) 2 An.W.R. 338.

Where the petitioners who were diploma holders in Engineering were promoted from Class III to Class II service but further avenues of promotion were barred because the State Government constructed the relevant Service Rules to mean that without a degree in Engineering, a Class II officer could not be promoted to Class I service but the Supreme Court in case of some other employees disapproved the said interpretation of the Rules and relying upon that judgment, the petitioners sought promotional benefits from back dates, *held*, as the petitioners had acquiesced in the interpretation of the Rules by the State Government all along and it was only after the Supreme Court's decision that they chose to move the Court under Art. 32 of the Constitution to seek promotional benefits. Having remained complacent for a long number of years, the petitioner could not now turn round and say that notwithstanding their inaction, they should be granted promotion from deemed dates on the basis of seniority: A.I.R. 1989 S.C. 2082: 1989 Lab.I.C. 2001.

Employee consenting to receive a lower pay scale was not barred from claiming statutory scale: 1985 Lab.I.C. (N.O.C.) 18 (Del.).

After interpretations of Rr. 22 and 30 of U.P. Fundamental Rules in favour of certain

promoted head clerks, their salary was fixed at Rs. 150—Notification about their fixation of pay and recovery of excess amount paid—Writ petition by one such clerk—State Government agreeing with other such clerks not to recover the excess amount, if the writ petition was allowed — Writ petition was allowed and State's appeal therefrom was dismissed — It was not open to the State Government to recover the excess amount—Excess amount, if recovered, must be refunded: 1979 All.L.J. 1184 (D.B.).

Petitioner in permanent service of integrating State declared surplus to requirement by new Government—Subsequent absorption of petitioner in permanent service on condition that period of discontinuance could be treated as of leave without pay—Petitioner accepting offer—Petitioner taking full benefit under order of absorption if can subsequently claim salary for the period of discontinuance. *See* A.I.R. 1957 Madh. Bh. 100.

Where upon abolition of the temporary post of the State Vigilance Commissioner, its incumbent was terminated, *held*, the retention or abolition of posts is a matter of policy; that is a duty which the State has to perform in public interest; otherwise the State might be rendered helpless to assert its powers in Government; as a general rule, estoppel is not applied against the State in its Government, public or sovereign capacity except where it is necessary to prevent fraud or manifest injustice: A.I.R. 1973 S.C. 2641: (1973) 2 S.C.C. 650.

Absence of any evidence that the Railway ever induced the employee to occupy Railway quarters that he would not be charged any rent, the Railway is not estopped from recovering the rent of the quarter occupied by him: 1974 Lab.I.C. 604: 1974 Raj.L.W. 13.

Where an arbitration clause in the agreement of service of the plaintiff with the defendant-College stipulates the composition of the Arbitration Tribunal but a dispute between them is decided in favour of the plaintiff by a Tribunal with different composition and no objection is taken by the defendant as to the competency of that Tribunal to adjudicate, the defendant is estopped from challenging the jurisdiction of that Tribunal later: 1969 W.L.N. 177: 1969 Raj.L.W. 430.

A plea of estoppel is applicable where a party by his conduct led another party to act to his disadvantage or has gained advantage not due to him. Thus, where the petitioner, who was a lower division clerk, was declared surplus and when notice of termination of his service was served it was challenged as illegal and, therefore, without determining his service, he was deputed on temporary service to another department and he joined there but was declared surplus there also and his earlier department also refused to take back him whereupon he filed a writ petition, *held*, by joining the other department, the petitioner did not draw a higher salary. By obeying the order, he therefore, could not be said to have derived any advantage nor did he put the State to any disadvantage. Ordinarily, a State servant can be sent to another department on deputation. Here, the petitioner was being shifted from one wing to another in the same department of education, therefore, the main relief asked for by the petitioner could not be refused on the ground of estoppel: A.I.R. 1984 Pat. 61: 1984 Pat.L.J.R. 238.

Person asserting particular date as his date of birth—Cannot later on claim that his date of birth was wrongly recorded: 1983 Lab.I.C. 162: 1982 B.L.J.R. 490.

Where the date of birth given by the plaintiff at the time of his joining service was different than the one claimed thereafter and the difference was of thirteen years and the mistake was not clerical, *held*, the plaintiff was estopped from suing on the basis of second date of birth: A.I.R. 1985 N.O.C. 223 (P.&H.).

Servant with war service to his credit—Final decision of Government to grant full benefits to servant—Government cannot refuse to implement decision because it is wrong or because decision of High Court in respect of claims of other servants with war service to credit, is awaited: 1968 Serv.L.R. 503 (Punj.).

Where the State Government had on enquiry reduced the age of an Assistant Director by about 3 years which was quashed by the High Court and while seeking leave from the High Court to appeal to the Supreme Court, it was stated for the purpose of evaluating the jurisdictional value of the appeal that the incumbent would continue in employment till 58th year but upon dismissal of the appeal the State Government retired the incumbent on three months notice on completion of 55 years age, *held*, the rule of estoppel was not attracted; the State Government has obtained no advantage by its statement as its appeal was dismissed. [A.I.R. 1968 S.C. 718, Disting.]: A.I.R. 1971 Ori. 170: (1970) 1 Cut.W.R. 287 (D.B.).

Compulsory retirement — Payment of three months' pay in lieu of notice period

salary must be simultaneous—Employees receiving such pay afterwards—They are not estopped from challenging validity of order—There cannot be estoppel against statute: 1982 Lab.I.C. 1523: (1983) 1 Serv.L.J. 45 (Andh. Pra.).

Government servant exercising option to retire—Grant of superannuation leave—He cannot revoke option: A.I.R. 1970 Ori. 130 (D.B.).

Conditional voluntary retirement by Principal of School—Condition not accepted before proposed date of retirement—Principal getting cleared from Education Officer that his offer having not been accepted he can continue in service—Subsequently, Education Department cannot turn round and say that Principal was retired voluntarily: (1983) 2 Serv.L.J. 332: 1983 Lab.I.C. 1662 (Del.).

Employee of dispensary run by Zilla Parishad—Granted extension for 2 years on attaining age of superannuation—Dispensary taken over by State—Services of employee accepted by State till expiry of period of extension—Effect—*Held*, in circumstances, State was estopped from challenging legality of extension: 1982 Lab.I.C. 1893 (All.) (D.B.).

Where the adverse entries for several years contained in service record of the appellant were communicated to him with inordinate delay and his representation against said entries was rejected on the ground that it was barred by time and relying on those appellant was prematurely retired from his service, *held*, representation made by the appellant against said entries could not be rejected on the alleged ground of delay as the Government itself was guilty of inordinate delay in communicating the adverse remarks to the appellant: A.I.R. 1989 S.C. 2218.

Where in proceedings against dismissal of petitioner-employee, the Supreme Court with the consent of the State Government directed that pension would be paid by the State to the petitioner as due from the date when the impugned dismissal order was passed but the State Government disputed its liability to pay pension to the petitioner on the ground that no pension was payable to the petitioner in terms of Bihar Pension Rules, *held*, when the Court used the word "due", it clearly did not intend that the pension would be paid only if due according to the Bihar Pension Rules. Therefore, the State Government was liable to pay pension to the petitioner: A.I.R. 1983 S.C. 578: (1982) 2 S.C.C. 497: 1982 U.J. (S.C.) 592.

Exemption from holding inquiry and giving opportunity under Art. 311 (2)—Government not estopped from claiming such exemption even after inquiry. [A.I.R. 1961 S.C. 619, Disting.]: A.I.R. 1970 Cal. 384: (1968-69) 73 Cal.W.N. 627: 1970 Cr.L.J. 1225.

Where prayer of the employee to the employer after termination of his service for arrears and allowance for suspension period after termination was accepted, *held*, the employee was estopped by his conduct from claiming continuance of his service after termination: 1977 Lab.I.C. 1179: (1977) 2 Serv.L.R. 575 (Assam) (D.B.).

Merely because a bank employee drew pay and allowances offered to him by cheque together with the dismissal order, *held*, the employee is not thereby estopped from impugning his dismissal as contravening Arts. 14 and 16 of the Constitution of India; it could not be said that the bank had thereby suffered any prejudice: 1986 Raj.L.W. 349 (D.B.).

57. Estoppel in labour matters.—Suit for declaration that dismissal of employee from service is illegal—His plea that he is Government servant not disputed by defendant-Corporation—On the other hand defendant admitting that plaintiff was Government employee—It was not open to defendant to revise plea subsequently that plaintiff was workman: 1981 Lab.I.C. (N.O.C.) 171 (All.).

Where services of an employee were terminated but he was, subsequently, appointed afresh for one month, *held*, his working for one month in compliance with said order of fresh appointment did not create any estoppel against him and he was not estopped from challenging the earlier order terminating his services: (1989) 1 Raj.L.R. 644 (Raj.).

Where an employer dismissed a workman after a domestic enquiry and sought approval from the Industrial Tribunal under S. 33(2)(*b*) of the Industrial Disputes Act, 1947 wherein the workman, claiming to be a protected workman, impugned his dismissal as illegal for want of the Tribunal's prior

permission under S. 33(3) thereof, but the Tribunal dismissed his objection and approved his dismissal; meanwhile, upon his appeal under S. 41(2) of the T.N. Shops and Establishments Act, the Commissioner had set aside his dismissal which was impugned by the employer on the ground that the proper course for the workman was to move the Industrial Tribunal under S. 33-A of the Industrial Disputes Act for violation of S. 33 thereof and having chosen a wrong forum, he was precluded from challenging the order of dismissal before the Commissioner, *held*, having got the workman's claim of being a protected workman rejected by the Tribunal, the employer could not raise the plea of ouster of the Commissioner's jurisdiction; besides, he had also submitted to the Commissioner's jurisdiction without objection; he could not be allowed subsequently to raise objection to the Commissioner's jurisdiction: A.I.R. 1974 S.C. 1915.

Where by a settlement between the employer and its recognised union it was agreed that the field staff would be deemed to be workmen and treated as a single entity on all India level and it is only at the national level that they would raise any dispute or demand on their behalf with the result that no reference could be made to adjudication in case a demand is raised at regional level, *held*, the employer was thereby not estopped from contending in a dispute raised in terms of the settlement regarding the dismissal of two field staff personnel, that they were not workmen as defined under the Industrial Disputes Act, 1947 and, therefore, the Tribunal had no jurisdiction to determine the suit; there can be no estoppel against statute: A.I.R. 1984 S.C. 516: (1984) 1 S.C.C. 728: 1984 U.J. (S.C.) 281.

Principle of estoppel or waiver cannot be rigorously applied against workman during proceeding under S. 33-C(2) of the Industrial Disputes Act: 1969 Lab.I.C. 1424 (Pat.).

Where the dismissal of a workman during conciliation proceedings was referred to the "formal arbitration" of the Labour Commissioner or his nominee and the award made thereunder was made a rule by the civil Court which as per (1977) 1 L.L.J. 382 (Mad.) (F.B.) had no jurisdiction which exclusively lay with the Labour Court under S. 33-C(2) of the Industrial Disputes Act, 1947, the civil Court's decree was liable to be set aside; merely because the employer had himself filed the award in the civil Court, he was not estopped to impugn the civil Court's jurisdiction; estoppel cannot confer jurisdiction which does not inheir in an authority; and there is no estoppel against statute. [(1977) 1 L.L.J. 312 (F.B.), Rel. on]: (1982) 95 Mad.L.W. 665.

Adjudication of Industrial Dispute—Recourse to legalistic principles like estoppel not wise: A.I.R. 1959 S.C. 967.

Employee discharged from service after enquiry—Objection as to the Officer in superintendence over the employee being a witness as well as the Enquiry Officer, not taken by employee at the enquiry—Employee must be held to have waived it: 1968 Lab.I.C. 1275: A.I.R. 1968 Manipur 68.

Dispute between management and workman—Conciliation proceedings commenced —Works-manager representing case on behalf of management—Agreement signed by workman and Works-manager—Management contending that settlement signed by Works-manager not binding on management as he was not authorised to do so—*Held*, it was a case of estoppel because of conduct altering situation and rights of parties and therefore, the management could not resile: (1969) 2 M.L.J. 211: (1969) 82 Mad.L.W. 491: 1970 Lab.I.C. 334.

Notice under S. 19(2) of the Industrial Disputes Act—Charter of demands alone presented—No compliance of S. 19(2)—Settlement existing between employer and workmen—Charter of demands, including subjects covered by such settlement, given—Employer neither in conciliation proceedings nor before Tribunal treating such settlement to be binding—Employer also making offers for settlement of dispute—Notice under S. 19 (2) waived by employer: (1962) 2 L.L.J. 85: (1961) 3 Fac. L.R. 261: 1969 Lab.I.C. 1158 (Cal.).

Lock-out due to workmen's illegal activities — Conciliation proceedings — Suggestions of Labour Commissioner in favour of workmen except that lock out would be treated on no work no pay basis — Representation by State Government that if Management accepted Labour Commissioner's suggestions and lifted lock out, State Government would take no further steps under Act —Management accepting Labour

Commissioner's terms but not workmen who resorted to strike—Consequent reference by Government under S. 10 of the Industrial Disputes Act, 1947 as to whether workmen were entitled to wages for period of lock-out and strike—*Held*, not barred by representation made by Government to Management: 1985 Lab.I.C. (N.O.C.) 5 (Cal.).

Insured filing application for commutation of periodical payments of permanent disablement benefit under Regn. 76-B framed under the Employees' State Insurance Act, 1948—Insured dissatisfied with assessment of permanent disablement made by Medical Board—Preferring appeal to Medical Tribunal—Appeal, *held*, was not barred by principles of estoppel or waiver: 1984 Lab.I.C. 397: (1983) 24 Guj.L.R. 1260: (1983) 3 Guj.L.H. 934.

Master and servant—Wrongful termination of service of employee—Submission to termination order and acceptance of dues—No waiver of right to recover damages: 1979 Lab.I.C. 506 (Cal.).

Master and servant—State servant discharged from service under retrenchment scheme, availing himself of benefit under scheme—Benefits fully enjoyed—He is estopped from challenging the order of discharge: 1954 All.L.J. 515.

Acceptance of benefit—Estoppel—Industrial dispute—Technical plea of estoppel is out of place in industrial dispute—Payment of retrenchment compensation after retrenchment—Employees are not estopped from questioning validity of retrenchment: 1970 Lab.I.C. 629 (Pat.).

Agreement between workman and employer as to compensation for permanent partial disablement registered under S. 28 of the Workmen's Compensation Act, 1923—Workman later declared unfit for service—Workman not disentitled from claiming compensation on the basis of permanent total disablement: I.L.R. (1966) 2 Mad. 402.

Where an employee, on termination of his service, passes a receipt saying that he had no further claim against his employer and it is found that the receipt was executed, without reference to bonus which was not, and could not then have been, in the contemplation of both parties, it does not constitute an estoppel against the employee's subsequent demand for the bonus declared afterwards in respect of the period during which he was in service: A.I.R. 1957 Ker. 16: 1957 Ker.L.T. 44 I.L.R. (1957) Ker. 26.

Where the Labour Court by its award set aside the dismissal of the workman but allowed him only compensation and not reinstatement and the workman accepted the cheque for the amount of compensation under "protest" and "without prejudice", *held*, the workman was not estopped from impugning the award and claiming reinstatement from the writ Court; the acceptance of the cheque in the circumstances did not amount to accord and satisfaction. [Case law extensively considered]: (1987) 1 M.L.J. 269: (1987) 100 Mad.L.W. 166 (D.B.).

Though what was paid by the management to the various workers under a comprise by way of bonus could not be got back by them, that does not estop the workers from claiming that the industrial dispute should be settled in accordance with law, particularly when they had received the payment of bonus without prejudice to their rights: (1960) 2 L.L.J. 556: (1961) 1 M.L.J. 393: A.I.R. 1961 Mad. 212. *See* also (1984) 1 Serv.L.J. 457.

The employees who are pitched against the management, are not in an equal position in bargaining. It is, therefore, open to the Union, who takes up the cause of the employees to raise the dispute by way of collective bargaining on their behalf. No question of estoppel arises in a case of this description. Therefore, an employee of a company having once accepted the pension cannot be estopped from questioning the same before the Court through the Union: 1968 Lab.I.C. 1386: A.I.R. 1968 Assam 39.

Retrenchment of workers—Union representing the workers raised industrial dispute challenging retrenchment — Individual workmen accepting retrenchment benefit subsequently—Union not estopped from challenging the retrenchment—Applicability to industrial disputes—Technical plea of estoppel is not applicable in all cases of industrial disputes—Retrenched workmen in starving condition forced to accept retrenchment benefit—Workmen not estopped from challenging the legality of the retrenchment: (1967) 1 L.L.J. 108: A.I.R. 1967 Pat. 12.

Where a settlement regarding certain demands was arrived at between employer and recognised majority Union and benefits

flowing from said settlement were accepted even by workmen who were not signatories to the settlement, *held*, it would not operate as estoppel against minority Union from raising same demands which were subject-matter of settlement; the employer could not avail of the benefit of theory of implied agreement by acquiescence: A.I.R. 1978 S.C. 828: (1978) 3 S.C.C. 42: (1978) 3 S.C.R. 535.

The person who caused the delay, or took part in the enquiry without protest even after the statutory period ran out, is not entitled to challenge the award on the ground of delay. Thus, an employer who participated in the enquiry before the Agricultural Tribunal under the Kerala Agricultural Workers Act, 1974 without protest even after the expiry of the statutory period for passing the award, *held*, is estopped from challenging the award of the Tribunal on the ground that it was time-barred. [A.I.R. 1968 Pat. 150 (F.B.), Foll.]: A.I.R. 1980 Ker. 156: 1980 Ker.L.T. 39.

58. Estoppel in matter of family arrangement.—A plea of estoppel can be invoked only in support of or to maintain a family arrangement where the Court finds that the parties should not be allowed to resile from a particular arrangement under which they have taken some benefit. If for some grounds which are not "frivolous or untenable", the Court finds that a party is entitled to re-open the arrangement or establishes that the continued enforcement of the family arrangement is wholly impracticable, unnecessary and unjust in the changed circumstances of the case, there is no question of applying the equitable principle of estoppel and holding any of the parties to such restrictive provisions in a family arrangement. This is especially so in the case of family arrangements intended to have application only for a limited time or purpose in contrast to family arrangements entered into for the purpose of effecting out and out partition, gift etc. In any case, the Courts will not accept such a plea of estoppel put forward in defence by a party who has himself gone against the very same provisions which he wants the Court to enforce strictly against the other party or parties. Thus, where defendants knowingly violated certain specific terms of a family arrangement regarding enjoyment of the impugned property, *held*, they could not contend that the provisions in that clause had to be enforced strictly against the plaintiffs or their predecessors-in-interest: A.I.R. 1994 Ker. 36; 1978 Punj.L.J. 370 (D.B.).

A family arrangement as also the recitals therein is an agreement between members of the family, generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or for preserving family property or peace or for avoiding litigation or saving its honour; thus, once a family arrangement has been entered into none of its members can be allowed to repudiate the arrangement; a family arrangement stands on a different footing from an ordinary contract and binds on all the parties; it operates as an estoppel and prevents family members from resiling from or revoking the arrangement after having taken its benefit: A.I.R. 1990 Ker. 226: (1990) 1 Hindu L.R. 235 (D.B.).

Once it is found that the family settlement was voluntary and *bona fide*, the same would be binding on the parties and it would operate as an estoppel preventing the parties after having taken advantage under the arrangement to resile from the same or to revoke it. Where pursuant to a family settlement the parties entered into respective possession of the parts of land allotted to them and they raised construction thereon and the partition of joint land was effected and the factum of partition was incorporated in *jamabandi* for the relevant year but thereafter the respondent filed a suit for separate possession by partition of the suit land against the appellants, *held*, the respondent was estopped from claiming partition: (1991) 1 Hindu L.R. 52: 1991 Punj.L.J. 190.

Where a family settlement, not required to be registered, did not contravene any law and was legally binding, *held*, it would operate as an estoppel against any of the parties thereto which flowed from their conduct of having taken the benefit thereunder for (in this case) full seven years and then try to resile therefrom; the position would be the same even if it was complusorily registerable but was not registered. [A.I.R. 1961 Pat. 79 and A.I.R. 1963 Pat. 62, Overruled]: A.I.R. 1976 S.C. 807: (1976) 3 S.C.C. 119: (1976) 3 S.C.R. 202.

The principle of estoppel mentioned in S. 115 will apply if relinquishment was made by one of the parties of his right to inherit in future for a consideration. Thus, where in

pursuance of a family arrangement mother of the plaintiff absolutely settled her properties in his favour only for the consideration that the plaintiff relinquished his right to future share in the properties left by her, *held*, the plaintiff having accepted said family arrangement could not be allowed later to turn round and say that he would only receive the benefits given under the document and that he was entitled to discard the disabilities incurred by virtue of that document: A.I.R. 1992 Ker. 397: I.L.R. (1992) 2 Ker. 105.

Where a family arrangement was entered into with the object of restoring family peace and amity and the question of succession to the shares allotted to the parties was not and could not be, in their contemplation, *held*, the parties thereto are not estopped from claiming a different mode of partition of the property as and when the occasion arises; the parties having not given up their right to partition the property differently from that of family arrangement, the rule of estoppel is not attracted, founded as it is upon the doctrine that it would be most inequitous and unjust if a person having made a representation as such or by conduct induces the other person to act in a manner which the other person would not have otherwise done should not be allowed to repudiate the effect of his representation to the loss and injury to the other person: A.I.R. 1979 All. 379 (D.B.).

Where by a deed of settlement which was not registered, the deceased had settled his properties on the plaintiffs and defendants and there was no case of any dispute between the parties regarding the properties of the deceased and, therefore, there was no question of settling the dispute by family arrangement, *held*, as the division of properties was very unfair, the plaintiffs were not estopped from claiming partition and separate possession of their share in the suit properties: (1993) 1 Hindu L.R. 246 (Karn.) (D.B.).

Where on the death of a Hindu coparcener governed by Mitakshra law his undivided share in the Hindu joint family properties was divided but his widow and two married daughters who were entitled to their respective shares in consequence of proviso to S. 6 of the Hindu Succession Act, 1956 were kept out and no shares were allotted to them and upon their suit to re-open the partition it was contended that being present at the partition, they had raised no objection and acquiesced, *held*, in the absence of reliable evidence of their presence at the impugned partition, they could not be said to have acquiesced; besides, mere presence cannot connote acquiescence which is an aspect of the rule of estoppel; it implies knowledge of the subject and there is no evidence to show that they knew that the partition was being made without allotting any shares to them: (1988) 2 Hindu L.R. 376 (Karn.) (D.B.).

Where a document merely recorded a family arrangement previously arrived at with the good offices of the *panchayat* to whose terms and conditions the parties had agreed and subscribed their signatures, *held*, one of the parties thereto who had kept quiet for so long and herself produced the document in Court is estopped from contending that the document is inadmissible for want of registration: (1988-2) 102 Mad.L.W. 491 (D.B.).

Party taking advantage under partition estopped from setting up plea of impartibility: 118 I.C. 342: A.I.R. 1929 Cal. 577.

Where, during the lifetime of the mother, the daughters who were in possession effected a partition of certain properties and the parties enjoyed the properties in pursuance of that arrangement but its validity was sought to be questioned after the death of the mother by the executants themselves, *held*, that they were estopped from doing so: I.L.R. 52 All. 716: A.I.R. 1930 All. 687: 1930 All.L.J. 688.

Where *karta* converted his separate property to joint Hindu family property and in the impugned document which described joint family, plaintiff and his sister being children from first wife of the *karta* were left out and subsequently they filed a suit for partition, *held*, such a suit was not maintainable in view of the fact that in reference proceedings before the Income-tax Authorities, none of them contended that said document was bad on account of their non-inclusion in it, *i.e.*, they had accepted that they were not members of joint family: A.I.R. 1993 Cal. 118: (1993) 1 Hindu L.R. 322: (1993) 1 Cal.L.J. 1.

Though the principle is that if the transaction is not valid under the personal law of the parties, the transferor will not be estopped from contending that the transaction is invalid, still, so long as the personal law contemplated a possibility of the transaction

being valid and so long as there is no other infirmity in the transaction, a transaction in the nature of release or renunciation should be considered to be invalid. A Hindu father or other managing member has no power to make gift except within reasonable limits of ancestral immovable properties and that too only for pious purposes. According to the Mitakshara law, as applied in all States, no coparcener can dispose of his undivided interest in the coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property: 1980 Hindu L.R. 780 (Mad.).

Members of joint Hindu family—Business carried on in partnership with other persons—No presumption that it is family business—Profits from partnership assessed for some years as family income—Members not estopped from pleading separate interest: 1961 B.L.J.R. 501.

Where in the earlier partition suit filed by two brothers *A* and *B* against their eldest brother *C*, the business was admitted to be a joint family business and in the insolvency proceedings the business was also admitted by *C*, to be joint family business, *held*, *B* and *C* were now estopped from urging that the business was carried on in partnership: A.I.R. 1980 Cal. 230.

59. Estoppel between vendor and vendee.—The doctrine of *"caveat emptor"* is also applicable under Portuguese system of law. If the buyer does not avail himself of the knowledge or means of knowledge open to him or his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations as the knowledge of his agent is as binding on him as his own knowledge: A.I.R. 1968 Goa 98.

It is manifestly clear that where a vendor voluntarily executed a contract of sale, put the vendee in possession and received the entire consideration, there is no special equity in his favour; he cannot after a long lapse of time be allowed to turn and claim the property merely because its market price had meanwhile shot up; he is estopped from repudiating his fiduciary obligation; the Court cannot extend any aid to him: A.I.R. 1973 J.&K. 11: 1972 Kash.L.J. 107 (F.B.).

Where a registered sale deed of land was executed and immediately thereafter another agreement between the parties in violation of S. 10 of the Transfer of Property Act and S. 23 of the Contract Act was entered into whereby the vendee and his heirs were prohibited to alienate or fitter away the land so purchased, *held*, once a sale is completed, it clothes the vendee with beneficial ownership; the right to alienate the property is incidental to, and inseparable from, such ownership; an absolute restraint on such right is repugnant to the concept of sale; and subsequent agreement is inadmissible: A.I.R. 1989 Him. Pra. 11: (1988) 2 Sim.L.C. 126.

Where sale deeds were executed, consideration was received from the vendees and other properties were purchased therewith in the vendor's name who eventually impugned the sale deeds as null and void on the ground that their execution was procured by him when he was still a minor, *held*, merely because he had purchased properties in his own and his brother's names from the sale proceeds, which after attaining majority got partitioned and sold his share did not amount to a representation on which the plea of estoppel could be based against him: A.I.R. 1973 Ker. 267: 1973 Ker.L.J. 944 (D.B.).

Where the vendee accepted the refund amount knowing full well that the vendor had cancelled the contract for sale and, thus, acquiesced in the breach of the contract committed by the vendor, *held*, the vendee waived his right to enforce the contract and his right could not be preserved merely because he had accepted the amount "without prejudice" to his right. [A.I.R. 1961 S.C. 1067, Dist.; (1824) 1 Car and P. 347, Rel. on]: A.I.R. 1983 Mad. 169: (1983) 96 Mad.L.W. 88: (1983) 1 M.L.J. 467 (D.B.).

Where a clause in an agreement of sale expressly provided that in case the property is requisitioned, the vendor would refund the earnest money with interest to the vendee, *held*, it implicitly creates a corresponding right in the vendee to demand the refund and rescind the contract; the clause being clearly for the exclusive benefit of the vendee, not of the vendor, creates no liability against the vendee who can waive it unilaterally. [A.I.R. 1947 P.C. 182; (1892) 3 Ch. 359; (1913) 2 Ch. 648, Foll.]: A.I.R. 1973 S.C. 559: (1972) 2 S.C.C. 757.

Under an agreement of reconveyance, the vendee agreed to resell the property to the vendor till a certain date and the vendor,

dissuading the vendee to obtain loan on unconscionable terms to pay the consideration, extended the time of purchase by two months. But when the vendee arranged money and called upon the vendor to execute the sale, the vendor declined on the ground that the time was already over. In the suit for specific performance, the vendor pleaded that the oral agreement to extend the time could not be proved because of the bar of S. 92 while the vendee pleaded waiver giving rise to the plea of estoppel. *Held*, the proof of waiver giving rise to estoppel is not barred by S. 92; it is open to the parties to waive their contractual rights embodied in a document and, if on that representation, the other party does something to its own prejudice, the party waiving its rights is not entitled to strict performance according to the original contract; it is estopped from doing so: 1972 M.P.L.J. 122.

Common passage over adjoining property not belonging to vendor—Passage mentioned in conveyance law—No grant of right of way: A.I.R. 1963 Cal. 110.

Registered agreement to sell—Earnest money made charge on property—Vendor found not to have title—Agreement repudiated—Subsequent sale to another on vendor acquiring title—Subsequent purchaser is not bound by charge created by agreement which was repudiated—Contract Act, 1872, S. 19: A.I.R. 1962 Cal. 12 (D.B.).

Execution of promissory note by purchaser for amount due to vendor—Execution does not extinguish vendor's lien under S. 55—Such execution does not estop vendor from an action on such lien: A.I.R. 1967 Mad. 127.

Upon the death of his father in 1951, the entire property left behind was mutated in revenue and municipal records in the name of the son who also remained in its possession and acted as *karta* of the joint family comprising himself, his mother and his sons. In 1961 and 1962 he built a single storey building on a plot in Lucknow. On 14-2-1964, he sold the western portion of a property to a stranger "as exclusive and complete owner" "in possession and occupation.....with powers of transfer of all kinds" as he needed to construct the upper portion of the single storeyed house. Seven months thereafter, his widowed mother and sons sued him and the vendee on the ground that she owned half the property as inherited from her husband, that she and the vendor formed a joint family to which the property belonged, that the vendor's sons had interest therein by birth and that the sale was without legal necessity. *Held*, since the widow raised no objection to the property being mutated exclusively in the name of her son who was managing it and also realising rents from the tenants in his own right and evidence also showed that the widow in the presence of the vendor consented to the sale, coupled with the fact of the widow and her son not appearing in the witness box, she was estopped from impugning the sale in respect of her half share: A.I.R. 1981 S.C. 2128: 1982 Hindu L.R. 10: 1981 All.L.J. 1172.

Where a legatee under the Will of her father by a deed of warranty assured the vendee that the property being sold by her brother, another legatee, was fully under his ownership, promised to indemnify the vendee if that title was found to be defective, attested the sale deed, and applied for mutation of the vendee's name in municipal records, *held*, her heirs were estopped from contending that the vendor has only a limited estate under the Will. [A.I.R. 1928 P.C. 20, Foll.; A.I.R. 1965 S.C. 1812, Disting.]: A.I.R. 1977 N.O.C. 228 (All.) (D.B.). *See* also (1991) 43 Del.L.T. 113: A.I.R. 1991 Del. 178 (D.B.).

60. Estoppel in pre-emption cases.—*See* A.I.R. 1967 Punj. 448; A.I.R. 1989 S.C. 1179: (1989-1) 103 Mad.L.W. 459: (1989) 2 S.C.C. 265.

There can be no waiver of right of pre-emption by minor: (1960) 62 Punj.L.R. 691.

Though pre-emption is a statutory personal right incapable of being transferred, yet it is open to the pre-emptor to pay the consideration from his own sources or by arrangements with a third party. Besides, pre-emption contemplates the right of substitution, it is not open to the vendor to pre-empt the sale in the garb of a *benamidar*. But merely because the pre-emptors happen to be the vendors' sons and are pre-empting the sale with the financial assistance from their father is by itself no ground to defeat their right of pre-emption; the pre-empted property would vest in the sons, not in the father; it would not amount to "collusion" in the wider sense either; the rule of estoppel is not attracted. [(1968) 70 Punj.L.R. 253, Affirm.]: A.I.R. 1971 S.C. 1158.

Where the real purchaser of land was the pre-emptee's son and had averred in his notice under S. 5(4) of the W.B. Land Reforms Act that it was agricultural land, *held*, he was estopped from contending to the contrary; he was also estopped from contending that he was a co-sharer of land by a previous purchase: (1984) 2 Cal.L.J. 275.

Co-sharer intending to sell share—Other co-sharer refusing to purchase—Right of pre-emption not affected—Vendee induced to purchase—Failure to give notice under S. 14, Agra Pre-emption Act—Other co-sharer is estopped: A.I.R. 1929 All. 531 ; I.L.R. 51 All. 820. *See* also 27 All.L.J. 528: A.I.R. 1929 All. 453.

Waiver means an intentional relinquishment of a known right. If the right of pre-emption under Partition Act arises only after a suit for partition is filed by the stranger-purchaser, it cannot be said to have been waived after the sale of a share to a purchaser who is a stranger to the undivided family. Further, mere facts of dis-inclination to purchase the share of a co-sharer or non-objection to the possession of a party of the property, which were earlier to the filing of the partition suit by the stranger purchaser, do not amount to a waiver of the right of pre-emption by the co-sharers. [A.I.R. 1977 Madh. Pra. 40, Rel. on; A.I.R. 1973 S.C. 554; A.I.R. 1979 S.C. 621; A.I.R. 1979 S.C. 1066; A.I.R. 1968 S.C. 1205, Disting.]: A.I.R. 1985 Cal. 406 (D.B.).

Previous consent—Right of pre-emption. *See* A.I.R. 1954 Nag. 92: I.L.R. (1953) Nag. 850.

There must be a concrete offer to purchase to the pre-emptor before a definite contract for sale has been concluded with another person. Thus, where the vendor was not produced and no witness stated that the vendor had made any offer to the pre-emptors to purchase the land before the contract of sale was concluded with the vendees and no question was put to the pre-emptor when he appeared in the witness box about his presence at the time of negotiations or at the time of sale to the vendees, *held*, it could not be said that the pre-emptor had waived his right to pre-emption: A.I.R. 1977 P.&H. 178: 1977 Punj.L.J. 273.

A general notice issued by the husband of the vendee in a newspaper signifying his intention to purchase the property and inviting objections, if any, does not cast any duty on the pre-emptor to give any response to such a notice and put forth his preferential right to purchase the property and negotiate with the purchaser to purchase the property. The failure on the part of the pre-emptor, to pay any heed to such a general notice issued by the husband of the vendee therefore, does not tantamount to waiver of the right of pre-emption on the part of the pre-emptor. Where there was no reliable evidence to prove that after the agreement for sale between the vendor and the vendee was concluded and the price was fixed between them, an approach was made to the pre-emptor to purchase the property in dispute for the price settled between the vendor and the vendee, *held*, it could not be said that the pre-emptor waived his right of pre-emption in favour of the defendant-vendee. [1975 W.L.N. (U.C.) 360 (Raj.), Rel. on]: A.I.R. 1977 Raj. 203: 1977 Raj.L.W. 301: 1977 W.L.N. 302.

The right of pre-emption is lost by estoppel and acquiescence. Thus, where vendor was required under the statute to serve the notice of sale on persons having right of pre-emption and he failed to give such notice but the pre-emptor not only came to know of the sale immediately but he also assisted the purchaser in raising construction, *held*, pre-emptor was estopped from challenging the sale as void: A.I.R. 1991 S.C. 1055: (1990) 4 S.C.C. 668.

The law of pre-emption applicable to Ajmer—Marwara embodied in Ch. II of the Ajmer Laws Regulation III, 1877, does not override S. 115; thus, a pre-emptor on notice of intended sale refusing to purchase the property, *held*, is deemed to have acquiesced in the sale and thereby lost the right to pre-empt. [A.I.R. 1947 Oudh 81; A.I.R. 1925 All. 645, Rel. on]: A.I.R. 1952 Ajmer 26.

In a suit for pre-emption, it was found proved on evidence that the plaintiff had declined to purchase the land when it was offered to him by the vendors, had refused to sign the notice issued by the Collector before he sanctioned the sale inviting objections to the sale in favour of vendees who were non-khewardars, having come to know of the sale kept quiet for a period of four months, allowed the vendees to spend money in sinking a well and constructing a compound wall. *Held*, that the plaintiff had waived the

right of pre-emption: 1964 Raj.L.W. 136: I.L.R. (1964) 14 Raj. 454.

Suit for pre-emption—Oral consent of pre-emptor given before sale—Purchaser, if can plead estoppel. *See* 1950 Nag.L.J. 1.

The interest in the joint Hindu family property is created in favour of the coparcener by virtue of his birth in the family and, therefore, it cannot be said that a coparcener acquires his right through his father. Where plaintiff co-sharer filed a suit for pre-emption and it was contended that notice of sale was given to his father and uncle who refused to purchase the property, *held*, waiver of the right to pre-empt by father could not disentitle the son to bring a suit for pre-emption. [A.I.R. 1924 Lah. 68, Rel. on]: A.I.R. 1976 Raj. 95: 1975 Raj.L.W. 269: 1975 W.L.N. 332.

In a given case, the vendees who challenged the pre-emption decree in appeal, may not have the requisite knowledge or information as regards the less deposit of the pre-emption amount or the deposit having been made beyond the time permitted. It cannot, therefore, be held as a matter of law that if the objection is not taken in the appeal as regards the less deposit or the deposit having been made after the time allowed, said objection cannot be taken at the stage of execution. No question of waiver arises in such a case. [A.I.R. 1970 Punj. 559, Overruled]: A.I.R. 1977 P.&H. 294: (1977) 79 Punj.L.R. 417: 1977 Punj.L.J 349: 1977 Rev.L.R. 318 (F.B.).

Where in a suit to pre-empt the sale of a house between Muslim parties, the plaintiff pleaded no specific custom but alleged that the requisite demands, *talab-i-mowasibat* and *talab-i-ishhad*, under Muslim law were made on the vendor and both the Courts below found against him, *held*, he could not be permitted in the second appeal to contend, after having proceeded in the plaint on the basis that they were necessary, that such demands were not necessary: A.I.R. 1982 All. 98.

Person seeking to enforce option of repurchase—Estoppel: 1957 M.P.L.J. 742.

61. Estoppel between mortgagor and mortgagee.—A usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status: 119 I.C. 568: A.I.R. 1929 All. 305. Usufructuary mortgage—Change in nature of possession by act of parties—Effect—Adverse possession—Estoppel. *See* A.I.R. 1957 Pat. 502.

A muafidar who has mortgaged his muafi plots cannot assert against the mortgagee his own want of title: A.I.R. 1928 Oudh 336. A person creating a charge or a mortgage is estopped from saying that he is not entitled to create the charge or mortgage on the property: (1929) 31 Bom. L.R. 439: 119 I.C. 186: A.I.R. 1929 Bom. 277.

Once the relationship of mortgagor and mortgagee is found to have been created or to be existing, the said relationship cannot be altered or put an end to except by act of the parties or in accordance with the provisions of law. It is equally well-settled that a mortgagee is estopped from denying the title of the mortgagor to the mortgaged property: 37 Cut.L.T. 1257: (1971) 2 Cut.W.R. 733.

A mortgagee who has been put in possession by the mortgagor pursuant to a mortgage is estopped, so long as the relationship between them continues, from denying the mortgagor's title to the property. But it is only where the mortgagors title is in doubt that there is any scope at all for invoking the aid of the rule of estoppel. The Courts cannot avoid application of the rule by going into the very question and finding that the mortgagor had no title on the date of the execution of the mortgage: (1962) 1 M.L.J. 229: (1962) 75 Mad.L.W. 236: A.I.R. 1962 Mad. 395.

It is not permissible to a mortgagee or a transferee of his rights to impeach the title of the mortgagors to the mortgaged property when possession of the properties has been obtained from them. A mortgagee cannot resist a claim for redemption on the ground that the mortgagor has no title to the property. Ordinarily, mortgagee is presumed to satisfy himself about the security being acceptable from the person who offers it when the money is lent. In the absence of special circumstances he cannot again seek investigation of this. That would, unnecessarily enlarge the scope of a suit for redemption and raise needless complications: I.L.R. (1955) Mys. 562: A.I.R. 1956 Mys. 14; (1990) 1 Karn.L.J. 134.

A mortgagee is estopped from denying the title of the mortgagor to the mortgaged property at the time of the mortgage. The

principle underlying this rule of estoppel extend to licensees as well. The estoppel does not prevent either a mortgagee or a licensee from proving that subsequent to the mortgage or the licence the mortgagor or the licensor lost his title to the property to which the mortgage or the licence related, so far, therefore, a mortgagee and a licensee stand on the same footing. But the estoppel operating against a mortgagee and the estoppel operating against a licensee are not identical in nature or co-extensive in scope. A mortgagee cannot, by repudiation of the mortgage convert his possession under the mortgage into one adverse to the mortgagor. He is not permitted by his own unilateral act to bring about an extinction of that legal relationship which was created by the mortgage or reduce the period of limitation prescribed for the redemption of the mortgage. During the period available to the mortgagor for redemption the possession of the mortgagee will always be attributed to the mortgagor despite any assertion by him of a claim hostile to the mortgagor. A licensee, however, is not precluded from setting up a claim of adverse possession even though he has not surrendered possession to the licensor provided that he has, to the knowledge of the licensor, expressly and openly denied the permissive nature of his possession and asserted a claim hostile to the licensor. Thus, in this respect a licensee differs not only from a mortgagee but also from a tenant. Therefore, it is open to a person who entered into possession of a property as a licensee to resist the claim of his licensor to possession on the ground that subsequent to the licence he had been ousted from possession by a person exercising a paramount right and that his possession was no longer under the licence but under a fresh title derived from the person who had ousted him: A.I.R. 1965 All. 309.

Mortgagee denying mortgagor's title and setting up adverse possession—Mortgagee cannot do so unless he actually leaves land and re-enters under different status and title: A.I.R. 1965 All. 223.

Mortgagee not to question mortgagor's title—Hindu widow effecting mortgage for 99 years—Same cannot be impugned by mortgagee—Widow to be presumed to deal with property as owner: A.I.R. 1928 Bom. 380.

Ordinarily, neither the mortgagor nor the mortgagee, can deny the title of the other at the time of the mortgage. But where the mortgagor in a suit for redemption has not only had no title on the date of the mortgage but he admits that he had no title and tried to acquire the same from a third person in whom the title vested, this rule of estoppel does not apply: (1955) 3 M.L.J. 14.

Though a mortgagee is precluded from denying, during the pendency of the mortgage, the mortgagor's title to mortgage the property, *held*, this rule is inapplicable where the mortgagee in possession is evicted by a party having paramount title: A.I.R. 1973 Mys. 28: (1973) 1 Mys.L.J. 186.

Mortgagor and mortgagee—Lease by mortgagor without authority—Estoppel—Validity as between mortgagee and lessee: (1956) 3 All E.R. 373.

Void alienation of khoti land to mortgagee—Mortgagor can resile from sale: I.L.R. 53 Bom. 676: (1929) 31 Bom.L.R. 778: A.I.R. 1930 Bom. 135.

Where a person admits his character as mortgagee in a civil suit, he cannot subsequently in a revenue suit plead that he was not a mortgagee but a proprietor: 15 R.D. 94. *See* also 14 Law Rep. 281 (Rev.) ; 17 R.D. 404.

In suit for eviction under Rent Act, mortgagor-lessee asserting that there was no independent lease but the lease was concomitant part of mortgage-transaction for assuring usufructuary mortgagee payment of interest on mortgage-money—Mortgagor securing order in his favour that there could be no order of eviction—In subsequent suit by mortgagee's legal representatives mortgagor cannot be allowed to contend that they should institute a separate suit for recovery of rent and that they could not claim interest on principal sum due under mortgage: (1965) 2 Mys.L.J. 792: 5 Law Rep. 486: A.I.R. 1967 Mys. 41.

Where a mortgagor refused possession when according to the terms of the contract he was bound to give possession, the mortgagor is precluded from asserting that the property is not liable to sale in satisfaction of the mortgage debt: 116 I.C. 214: A.I.R. 1929 Lah. 289. *See* also I.L.R. 41 Mad. 259: 33 M.L.J. 623 (F.B.).

Mortgagee parting with title deeds knowing that they are required for effecting a sale, no estoppel against mortgagee, in favour of a purchaser, arises: A.I.R. 1933 Mad. 195. *See*

also I.L.R. 20 Cal. 286 (P.C.); I.L.R. 50 All. 885: A.I.R. 1928 All. 459; A.I.R. 1938 Lah. 558 ; 1937 O.W.N. 237 ; A.I.R. 1937 Lah. 272.

Estoppel by conduct—Mortgage amount tendered by purchaser of equity of redemption—Refusal to accept—Interest ceasing to run—Claim to recover interest—Maintainability: I.L.R. 52 Mad. 322: A.I.R. 1929 Mad. 230: 56 M.L.J. 255.

A mortgagee bidding at an auction-sale of the property mortgaged to him is not estopped from enforcing his mortgage although he had not disclosed his mortgage at the time when he bid at the auction. Unlike an execution creditor, he was under no obligation to disclose his mortgage, and his bid did not amount to any representation that there was no mortgage in his favour: I.L.R. (1948) Nag. 133.

A held two mortgages against the same property. He obtained a decree for the sale of mortgaged property in a suit brought on the second mortgage, discharging the prior mortgage. In the meantime, the mortgagor sold the property to *B* privately and free from incumbrances and the decretal amount was deposited in Court. *Held*, that as *A* had disclosed the existence of prior mortgage and as he did not know that the property was sold privately to *B* free from incumbrances he was not estopped from suing on the prior mortgage: A.I.R. 1936 Lah. 1020. *See* also (1940-41) 45 Cal.W.N. 470.

Mortgagee accepting money deposited under S. 83 of the T.P. Act, 1882—He cannot later claim damages on ground that he was not given possession of the mortgaged property: A.I.R. 1963 Pat. 324.

Irrespective of the defect, if any, of the title in the mortgagor when a mortgagee has accepted the security for the advance made by him, it is not open to him to disclaim the right which he has taken as security and refuse to allow redemption when the money advanced is tendered or paid to him. [A.I.R. 1965 All. 309; A.I.R. 1962 Mad. 395 and A.I.R. 1956 Mys. 14, Rel. on]: (1971) 2 Cut.W.R. 733.

Where plaintiff co-mortgagees who were in possession of disputed land for over a period of 60 years sought a declaration to the effect that they were the owners but the defendant opposed the suit and pleaded that the plaintiffs were estopped by their act and conduct as they represented to the mortgagors that in case the latter paid Rs. 99 the entire mortgage would be redeemed and on that representation the defendant did pay Rs. 99 to the plaintiffs, *held*, as there was no consent of the other co-mortgagees, there could not be a valid redemption. Thus, it was wrong to say that the plaintiffs were estopped from pleading that no redemption had been effected: A.I.R. 1974 Him. Pra. 11.

Suit on mortgage—Defence that plaintiff has agreed to receive lesser amount than under mortgage, by oral agreement—*Held*, oral agreement was inadmissible in evidence and therefore, plaintiff was not estopped from claiming whole amount under mortgage—Passing of receipt by plaintiff for part payment of amount agreed also did not estop him from claiming whole: (1966) 2 An. L.T. 198.

In a suit by a member of a tarward to set aside a deed of gift by another member on the ground that the property gifted belonged to the tarward, an alienee from the donee is not estopped from impeaching the plaintiffs' title by reason of the fact that he had taken a hypothecation of the property from the donor: A.I.R. 1956 Trav.-Co. 266.

Hindu joint family—Mortgage by father or manager—Co-parcener signing mortgage-deed—Estoppel: A.I.R. 1957 Raj. 355.

62. Estoppel in case of principal and agent.—Commission payable if binding contract entered into—Contract induced by agent's misrepresentation—Estoppel: (1956) 3 All E.R. 207.

Under terms of lease, lessor or his representative was only entitled to supervise the operations of the Tea Estate (property leased) with a view to safeguard the lessor's interest—Superintendent so appointed having no right to interfere with the management of the Tea Estate—*Held*, that the responsibility for the proper management of the Tea Estate was with the lessee and the right of the lessor to re-enter the property on the breach of the conditions of lease on ground of mismanagement was not taken away by merely appointing the lessor to supervise the operation of the Tea Estate, and question of estoppel did not arise—Even if the lessor was appointed as Superintendent, he was the agent of the lessee and if any mismanagement was committed by him it would be the mismanagement of the lessee: I.L.R. (1961) 13 Assam 101: A.I.R. 1961 Assam 70.

63. Estoppel in case of consignor and consignee.—Where the appellant declared the value of consigned goods as Rs. 25,000 but at the time of claiming damages he enhanced the actual value of the consigned goods, *held*, the appellant should not be permitted to change the value of the consigned goods at his convenience and to his advantage. He was, thus, estopped from contending that actual value of the goods was more than what was declared by him initially: (1991-1) 107 Mad.L.W. 13 (D.B.).

64. Estoppel in case of partnership.—Whether it is case of retirement of a partner from a partnership or its dissolution, public notice is intended only to serve the purpose of bringing home to the persons concerned the factum of retirement or dissolution. So far as third parties entering into some dealings are concerned, that purpose will be undoubtedly served better by personal or actual service of notice. In the absence of compliance of the provision for notice third parties may deal with the firm of partners to their disadvantage on the belief that the firm or all the partners continue. But when third parties know well by individual notice what the real position is, there is no question of themselves being led into wrong belief and acting to their detriment. If so, in such cases there is no question of application of the rule of estoppel to make the retired partners or the partners of a dissolved firm liable: A.I.R. 1987 Ker. 239: 1987 Ker.L.J. 205.

Where in pursuance of a suit for dissolution of partnership, a compromise was entered into wherein the plaintiff partner stated that he had nothing to do with the partnership properties without specifying such properties, *held*, he was not estopped from filing a suit for partition of partnership properties later on: A.I.R. 1984 N.O.C. 305 (Del.).

65. Estoppel in bank cases.—(*See* also Note 28, *supra*). Where holder of a saving bank account had made nomination in favour of his two wives while depositing a huge amount, *held*, when subsequently, after the depositor's death, his said two wives sought to withdraw said amount, the bank could not refuse it on the ground that said nomination was irregular and unenforceable; having accepted the nomination, the bank could not be permitted to take advantage of its own mistake: A.I.R. 1988 Andh. Pra. 289.

Where by an arrangement between them the bank was to sell to the customer demand drafts on concessional rates only on the customer keeping a time deposit with the bank, *held*, when the bank's representation was not for all times to come and the sale of demand drafts was not its statutory obligation but only an ancillary service, the customer could not claim the facility as of right; the doctrine of promissory estoppel could not be invoked: A.I.R. 1987 Cal. 88 (D.B.).

Where an amount borrowed from the bank was found to have been utilised not for the purposes of business but charity (donation to an Engineering College) and interest was paid to the bank on the overdrafts thereby occasioned, *held*, the payment of interest was purely a personal and not a business obligation; the contention that the assessee having promised to the College to pay the donation was estopped from retracting from the promise and it was, therefore, its business liability has no basis for nothing on record indicated that the College had actually incurred any expenditure acting on the basis of the promised donation. [1971 U.P.T.C. 588, Affirmed]: A.I.R. 1979 S.C. 1291.

Where a person mortgaged two different properties in favour of the bank under two different transactions and on his failure to repay the loan in respect of one of those properties, a suit was filed whereunder a consent decree was passed whereafter he requested the bank to credit the rental income of the other property, in possession of the bank, towards the suit property's loan account and the bank acted accordingly, *held*, he was estopped from challenging later on said appropriation made by the bank. Further, as the rule of estoppel must prevail against a pure rule of procedure contained in S. 92, he could not fall back upon S. 92 of the Evidence Act: A.I.R. 1974 Madh. Pra. 193: 1974 M.P.L.J. 329: 1974 Jab.L.J. 476 (D.B.).

Where, in the course of recovery of the loan, the Branch Manager takes part and represent to the debtors that their liability by sale of the hypothecated properties can be transferred to the third party and by that they will be discharged from their liability, and he becomes instrumental for sale of the properties which are hypothecated to the bank for the loan advanced and the parties act upon such assurance given by the Branch

Manager that they would be discharged of their liability, and accordingly they proceed to execute the sale deed, and transfer the assets alongwith the liabilities to the third party and the bank keeps quiet for a long period of two years and no record is produced to show that the head office of the bank had not approved, *held*, it will not be open to the bank to turn round and claim that the liability of the debtors had not been discharged since the bank is estopped from making any claim against the vendor-debtors: A.I.R. 1992 Karn. 146 (D.B.).

Banker's right of set-off—Bank receiving notice of assignment of fixed deposit receipt but falling to intimate its right of set-off—Bank subsequently adjusting amount of receipt—Bank has no right to set-off and is estopped by conduct from claiming it: (1979) 1 Ren. C.J. 643: I.L.R. (1979) 1 Del. 121.

Where the instruction was to furnish a mobilisation guarantee but the bank issued a mobilisation advance-cum-performance guarantee in favour of the creditor and the debtor, not being a party thereto, could not detect the banker's mistake and the guarantee was accepted by the creditor, obviously with ulterior and *mala fide* motive, to saddle the debtor with additional liability absolutely beyond the scope of the contract, *held*, the creditor could not invoke the guarantee to recover loss and damages; it could not say that the debtor is estopped from contending that the guarantee was not a mobilisation advance-cum-performance guarantee, the creditor had full knowledge of the correct legal position regarding the guarantee, it was the creditor's duty to point out the mistake and not to accept the guarantee. A special equity had, therefore, arisen in favour of the debtor; he was entitled to prevent the creditor from enforcing the guarantee and to seek the Court's protection: A.I.R. 1989 Cal. 184: (1988) 2 Cal.L.J. 257.

The plaintiff, holder of a promissory note, endorsed it in favour of a bank and delivered it to them. The plaintiff wrote a letter to the bank asking them to encash the note and hand over the amount to the defendant, and saying that he had no right, title or interest in the note. The letter was taken to the bank by the defendant, who asked them for money due on the note or an advance against the note. The bank advanced the sum to the defendant and debited him with the amount in an account opened on that day. Subsequently, the plaintiff wrote to the bank cancelling his previous instruction. Thereafter the bank realized the sum due upon the promissory note and adjusted it to the account of the defendant. The plaintiff thereupon brought a suit for recovery of the amount due on the note. *Held*, (Per *Khosla, J.*) that the plaintiff by issuing first instruction to the bank gave the bank authority to realize the sum due on the promissory-note and pay it to the defendant. The defendant and bank agreed among themselves and privity of contract between the bank and the defendant was thus established. The plaintiff in his letter had clearly stated that he thereafter held no right, title or interest in the promissory-note and he, therefore, was transferring or assigning all rights held by him in the note to the bank for a certain purpose. The plaintiff, thereafter, could not be said to have any interest in the money due on the promissory-note. On the other hand, the bank, undertook to pay the money to the defendant and the latter accepted this undertaking. This contract between the bank and the defendant could not be revoked by the plaintiff. Per *Khosla* and *Kapur, JJ.*—It may be said that the plaintiff was estopped from claiming any interest in the promissory note because upon his instructions and representations the bank acted to its detriment and made payment in full to defendant or undertook an obligation which could be legally enforced. The plaintiff, therefore, could not subsequently revoke his instructions and could not be allowed to deny the position which he himself brought about: A.I.R. 1956 Punj. 78: I.L.R. (1955) Punj. 200.

Where the daughter wrote a letter to the Bank, a third party, that having joined a Nunnery she had no claim to her paternal properties but later on she sued for claiming her legitimate share in the paternal property, *held*, it was not open to her contesting brother to plead estoppel based on her letter to the bank; she could not be taken to have surrendered her share in the properties without a valid deed of relinquishment: A.I.R. 1985 Karn. 231: (1985) 2 Karn.L.J. 61: I.L.R. (1985) Karn. 1645 (D.B.).

66. Estoppel in matrimonial matters.—Where two persons not eligible for marriage live as husband and wife, the marriage not being valid cannot be supported by an estoppel: 46 P.R. 1912: 13 I.C. 482.

Husband and wife—Party once affirming marriage cannot subsequently object to it: (1928) 30 Bom.L.R. 523: A.I.R. 1928 Bom. 279.

Where a husband pleaded that his wife's earlier marriage had not been validly determined and the couple had for long been living and recognised as husband and wife and having begotten several children, *held*, the husband is estopped to raise the plea even if the wife is unable to establish the custom whereunder she claimed to have been divorced by her earlier husband: 1981 Hindu L.R. 211: (1980) 21 Guj.L.R. 887 (D.B.).

Where in a title suit the defendant, in his written statement, admitted that his father was married to plaintiff's mother in accordance with *"Henga"* form of marriage, *held*, even though he did not come to the witness box in support of his said averment, he could not be allowed to say that there was no marriage between the above mentioned parties according to *"Henga"* custom of marriage: A.I.R. 1981 Gau. 42 (D.B.).

A party describing a wedded wife as concubine, *held*, is not estopped from proving her status as wedded wife; her description as concubine does not change her status: 1982 M.P.W.N. 53.

Where the respondent-husband sought a decree for restitution of conjugal rights and the appellant wife contended that she was not legally wedded wife of respondent and she was still wife of one *"H"* as there was no legal and valid divorce between them and the respondent himself had led evidence to prove that before he contracted marriage with the appellant she had been divorced by *"H"* and the parties were minors at that time, *held*, the fact that appellant-wife failed to take a specific plea in her reply to the notice sent by the respondent to the effect that she was a minor at the time of divorce with *"H"* would not be fatal to her case: A.I.R. 1971 Him. Pra. 27: 1971 Sim.L.J. 216.

Dismissal of earlier petition for restitution of conjugal right filed by the husband under S. 9 of the Hindu Marriage Act, 1955 on the ground that his wife had shown reasonable excuse for withdrawal from his society, *held*, would operate as estoppel for subsequent petition filed by him for dissolution of marriage on the ground of desertion under S. 13(1) (*ib*) of the 1955 Act: (1993) 1 Hindu L.R. 330 (Bom.).

Estoppel *per rem judicatam*—Husband's petition for nullity on ground of non-consummation of marriage—Allegation denied and cross-prayer for divorce on ground of cruelty—Both, petition and cross-prayer dismissed—Subsequent petition by husband for divorce on ground of wife's desertion—Wife praying for divorce on ground of constructive desertion—Wife is not estopped from repeating cruelty allegations: (1959) 3 W.L.R. 471.

Marriage void under S. 11 of the Hindu Marriage Act, 1955—Decree of nullity cannot be passed after death of one of the spouses: (1962) 75 Mad.L.W. 559: A.I.R. 1962 Mad. 510.

If an obedient son, who is in good terms with his father, authorises his father to negotiate for and settle his marriage including the selection of the bride, and the father selects a bride after full knowledge about her physical defects and the son marries that bride, the son cannot thereafter be allowed to turn round and to have the marriage annulled on the ground that he would not have consented if the defects were made known to him: A.I.R. 1988 Cal. 210: (1987-88) 92 Cal.W.N. 709 (D.B.).

Where the bride and her father agreed to her marriage to a fickleminded groom on the prior assurance of his father evidenced by a memorandum of settlement and a power-of-attorney granted by the groom's father to secure the benefit of the bride, *held*, the bride and her father having changed their position to their detriment by solemnisation of such marriage, the groom's father thereafter became more smart and sold the properties, by associating the groom with the transaction, the Supreme Court by invoking Art. 142 of the Constitution of India granted the relief to the wife and her daughter on the ground of promissory estoppel, equity and fair play by directing that out of the consideration, Rs. 60,000 be paid by the purchaser to the wife and her minor daughter: A.I.R. 1995 S.C. 1624.

To be entitled to get maintenance under S. 125, Cr.P.Code, the wife must be a legally wedded wife. The marriage of a woman with a man having a living spouse is a complete nullity in the eye of law and she is, therefore, not entitled to the benefit of S. 125. The fact that she was not informed about the man's marriage when she married him, who treated her as his wife, was of no effect. She could not rely on the principle of estoppel as to defeat the provisions of the Act. [1983 Cr.L.J. 259 (Bom.), Affirmed]: A.I.R. 1988 S.C. 644: (1988) 1 Hindu L.R. 375: 1988 Cr.L.J. 793.

The doctrine of estoppel cannot be invoked against a wife to defeat her claim to a higher rate of maintenance allowance even though on an earlier occasion a maintenance

decree had been passed and a certain rate of maintenance had been fixed thereunder. [A.I.R. 1945 Bom. 539; A.I.R. 1968 Guj. 150, Rel. on]: A.I.R. 1991 All. 255: (1991) 17 All.L.R. 67 (D.B.).

67. Estoppel in respect of burden of proof.—Where the plaintiff accepted the burden of proof pertaining to the execution of the mortgage deed by the defendants, *held*, he was estopped from contending later on that the burden of proof was wrongly placed on him: A.I.R. 1971 Raj. 124: 1971 Raj.L.W. 122.

68. Estoppel in case of *benami* transaction.—*Benami* transactions — Estoppel against real owner. *See* A.I.R. 1957 Ker. 48.

Where a benamidar executed a Will wherein he described himself as real owner and said Will was executed by the real owner but there was no evidence to prove that the Will was executed at real owner's instance or that the real owner had knowledge about the contents of the Will, *held*, the heirs of the real owner, were not estopped from bringing a suit against the benamidar even though the real owner failed to take any action against the benamidar: A.I.R. 1983 N.O.C. 101 (All.) (D.B.).

Where the father acquired a property in the name of but not for the benefit of his minor sons who were then possessed of no means and the consideration therefor was paid by the father out of his own funds, *held*, the property undoubtedly belonged to the father; upon his death it devolved on his legal heirs; any promises made by or conduct of his widow and sons do not make any change in the legal position; they cannot operate as estoppels in the partition suit unless all its ingredients are established: A.I.R. 1988 Cal. 375 (D.B.).

Where the purported transferor had sold his property to another but without intending the title to pass to the other which continues to vest in the transferor to the knowledge of both the parties and in the suit for partition by the transferee impleading the transferor as a party, non-raising the plea of *benami* by the transferor in the suit, *held*, cannot operate as estoppel against the transferor in his subsequent suit for declaration of his title to the property: A.I.R. 1984 Pat. 80: 1984 B.B.C.J. (H.C.) 66.

Where in a suit for ejectment and arrears of rent by the *benami* owner, the tenants were barred from denying the title of the *benami* owner who had inducted them into the premises and a compromise was arrived at, *held*, the tenants were not barred by the doctrine of estoppel from suing the real owner of the promises for specific performance of the contract for purchase of the demised premises entered into by them with the real owner; the compromise did not amount to a representation by the tenants that the premises belonged to the wife, *i.e.*, the *benami* owner: 1984 Raj.L.W. 321.

69. Estoppel against minor.—It is true that the doctrine of estoppel does not apply to minors and still less the Court will hold a minor estopped by the acts and omissions of others. There is, however, another principle that a minor is not entitled to repudiate an agreement and yet retain the advantage derived by him under it. General principles of equity seem incompatible with such a position. Thus, where the respondent on attaining majority repudiated a particular part of the agreement entered into by his guardian regarding sale of impugned house which was not beneficial to him and accepted the other part which was for his benefit, *held*, minor could not challenge the sale: 1974 Raj.L.W. 156.

No estoppel against infants: I.L.R. 25 Cal. 616 ; I.L.R. 26 Cal. 381. Major allowing decree to be passed as minor—Estoppel to question decree in subsequent suit: I.L.R. 48 All. 661: A.I.R. 1926 All. 673.

Even if, in S. 115, the word "person" includes minors, the general intention of adjective law of the Legislature as to the rule of evidence in this section must give way to the particular intention of substantive law in S. 11 of the Contract Act. A deed executed by a minor is a nullity according to Indian Law and it cannot be the subject of a plea of estoppel as against the executant: (1929) 31 Bom. L.R. 340: A.I.R. 1929 Bom. 201: I.L.R. 55 Bom. 741. *See* also (1940-41) 45 Cal.W.N. 906.

Minor executing sale deed representing himself as major—No estoppel to plead invalidity of sale: 23 Mad.L.W. 521: A.I.R. 1926 Mad. 607 ; A.I.R. 1934 Mad. 560: 67 M.L.J. 257 (case of pronote executed by minor) ; I.L.R. 20 Pat. 1130: A.I.R. 1941 Pat. 433 ; 139 I.C. 718: A.I.R. 1932 All. 710. *See* also A.I.R. 1926 Nag. 491 ; I.L.R. 9 Lah. 701: A.I.R. 1928 Lah. 609 (F.B.) ; A.I.R. 1928 All. 626; A.I.R. 1936 Cal. 567.

Respondent (minor) and his mother becoming entitled to land — Lease in favour of petitioner by minor respondent — Petitioner's right to challenge right of respondent alone to terminate — Estoppel: 1959 Nag.L.J. (Notes) 66.

Representations by persons legally competent to bind minors—Minors are estopped

from challenging them—Compromise by *karta* on behalf of himself and minor member of family—Minors not entitled to dispute—Permission of Court not necessary—C.P. Code, 1908, O. 32, R. 7: 1961 Jab.L.J. 395.

Vendee not using due diligence in ascertaining minor vendor's age. *Held*, that the vendor was not estopped from pleading minority at the time of the transaction impeached: 150 I.C. 968: A.I.R. 1934 Lah. 304 (1). The mere fact that the purchaser from the guardian of a minor properties belonging to the minor took a letter from the minor stating that there was necessity for the alienation does not estop the minor from impeaching the sale, so long as it is not shown that the minor caused or permitted the vendee to believe that necessity existed: 115 I.C. 175 (2): A.I.R. 1929 Nag. 221. Admissions by *guardian-ad-litem*—When estops minor. *See* A.I.R. 1957 Manipur 32.

As a general proposition the position of law is that a representation made by a minor would not operate as estoppel. But where a guardian or a person legally competent to bind the minor makes a representation on behalf of such minor and himself and then both the minor and such person legally competent to bind him are estopped from challenging the representation.

The plaintiff filed a suit for redemption of certain ornaments alleged to have been pawned by their father with the defendant. The defendant pleaded bar of estoppel. He had earlier filed a suit against the plaintiff who was minor then and his other major brothers, for recovery of his amount by sale of pawned articles and that a compromise was arrived at between the *karta* and himself whereby the defendant was allowed to keep the articles in lieu of his dues including interest. No decree was, however, passed in terms of the compromise and the Court dismissed the suit as having been compromised out of the Court. *Held*, that the agreement having been made by the *karta* of the joint Hindu family on behalf of the family was binding on the minor members also and the plaintiffs were estopped from challenging the same: 1961 M.P.L.J. (Notes) 289: 1961 Jab.L.J. 395.

Appointment of guardian in proceedings under S. 27 of U.P. Tenancy Act, 1947—Appointment not challenged as irregular on ground that minor had attained age of majority or on any other ground by the said minor or by proposed guardian. *Held*, said minor and proposed guardian were estopped from challenging the appointment: 1966 All.L.J. 607.

Where a *de facto* guardian of a minor-debtor executes an acknowledgment on behalf of the latter for purposes of extending limitation under S. 19 of the Limitation Act, and the debtor after attaining majority subsequently executes another acknowledgment, the subsequent acknowledgment, does not estop him from questioning the authority of the *de facto* guardian, as it clearly could not have misled the creditor in receiving the prior acknowledgment: A.I.R.1948 Nag. 293: I.L.R. (1947) Nag. 710: 1947 Nag. L.J. 405.

Though by reason of having accepted certain benefits under an ekrarnama wrongfully disposing of properties belonging to a wakf, a minor may be estopped from questioning the validity of the ekrarnama in his personal capacity, it does not preclude him in the capacity of mutawalli to sue for the recovery of the properties of the endowment wrongfully disposed of under the ekrarnama: (1931-32) 36 Cal.W.N. 972.

Where expense incurred on the marriage of a male was justified as a legal necessity in the plaint on the ground that he was a major and no plea of the mortgage being of non-binding nature was raised therein either, *held*, the settled law is that the plaintiff cannot be allowed to succeed against his own pleadings and adopt a contrary plea for the first time in second appeal from a favourable averment elicited from a witness, not a family member, in cross-examination that the groom was then a minor when no relevant issues were raised or tried: A.I.R. 1972 All. 357: 1972 All.L.J. 351.

Where persons to be sued are majors, a suit brought without their knowledge against them on the footing that they are minors is wrong, and the guardian *ad litem* appointed to represent them has no legal standing to act for them and his admission of liability is not binding on them. Such persons are not estopped from contesting the validity of the decree even if they became aware of the execution proceedings and did not come forward to prosecute their claims then: A.I.R. 1938 Rang. 468.

70. Estoppel against reversioners.—There are three classes of estoppel which

may arise where a reversioner impugns an alienation made by a widow: (*i*) as embodied in S. 115; (*ii*) election in its strict term whereby the person electing is benefited under the transaction; and (*iii*) later on agrees to abide by the transaction. A presumptive reversioner becoming an actual reversioner when succession opens is precluded from impugning the transaction; however, if he had taken the benefit while he was a minor, another rule would apply because a minor, obviously, cannot be compelled to accept the benefit if on opening of the succession he would stand deprived of his legal rights; but he can, on attaining majority, certainly ratify the transaction and be bound by it or repudiate the transaction and disgorge the benefit. [(1954) 2 M.L.J. 162, Approved: A.I.R. 1972 S.C. 2069.

Surrender by widow—Consent by reversioner not necessary—Neither reversioner nor person claiming through him can be stopped from challenging surrender, if it was void or voidable in law: A.I.R. 1965 Pat. 47.

Reversioner enjoying benefit under it for several years—Arrangement not challenged even after widow's death—Arrangement is binding and cannot be challenged: (1961) 3 Ori.J.D. 201.

Reversioners cultivating under the alienees from the widow and getting contribution from them for building a common well while widow is living, insufficient to establish admission of alienees' title: A.I.R. 1928 Lah. 6.

The facts that the reversioner to the estate of a widow's husband had received some items of property from the widow in consideration of relinquishing his reversionary right to the remainder and that his son, himself inherited those items which the father had received, could not operate as estoppel against the son from questioning the subsequent alienation by the widow in favour of others: A.I.R. 1933 Mad. 637: 65 M.L.J. 282.

Where the ancestor of a reversioner had admitted the execution of a sale deed by a Hindu widow who was a *pardanashin* lady but her knowledge and understanding of the document was nowhere admitted, the reversioner was not estopped from pleading want of proper understanding of the transaction by the executant: 10 O.W.N. 147: A.I.R. 1933 Oudh 170 (2).

Where a Hindu widow, the next reversioner and the remote reversioners were all parties to a family settlement entered into to bring harmony in the family and the avoidance of disputes and litigation, and the remote reversioners were greatly benefited by the compromise, after the death of the next reversioner, the remote reversioner to whom the estate had opened under Hindu law, could not be permitted to say that at the time of the settlement, they had no title and could not enter into a compromise with the next reversioner and others. The principle of estoppel was clearly applicable under the circumstances: 1959 All.W.R. (H.C.) 85: A.I.R. 1959 All. 473.

Deed of surrender by widow in favour of next reversioner and alienations in favour of others—Latter conveying portion to sister to last male holder—Her sons who had become presumptive reversioners enjoying properties and disposing of portions—If precluded from challenging alienation by widow: 1956 An.W.R. 1125: A.I.R. 1957 Andh. Pra. 846.

Alienation by Hindu widow—Deed of alienation signed by next reversioner with full knowledge of contents—Estoppel—Right to challenge the alienation subsequently: A.I.R. 1960 Pat. 564.

Alienation by Hindu widow with daughter's consent—Daughter and reversioners through her cannot impeach alienation: (1965) 67 Punj.L.R. 325: A.I.R. 1965 Punj. 317.

Where a widow was granted life estate in lieu of her maintenance, an admission by a reversioner that her daughter was also entitled to the property, *held*, would not estop him after the widow's death that her daughter had no title to the properties; S. 14(1) of the Hindu Succession Act, 1956 is not attracted: A.I.R. 1977 Mad. 64: (1976) 89 Mad.L.W. 628: (1976) 2 M.L.J. 205.

Hindu widow—Compromise by—Reversioner enjoying benefit under compromise by widow for a long time—Estoppel: A.I.R. 1958 Cal. 447: (1957-58) 62 Cal.W.N. 209.

Obiter—In order to constitute election or ratification it is not essential that a reversioner should assent to the transaction impeached only when he is in titulo. The ratification can be effected even during the lifetime of the widow and before the reversion falls. There is no justification for limiting this

doctrine to cases of alienation by Hindu widows. It applies to awards as well: A.I.R. 1960 Andh. Pra. 222: (1960) 1 An. W.R. 340: I.L.R. (1959) Andh. Pra. 951.

Where a suit for possession challenging the adoption made by the last male holder, the other reversioner impleaded as a defendant supported the adoption, disclaimed any share in the suit property but was resisted by the widows of the adopted son and the adopted grandson of the last male holder, was decreed on first appeal and in the second appeal, the first defendant remained *ex parte* and the second appeal was compromised by the plaintiff and the widows, without pressing the appeal against the first defendant, *held*, the first defendant by his plea and conduct had waived his right to the suit properties; he was estopped from impugning the compromise and claiming his share in the suit property as a reversioner. [A.I.R. 1928 Mad. 555; A.I.R. 1939 Mad. 576, Disting.]: A.I.R. 1973 Andh. Pra. 96.

If a person having full knowledge of his rights as a possible reversioner enters into a transaction which settles his claim as well as the claim of the opponent at the relevant time, he cannot be permitted to go back on that arrangement when reversion actually opens: A.I.R. 1961 S.C. 797: (1961) 3 S.C.R. 624; A.I.R. 1971 S.C. 1041: (1971) 1 S.C.W.R. 614.

71. Estoppel in case of adoption.—Adoption—Applicability of rule of estoppel: A.I.R. 1967 Ori. 103.

Adoption—Giving and taking not proved—Party acknowledging adoption is not estopped from disputing its validity. *See* A.I.R. 1955 Madh. Bh. 129.

The presence of a person at an adoption or his subsequent acquiescence in the adoption cannot estop him from challenging the validity of the adoption. He cannot dispute the fact of the adoption, but its legality cannot be established by mere estoppel: I.L.R. (1943) Bom. 706: (1943) 45 Bom.L.R. 992: A.I.R. 1944 Bom. 40.

A mere presence at an adoption or a mere acquiescence in an adoption does not create an estoppel so as to preclude the person from challenging the adoption afterwards, when there is no representation made as to any matter of fact on the strength of which the act of adoption can be said to be made: (1937) 39 Bom.L.R. 599: A.I.R. 1938 Bom. 20.

The principle underlying S. 115 is that estoppel may be described as a rule by which a person, in some cases will not be allowed to plead the contrary of a fact or state of things which he has formerly asserted by words or conduct. Estoppel thus operates merely as a personal disqualification and does not bind any one who claims by an independent title. A person may be so estopped although he was acting in good faith or without full knowledge of the circumstances or under a mistake or misapprehension. The misrepresentation to operate as an estoppel must be of a matter of fact. An erroneous expression of opinion that an adoption was valid in law cannot lead to an estoppel. Mere acquiescence in an adoption or mere presence at an adoption does not create an estoppel or even subsequent conduct recognising the adoption.

A Hindu widow whose power to take a son in adoption to her deceased husband had exhausted due to the presence of her widowed daughter-in-law, adopted X and induced the daughter-in-law to change her status of her being a legal heir on the date of the adoption, by marrying the adopted son X. The arrangement of marriage was settled before the adoption. The adoption being void the daughter-in-law by marrying X had caused her own civil death and had lost the status of a legal heir. This was the result of the representation made by the widow that the adoption was valid and would enable X, the husband of the daughter-in-law to succeed. *Held*, that the widow was estopped by her conduct both before and after the adoption from changing her ground and challenging the adoption by her of X: A.I.R. 1958 Ori. 242.

The doctrine of estoppel cannot confer on a person the status which an adoption alone can give him. But the doctrine, can be invoked to prevent a challenge to the adoption by one who has induced the adopted boy to change his position so irrevocably as to render it impossible for him to revert to his original position in his natural family: A.I.R. 1955 Nag. 241: I.L.R. (1955) Nag. 656.

The belief induced in the person who sets up an estoppel under S. 115 must be one in a fact, not in a proposition of law. Hence, a Hindu widow's conduct in adopting a boy without the authority of her husband does not estop her from challenging the validity of

the adoption on the ground of the absence of her husband's authority: I.L.R. (1943) Nag. 678: A.I.R. 1944 Nag. 62.

Estoppel does not confer any status and father was not estopped from challenging validity of adoption: I.L.R. (1964) Cut. 970: A.I.R. 1965 Ori. 96.

Adoption—Plea of estoppel by conduct raised by adoptive son—Sustainability: A.I.R. 1959 S.C. 504.

Widow acting in pursuance of power contained in Will and adopting boy—Will construed as conferring no such power—Widow if estopped from questioning validity of adoption: A.I.R. 1939 Mad. 187: (1939) 1 M.L.J. 75.

Conduct—Adoption made under settlement deed—Validity of adoption—Party bringing about settlement and adoption, if can question: 153 I.C. 102: A.I.R. 1935 Mad. 141.

Adoption by widow challenged by suit after 15 years by reversioner, who all the while has not been accepting the adoption and challenging authority of widow—He is not precluded by any rule of law from questioning the adoption: (1965) 1 S.C.W.R. 947: A.I.R. 1965 S.C. 1549.

72. Estoppel by record.—*See* A.I.R. 1969 All. 342: 1967 All.W.R. (H.C.). 731: 1968 All.L.J. 144 (F.B.).

Entries in revenue records—Presumption—Finality—Entry of persons being adopted son—Failure to get it corrected—Recital is not binding on rightful holder. *See* A.I.R. 1954 Nag. 319: I.L.R. (1954) Nag. 692.

In order that estoppel by record may arise out of a judgment or order, the Court which pronounced the judgment or order must have had inherent jurisdiction to do so. Lack of inherent jurisdiction deprives the judgment or order of any effect. Such a judgment or order cannot operate as an estoppel even against the person who sought the assistance of the Court whose jurisdiction is impugned. Therefore, an order passed by a Revenue Officer deciding a question of title to property or transferring title being wholly devoid of jurisdiction, a plea of estoppel by record cannot be founded on an order so wholly devoid of inherent jurisdiction. Mere consent of a party to the making of the order in question by the Revenue Officer will not give that order legal force and validity: A.I.R. 1963 J.&K. 15.

Estoppel by record—Not applicable to taxation matters: I.L.R. (1964) Cut. 575: (1965) 16 S.T.C. 271: A.I.R. 1965 Ori. 44.

Mere non-action against an incorrect settlement entry is not such an act or omission as will, without more, be sufficient in law to induce or mislead another person to act upon the same and so to act to his prejudice: (1958-59) 63 Cal. W.N. 689.

Entries made in mutation proceedings are presumed to be correct but they are nevertheless rebuttable; they cannot, therefore, amount to estoppel by record: A.I.R. 1972 Him. Pra. 20: (1971) 1 Sim.L.J. 1 (D.B.).

Mutuation proceeding—Officer to be bound by oath—Decree passed on basis of oath—Re-opening of matter in civil Court: 1934 All.L.J. 92: A.I.R. 1934 All. 300.

Where deceased's estate was mutated equally in favour of his three sons and a daughter each getting one-fourth share and said mutation was relied upon by the plaintiff sons in proceedings before Special Collector, Surplus Area, to claim that they had succeeded to one-fourth share to the estate of their father, *held*, the plaintiff-sons would be estopped from contending subsequently that their sister was only entitled to one-sixteenth share is the estate of their father: A.I.R. 1985 P.&H. 238: 1985 Rev.L.R. 277.

Where the plaintiff's father admitted the right of the defendant's predecessor-in-interest and thereafter of the defendant herself to the suit land inherited from a common ancestor and allowed its mutation to be entered in the names of that predecessor and thereafter of the defendant, *held*, the plaintiff was, because of his own and his father's conduct, estopped from changing his position and deny the defendant's title to the suit property: A.I.R. 1973 P.&H. 126 (D.B.).

Where upon the death of the father who owned a house under a co-operative society, his son nominated in the records of the society, moved an application to the Calcutta Municipal Corporation for mutation of the house in his own and his other brother's name in the municipal records when under the W.B. Co-operative Societies Act, 1983 it was only the nominee named by the deceased in the society's record who alone could inherit the house, *held*, the application for mutation in the name of both the brothers having been made in ignorance of his rights

under the law, would not estop the nominee son to contend to the contrary. [A.I.R. 1984 S.C. 921 and A.I.R. 1967 All. 405, Foll.]: A.I.R. 1991 Cal. 181: (1989) 1 Cal.L.J. 373.

Where, the defendant held possession as a tenant under his paternal uncle and thereafter under his uncle's widow during their life times and upon her death, the defendant surrendered three-fourth of the demised property to the plaintiffs, the two surviving brothers and a surviving sister of his deceased uncle, and the plaintiffs admitting the defendant's right to the remaining one-fourth share, the property was mutated in the revenue records by consent of all the parties, *held*, the plaintiffs were estopped from impugning the defendant's right to his one-fourth share after many (9) years. [A.I.R. 1965 S.C. 1055; A.I.R. 1973 P.&H. 126, Foll.]: A.I.R. 1979 P.&H. 12.

73. Estoppel in election matters.—(*See* also Note 24, *supra*). Where the election of a candidate from a constituency reserved for Scheduled Castes, was challenged on the ground that having embraced and professed Buddhism, the elected candidate was not entitled to contest from the reserved constituency, *held*, though legally there is no bar in raising said question in the election petition, the petitioner's allegation that the elected candidate was not member of the Scheduled Caste would be considerably weakened because of his failure to object at the time of the scrutiny of the nomination papers: A.I.R. 1975 S.C. 420: (1975) 1 S.C.C. 589.

Where a defeated candidate challenged the election of the returned candidate and claimed the seat for himself on the ground of improper reception and rejection of votes which attracts S. 97 of the Representation of People Act, 1951 requiring the successful candidate, in case he desires to contest the petitioner's claim to the seat, to prefer a recrimination as well as to deposit costs in favour of the Election Commission, *held*, the returned candidate's failure to comply with the requirement would disentitle him to rely on the petitioner's concession on scrutiny of ballots regarding validity of the returned candidate's rejected ballots; a concession is tantamount to an admission and, therefore, evidence; the Election Tribunal would have no jurisdiction to use the petitioner's concession in favour of the returned candidate; on facts, the petitioner's contention as having been duly elected upheld. [(1972) 2 M.L.J. 118, Affirmed]: A.I.R. 1973 S.C. 2077: (1973) 2 S.C.C. 170.

Estoppel—Elections—Petitioners taking part in—Having full knowledge of illegality in "voters" list—Is estopped from challenging the validity of election on his defeat: 1961 B.L.J.R. 14.

In a election petition alleging corrupt practices on the basis of speeches made in the election meetings, *held*, the Court could draw an adverse inference against the authenticity of the gist of the speeches since published in the newspapers for non-production of the notings made at the spot by the reporters: A.I.R. 1995 S.C. 1836.

Election dispute—No estoppel against applying for setting aside on ground that electoral rolls were defective. *See* A.I.R. 1955 Nag. 49: I.L.R. (1954) Nag. 875 (F.B.); I.L.R. (1959) 9 Raj. 1084: A.I.R. 1960 Raj. 152.

Where the election petitioner in the wake of the impending general election impugned the electoral rolls as containing a large number of bogus voters and the writ petition was disposed of on the assurance of the electoral officers that they would in the short time available scrutinise the rolls and rectify the rolls and an election petition was, thereafter, instituted against the returned candidate on the ground, *inter alia*, of entry of bogus voters on the rolls and the returned candidate plead estoppel on the ground that the previous writ petition had already settled the point of bogus voters, *held*, the previous writ petition could not operate as *res judicata* as it did not decide any point; the returned legislator was already a candidate and he could not claim to have joined the electoral contest on any representation said to have been made in the previous writ petition; estoppel was not attracted: (1991) 4 Bom.C.R. 156.

Where a defeated candidate after taking part in the election challenges it there can be no question of any estoppel because it cannot be said that the position of the other side was in any way altered by reason of something done or not done by the defeated candidates: I.L.R. (1959) 9 Raj. 1084: A.I.R. 1960 Raj. 152.

Writ petition to set aside elections—Petitioner fighting election in spite of alleged defects—Does not operate as estoppel—Writ petition not barred: 1962 Raj.L.W. 57.

Candidate to election admitting disqualification during scrutiny of nomination paper—Voter not present there not estopped by admission: A.I.R. 1969 Guj. 251.

Return of election expenses—Candidate is not estopped from contending that

particular expenditure is not expenditure in eye of law: 1970 Jab.L.J. 342.

Where nomination form of the petitioner, who was sole contestant of a seat reserved for women, was rejected on the ground that she had not mentioned her number in the voters' list and the petitioner challenged the same by filing a writ petition and at the time of admission of the petition, the State Government failed to raise a contention regarding non-maintainability of petition on the ground of available alternative remedy under R. 11(4) of the Election Rules, *held*, the State Government must be deemed to have waived this objection at that stage: A.I.R. 1982 Guj. 281: (1982) 2 Guj.L.H. 617: (1982-2) 23 Guj.L.R. 397.

The petitioner who had taken part in the election, contested for the office of President of Municipal Committee but defeated, *held*, is estopped from contending that proper notice had not been given to him for election: 1988 Punj.L.J. 46 (D.B.).

Where the Bar Council fixed last date for filing of nomination papers as 30-9-1973 but extended it before expiry of said date, *held*, the petitioners who had filed their nomination papers after 30-9-1973, on being declared unsuccessful could not challenge the right of the Bar Council to postpone the date of filing nomination papers: A.I.R. 1975 All. 190 (D.B.).

Election of office-bearers of Gram Panchayat—Party participating in election—Party was estopped from challenging validity of election: 1965 B.L.J.R. 397.

Panchayats—Rajasthan Panchayat Samities and Zilla Parishads Act (XXXVII of 1959), Ss. 14, 20(10), 20(11)—Standing Committees formed under S. 20 (10)—Term of—Dissolution can be by expiry of term or resignation by all members—Resolution purporting to dissolve them before the term is invalid—Members party to such resolution not estopped from challenging it—Subsequent bye-laws fixing number of Committees does not apply to them: 1962 Raj.L.W. 634.

Where on a candidate's objection to the nomination papers of his only rival for the election of the *Mukhia* which were rejected whereby he was declared elected unopposed but subsequently the rejection of nomination papers and consequently the unopposed election was set aside and fresh election was held, wherein the candidate whose unopposed election was set aside had also participated, *held*, he was estopped from challenging the validity of the election on the ground of illegalities committed therein. [A.I.R. 1959 Pat. 7, Rel. on]: A.I.R. 1972 Pat. 439 (D.B.).

Where the defeated candidate in the election for the office of *Mukhia* had participated in the election with the full knowledge that 179 electors had been illegally included in the voters list in between the dates of nomination and polling, *held*, he will be deemed to have acquiesced or concurred in the election and is estopped from challenging the same after having taken his chance and losing in the election; he could not maintain a writ petition when his election petition was still pending before the Election Tribunal. [A.I.R. 1958 Pat. 147, Dissent.]: A.I.R. 1972 Pat. 283: 1972 B.L.J.R. 288: 1972 Pat.L.J.R. 360.

Where the Counsel for the returned Sarpanch in the election petition under the A.P. Gram Panchayat (Conduct of Election) Rules expressly stated that he had no objection to the recounting of votes and the recounting disclosed that though he had won by 22 votes, 29 invalid votes had been cast in his favour, *held*, it was not open to the returned Sarpanch to contend in the writ Court that the recounting ought not to have been ordered when there was in fact material on record warranting recounting: A.I.R. 1984 Andh. Pra. 298 (D.B.).

Where the election of a *Mukhiya* was set aside by the Election Tribunal for corrupt practices after trial who impugned the same in the High Court on the ground that the election petition should have been summarily dismissed for non-compliance with the mandatory requirement of R. 75 as laid down in R. 77 of the Bihar Panchayat Election Rules, 1959 and it was contended by the opposite party that having participated in the trial of the election petition on merits, the *Mukhiya* was estopped from pressing the objection, *held*, it was the duty of the Election Tribunal to summarily dismiss the election petition as it stood; the rule of waiver or estoppel was not attracted: A.I.R. 1973 Pat. 389: 1973 B.L.J.R. 580.

Where the petitioner actually participated in the no-confidence meeting and took a chance of succeeding at the voting by show of hands without raising any objection to such a procedure being followed, *held*, he was estopped from contending that the impugned meeting was not proper and legal. [1975 Punj.L.J. 4, Foll.; 1973 Punj.L.J. 90; A.I.R. 1975 P.&H. 33, Disting.]: A.I.R. 1976 P.&H. 122: 1975 Punj.L.J. 449: (1976) 78 Punj.L.R. 170: 1976 Rev.L.R. 185 (D.B.).

Co-operative Society—Election of Chairman—Previous approval of Registrar for electing non-official Chairman—Election of official as Chairman—Challenge to validity—Estoppel: A.I.R. 1958 Pat. 154.

Where under the Rules and the established practice the Secretary of a society was elected by its general body meeting (its supreme authority) and not by the Managing Committee which alone was empowered to convene the extraordinary general body meetings and such a meeting was called, without requisition, by the Secretary himself elected by the Managing Committee where the Managing Committee was elected, *held*, both the general body meeting as well as the elections are illegal; when some of the Managing Committee members sued for a declaration of their having been validly elected, other members of the Committee were not estopped from contending that the general body meeting as well as the elections held there were against law: A.I.R. 1985 N.O.C. 97: (1984) 2 Karn.L.J. 407.

74. Estoppel in case of easement.—Imposition of easements—Grant of easement by person with no title—Estoppel: 1967 Ker.L.J. 105.

Easementary right of plaintiff declared by decree of Court—Defendant raising new construction and obstructing plaintiff's right—Failure by plaintiff to raise objection at the time of construction—Lapse of ten years—Effect—*Held*, that a subsequent suit for demolition of such construction would be barred by acquiescence and also laches: 1981 All.L.J. 1345.

Extinguishment of right of easement—Non-user of easement for over fifteen years—Non-user will not amount to implied release—But equitable release of right of easement is still possible—When it can be so presumed—Easements Act, 1882, Ss. 38, 46: (1965) 2 M.L.J. 536: A.I.R. 1966 Mad. 158.

75. Estoppel by deed.—Suit by beneficiary to follow trust properties—*Held*, on facts, that since plaintiff's father had settled dispute and received his share of sale-proceeds of trust-property sold by Trustee, plaintiff could not charge Trustee for committing breach of trust nor could follow alleged trust properties—(Trust Act, 1882, Ss. 63 and 23): I.L.R. (1966) 2 Mad. 385: A.I.R. 1968 Mad. 161.

Where joint purchasers of a property by an unregistered partition deed gave exclusive ownership and possession of the passage therein to one of them, in his suit for declaration of his title to the passage based not on adverse possession but the partition deed, *held*, the suit could not be decreed on the unregistered deed which is not legal or admissible evidence; merely because the deed had been acted upon and possession delivered was of no avail: A.I.R. 1988 Del. 13 (D.B.).

Interpretation of document is question of law and there can be no estoppel in such matters: I.L.R. (1968) 18 Raj. 540: 1968 Raj.L.W. 332: A.I.R. 1969 Raj. 22.

An estoppel does not arise against the maker of a promissory note, by the mere fact that after discharge, it is left with the payee and he passes it off on others as if it was still a negotiable instrument: A.I.R. 1933 Mad. 300: 64 M.L.J. 241.

Promissory note by elder brother in Hindu joint family—Debt borrowed for private purpose—Endorsement of payment signed by executant and by younger brother —Liability of latter—Estoppel against denial does not arise: I.L.R. (1943) Mad. 717: (1943) 1 M.L.J. 104.

A brought a suit against *B* and *C* and claimed a decree against the former as the executant of the suit pronote. As against *C* it was claimed in the alternative that *A* handed over the pronote to him for collection and that if he had collected the amount from *B* the decree should be passed against him for the amount. Both *B* and *C* set up the plea that *A* was a benamidar and not real owner of the note and that since payment was made to *C* who was the beneficial owner thereof the suit should be dismissed. *Held*, that although it was not open to the promisor of a note to contend that someone other than the payee on the face of a pronote is the real owner of the note the question as to who is entitled to the moneys could be gone into when there is a contest between the beneficial owner under the note and the ostensible payee. Therefore, in the case before the Court although it would have been held that *B* was precluded from contending that *A* was not the owner of the money in question yet in view of the fact that *C* had been impleaded as a party to the suit and in view of the reliefs claimed against both *B* and *C* in the plaint as framed the

Court decided the dispute on merits and did not wish to rest its decision on the question of law alone: (1957) 70 Mad.L.W. 361: (1957) 2 M.L.J. 154: A.I.R. 1957 Mad. 573.

Suit against firm for recovery of amount based on pronote—Copy of trial balance-sheet enclosed with income-tax return sent by manager of firm and given to plaintiff by partner of firm, filed by plaintiff in suit to prove subsisting liability of firm and marked with consent—Effect: (1968) 2 An.W.R. 567: 74 I.T.R. 224.

76. Estoppel by recital in deed.—Recital of receipt of consideration in deed does not operate as estoppel: I.L.R. 49 All. 708. *See* also A.I.R. 1926 Lah. 471.

When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true it is an estoppel upon all. But, when it is intended to be the statement of one party only the estoppel is confined to that party and the intention is to be gathered from construing the instrument. The recital, however, cannot operate as against a third party: A.I.R. 1933 Pat. 708. *See* also 19 Pat.L.T. 421: A.I.R. 1938 Pat. 431.

A recital in a deed or other instrument is in some cases evidence against the party who makes it, but it is no more evidence as against other persons than any other statement would be: 1953 Ker.L.T. 254: A.I.R. 1953 Trav.-Co. 417.

When a deed confers on a person certain benefits burdened with certain obligations, the law does not permit him to retain the benefits and to repudiate the burden: (1952) 65 Mad.L.W. 231: A.I.R. 1954 Mad. 19.

Party executing a document—Document proved to be fictitious—Parties to document not bound by contents thereof: 1964 Kash.L.J. 222: A.I.R. 1965 J.&K. 11.

No express or implied contract to pay sales tax on or above price—Sale tax included in bills submitted—Purchaser not estopped from repudiating or disputing liability: A.I.R. 1966 All. 422.

Where a person was taken as an *illatom* son-in-law by his father-in-law under a settlement-cum-will which contained a mention of an agreement between his father and father-in-law whereby the son-in-law was to give up his rights in his natural family and to get his in-laws' properties and upon his suing for partition of his natural joint family properties, the agreement between his natural father and father-in-law was set up as an estoppel in defence, *held*, there was no evidence that the plaintiff after his marriage was excluded from enjoyment of the joint family properties and had ceased to be its member and even otherwise in law an *illatom* son-in-law does not cease to belong to the natural family and does not become a member of his father-in-law's family; as long as he did not relinquish his right by an appropriate deed, a mere recital in the settlement-cum-will of his father-in-law was not sufficient to estop the plaintiff from claiming his share in his natural family; it was no representation from the plaintiff to the members of his joint family: A.I.R. 1993 Karn. 24: (1993) 1 Hindu L.R. 305: (1992) 2 Karn.L.J. 527 (D.B.).

77. Estoppel in case of acknowledgment of settlement of account.—It is always open to a person to recover his legal dues unless he has, by some action, legally bound himself not do so. If not, it does not matter whether he has not exercised his rights, or whether he has recovered his dues only partially, provided he sues within limitation. Estoppel is a ground on which he might be precluded from claiming ; express waiver is another and so forth. But the mere fact that he accepts a part of the money tendered does not estop him from claiming the rest unless his hands are tied by something more: I.L.R. (1946) Nag. 392: 1946 Nag.L.J. 358: A.I.R. 1947 Nag. 153.

Where a contract entered into between the Railways and a contractor for executing certain construction work was terminated after Railways fulfilled certain conditions put forth by the contractor and he issued a "no-claim certificate" and received the payment, but thereafter he sought a reference to arbitrator on the ground that the Railways had committed breach of contract and he was, therefore, entitled to damages, *held*, having received the payment and having put the Railways in a position by which the Railways changed its position to its own detriment, it was not open to the contractor to say that the dispute had not been settled and it still existed with regard to the alleged damages sustained by him. The plaintiff was estopped from raising the dispute by his own conduct in as much as on account of its conduct the Railways has changed its position. [A.I.R. 1974 S.C. 158, Rel. on]: A.I.R. 1984 Guj. 41: (1983) 3 Guj.L.H. 748: (1983-2) 24 Guj.L.R. 1347.

For the work done by the plaintiff under a contract entered into with the defendant, the latter sent a sum by cheque to the former requesting him to accept the same in full and final settlement of all the plaintiff's claim against the defendant and to return the enclosed receipt duly signed by the plaintiff. The plaintiff received the payment but did not return the receipt as required by the defendant but on the contrary before encashing the cheque sent a letter to the defendant through a pleader informing him that he was entitled to something more. *Held*, that the acceptance of the payment by the plaintiff in the circumstances was not in full and final settlement of his claim and did not amount to accord and satisfaction but was in partial satisfaction of his claim and the plaintiff was not estopped from claiming the balance alleged to be due to him: A.I.R. 1961 Pat. 37 (D.B.).

Claim for damages—Acceptance and encashment of cheque for sum less than claimed—Party if estopped from claiming balance: A.I.R. 1963 Pat. 30.

Where the petitioner, an advocate, accepted payment towards his professional fees from State Government in full settlement of all his claims and acknowledged it without any protest, *held*, he could not subsequently claim interest on account of undue delay caused in payment of his fees: A.I.R. 1990 Andh. Pra. 76: (1989) 2 An.L.T. 470.

78. Estoppel when transferor of property acquires title subsequent to transfer or when he had limited interest.—*See* (1978) 2 M.P.W.N. 285.

Sale of estate comprising interests of lunatic and non-lunatic—Non-lunatic consenting for sale—Manager and Court acting upon such consent—Sale is good or bad in its entirety—Non-lunatic cannot resile from its position and extricate its interest: A.I.R. 1966 Mad. 89.

Where property of a lunatic was alienated by his wife and the lunatic brought a suit against his wife and the transferee wherein the transferee pleaded that the sale was saved by S. 43 of the Transfer of Property Act, 1882 as wife subsequently acquired estate after lunatic's death and was bound to perform her contract and that the principle of "feeding the estoppel" wholly applied in the case, *held*, the fact that the deceased was a lunatic and that the property in question was owned and possessed by him and was his estate was well known to the purchaser and, thus, he would not get any relief by applying the principle laid down under S. 43 of the 1882 Act, as the sale was void from its inception. Further, it is also settled that no estoppel can be pleaded against a statute so as to prejudice a minor or a lunatic who enjoys the protection of law. [A.I.R. 1962 S.C. 847; A.I.R. 1985 S.C. 694, Foll.]: A.I.R. 1991 Madh. Pra. 340: 1991 M.P.L.J. 217.

Where an absolute settlement of property in favour of a minor with the minor's mother as his guardian was made with the condition that the mother should hand over the possession to the beneficiary on his attaining majority with the stipulation that if the minor's life span was short and he were to die suddenly, the mother shall become absolute owner of the property; after attaining majority the beneficiary sold the property wherein the minor's parents represented and declared that the property absolutely belonged to the vendor who, however, shortly after his marriage died; the mother claimed the property sold on the ground of herself having become its absolute owner on the death of her son, *held*, the defeasance clause would have applied only on the beneficiary's death during his minority; the mother was, therefore, estopped from impugning the sale in view of her assurance and declaration that the property belonged absolutely to her son: (1981) 1 Karn.L.J. 487.

79. Estoppel in case of trust.—Where the defendant not only agreed to become a trustee but he discharged some functions in that capacity and with the intention of gaining two valuable houses in the municipal town entered into an exchange deed thereby getting at the trust properties, *held*, he could not thereafter turn round and say that there was no valid trust: A.I.R. 1975 Andh. Pra. 97: (1975) 1 An.W.R. 113: 1975 An.L.T. 1 (D.B.).

Trust—*Cypres* application—Power of Court to make scheme—Necessary condition—Trusts created by deed of grant—Trustees if can deny trusts: (1956) 2 All E.R. 881.

Charitable scheme—Scheme erroneous—Amendment—Attorney-General if estopped from raising validity of trusts declared by scheme: (1956) 3 All E.R. 14.

Suit against Mahant—Statement that loan was given to Mahant in personal capacity—Plaintiff cannot urge that Mahant was sued as such. *See* A.I.R. 1957 Raj. 264.

Estoppel against a Mahant whether can be got rid of by a suit brought by him formally in the name of idol: I.L.R. 56 Cal. 894: A.I.R. 1929 P.C. 65: 56 M.L.J. 636 (P.C.).

80. Estoppel against insurer.—Where in a motor-accident claim case, the owner of vehicle who himself gave the particulars of the insurance policy and did not raise any objection when a copy of the insurance policy was tendered and admitted in evidence, and who also failed to produce the original policy himself or making any effort in refuting the correctness of the copy, *held*, he could not raise the objection that the same could not be read in evidence in deciding the question regarding compensation: A.I.R. 1994 Him. Pra. 21 (D.B.).

Suit for damages against owner of vehicle and the insurer—Plaintiff dropping the later upon the owner endorsing that he has no claims against insurer—Endorsement, *held*, could not estop the owner to implead the insurer as a third party under O. 8-A of the C.P. Code—C.P. Code, 1908, O. 8-A: (1968) 38 Comp. Cas. 19: 1967 Comp. L.J. 235: (1967) 2 M.L.J. 446: (1967) 80 Mad.L.W. 362.

Insurance policy—Award made condition precedent for right of action—Waiver of condition, what amounts to: A.I.R. 1963 Ker. 270: I.L.R. (1963) 1 Ker. 545: (1963) 1 Comp. L.J. 329. *See* also A.I.R. 1989 Pat. 269; A.I.R. 1979 Pat. 124, cited in Note 40, *infra*.

Where in a motor accident case under S. 110-D of the Motor Vehicle Act, 1939 the insurance company failed to plead that the deceased was a gratuitous passenger in the truck either in the written statement or before the Tribunal, *held*, the insurance company had clearly waived its right to deny its liability on that ground: A.I.R. 1982 Guj. 136: (1982) 2 Guj.L.H. 207: (1982-1) 23 Guj.L.R. 572.

81. Plea of estoppel in appeal.—The case of waiver and implied agreement involves questions of law and fact and in the absence of specific pleading and specific issue such pleas cannot be allowed to be raised in appeal: A.I.R. 1960 Cal. 146 ; A.I.R. 1960 Punj. 226.

Plea of estoppel cannot be allowed to be raised first time in appeal: (1983) 2 Serv.L.J. 418: 1984 Lab.I.C. (N.O.C.) 167: I.L.R. (1984) 1 Del. 163. *See* also (1978) 1 M.P.W.N. 260.

Failure to take plea of *'autrefois acquit'* in lower Court—Plea can be taken in appeal for first time: 1969 Cr.L.J. 844 (Manipur).

Where in a suit for ouster of an encroacher, the defendant remained absent on the date the local Commissioner appointed by the Court submitted his report as also on the subsequent date and his subsequent application seeking time to file objections was rejected, *held*, the defendant was estopped from raising in appeal the plea of non-affording of opportunity to file objections to the report: A.I.R. 1990 N.O.C. 77 (Gau.).

Where respondent-bank held four mortgages in respect of same property and instituted four separate suits for recovery of amounts by sale of mortgaged property and the appellants judgment-debtors submitted to passing of decrees in all the suits and put forth no contentions regarding violation of S. 67-A of the Transfer of Property Act, 1882 as all claims had not been consolidated in one suit when suits were pending before civil Judge or after the initiation of execution proceedings before the trial Court, *held*, the appellants by their conduct were estopped from taking a defence in appeal regarding violation of S. 67-A of 1882 Act: A.I.R. 1993 Karn. 279: (1993) 1 Karn.L.J. 519.

New plea of estoppel must be specifically pleaded—Whether can be taken for the first time in second appeal: A.I.R. 1957 Tripura 11.

Where no foundation in the plaint was laid for the plea of estoppel nor any issue in respect thereof was raised in the trial Court, *held*, the plaintiff could not be allowed to canvas the same for the first time in second appeal: A.I.R. 1973 All. 89: 1972 All.L.J. 912.

New point—Estoppel not pleaded in lower Courts—New point cannot be allowed to be set up in second appeal when it is one of fact: 1962 M.P.L.J. 290.

In order to raise the plea of estoppel, the facts on which it is based must be pleaded. Thus, where landlord contended that inasmuch as the tenant was a party to the compromise, he was estopped from challenging the validity of the order made by the Rent Controller on the basis of that compromise but said point was not taken before the lower Court and was raised for the first time in second appeal, *held*, plea of estoppel could not be raised in second appeal. [A.I.R. 1929 Mad. 462; A.I.R. 1937 Bom. 326, Rel. on]: A.I.R. 1978 P.&H. 260: (1978) 80 Punj.L.R. 434.

Where the Court's power to direct the tenant to deposit arrears of rent for the pre-suit period under S. 11-A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 was not impugned in the grounds of first appeal, *held*, the appellant was not precluded from urging that point as a ground in the second appeal: A.I.R. 1981 Pat. 36: 1981 Pat.L.J.R. 1: 1980 B.B.C.J. (H.C.) 665 (F.B.).

Where in an appeal before the Supreme Court, the appellant raised a totally new plea regarding promissory estoppel though necessary facts to find any such promissory estoppel had not been put forward or considered by any of the assessing or appellate authorities, *held*, such a plea could not be raised before the Supreme Court for the first time: A.I.R. 1990 S.C. 2256.

Where the High Court hearing an appeal under Cl. 15 of the letters patent granted amendment of pleadings and examined witnesses and recorded findings of fact on appreciation of evidence in respect of amended pleadings, *held*, the fact that appellant never objected to the appellate Bench examining witnesses and recording findings of fact on appreciation of evidence could not estop him from raising that objection in Supreme Court as the appellate Bench lacked inherent jurisdiction to record fresh evidence and no amount of consent could confer jurisdiction. [A.I.R. 1977 Cal. 136, Reversed]: A.I.R. 1978 S.C. 1062: 1978 U.J. (S.C.) 224: (1978) 2 S.C.C. 559.

An agreement entered into between the then Ruler of Kota in 1945 with a quarrying company granting monopoly rights for 15 years alongwith exemptions from taxes, etc. was sought by the company to be enforced against the Union of India and the State of Rajasthan. On conclusion of arguments, the parties agreed that if the agreement was found to be void, Ss. 65 and 70 of the Contract Act, 1872 would become applicable whereafter evidence was adduced by the parties but the State raised the objection that neither in the plaint nor in the notice under S. 80 of the Code of Civil Procedure was there any mention of the relief under S. 65 of the Contract Act, which, therefore, could not be granted. *Held*, merely because the State had adduced evidence in the Court and obtained adjournments therefor is not sufficient to estop the State from raising the plea which was purely legal: A.I.R. 1971 Raj. 128: 1971 Raj.L.W. 334 (D.B.).

Agreement between Administrator appointed under S. 260 of the J.&K. Municipal Act, 1951 after dissolution of a Municipal Council and third party—Agreement neither signed by Secretary nor bearing seal of the Municipality as required by S. 56 thereof—Agreement is unenforceable—Plea as to unenforceability of agreement being one of law could be raised even though not raised in the trial Court: 1979 Kash.L.J. 413.

Where both the parties had preferred objections to the report about the quantum of damages determined by the special referee appointed by their consent but the Court allowed the plaintiff's objections but dismissed the defendant's objections who preferred no appeal, *held*, in his appeal against the decree, the defendant was precluded from challenging the trial Court's order dismissing his objections: A.I.R. 1989 N.O.C. 119: (1988) 2 Cal.L.T. (H.C.) 136 (D.B.).

82. Miscellaneous.—Estoppel in cases of void transactions: 1965 B.L.J.R. 242: A.I.R. 1965 Pat. 144.

Estoppel by grant: (1963) 1 Ker.L.R. 483.

Estoppel against public bodies: (1970) 2 S.C.J. 689.

Where the Madras University launched its programme of recognising "autonomous Colleges" from year to year basis, invited applications and one of the applicants, a College for women, was recommended by the University Inspection Committee for grant of such status but without any such promise or assurance by the University, *held*, the College could not invoke the rule of estoppel on the ground that it had altered its situation by prescribing its own syllabus when the University did not confer the "autonomous status" on the College under the University Grants Commission's direction; the College had altered its position without having any power to do so as the syllabus could be devised only by the statutory Board of Studies which had not even been constituted: A.I.R. 1991 Mad. 32.

Where no promise or representation was held out by the respondent-company to the petitioner-firm to continue the supply of the lube products to it indefinitely and uninterruptedly and the supply was made on the basis of *ad hoc* arrangement or Indent to Indent or Invoice to Invoice basis or Product Indent-cum-Delivery Order and on cessation of supply by company as a result of change of

policy, the aggrieved firm pleaded estoppel, *held*, as no legal relationship had been created between the firm and the company for supply of products in future, the promissory estoppel could not be invoked. In fact no right arose out of the dealings by the firm with the company and, therefore, the doctrine of promissory estoppel was wholly inapplicable: A.I.R. 1989 Del. 315 (D.B.).

Where the plaintiff-company purchased scrap copper from the defendant on the basis of sale price represented to them by it but thereafter the plaintiffs were asked to pay additional amount on the ground that the fact of revision of rates for relevant period by MMTC was not in the knowledge of the defendant at the time of fixing of price and it was alleged that according to the terms and conditions of the contract, the price payable by the plaintiffs was based on the prevalent MMTC rate of copper ingot/bar as on the date on which it was actually lifted by the plaintiffs, and thus, the plaintiffs were required to pay according to revised price, *held*, defendant could not take shelter under said condition of agreement to force upon the plaintiff a higher rate of sale price than the one represented by them earlier. Once the selling price had been declared, defendants bound themselves to the said declaration; even if there was a mistake, they were to blame themselves. They could not, for their omission, be allowed to put any burden on the plaintiffs, saying that there was mistake in quoting the sale price: (1991-2) 108 Mad.L.W. 147 (D.B.).

Where the petitioner took possession in execution of eviction order but the appellate authority ordered re-delivery of possession on deposit of certain amount with the petitioner and the respondent so deposited the amount, *held*, that would not estop the petitioner from challenging the order of re-delivery: 1978 M.P.L.J. 863: 1978 Jab.L.J. 645.

Where a tenant put in appearance on service of notice of the application for attachment before judgment sought time for filing of objections and the Court in his and his Counsel's presence fixed date for his written statement and for final hearing of the suit without ever complaining during the trial of the suit that not being aware of the date fixed in the suit he could not deposit the rent on that date but, in fact, on several dates he applied for time before ultimately filing his written statement, and subsequently, he contended that the summons of the suit not having been issued to him, he was denied the benefit of S. 20(4) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act by depositing the requisite money on or before the first date of hearing, *held*, his conduct throughout the trial shows that he never felt the necessity of the service of summons; he never raised any objection or protest against non-service in the trial Court; having so forfeited his right to the summons, he could not be allowed to take shelter behind the stale plea of the summons not having been served on him: A.I.R. 1981 All. 400.

Where adjournment was granted on certain condition on the asking of a party, whether said party is entitled to challenge the condition imposed. *See* (1981) 1 M.P. W.N. 138.

The filing of an incompetent appeal on the mistaken advice of a lawyer and the withdrawal of the same do not prejudice the right to file a proper appeal and cannot be held to constitute such conduct on the part of an appellant as to deprive him of his right to file a valid appeal: A.I.R. 1983 S.C. 786: (1983) 3 S.C.C. 75.

Where a single Judge on pronouncement of judgment allowed the defendant to pay the decretal amount in instalments and the defendant impugned only the order of instalments in the Letters Patent Appeal without annexing a certified copy of the decree which at admission was withdrawn by the defendant's Counsel, *held*, since it was not a valid appeal in the eyes of law, its withdrawal could not estop the defendant from preferring an appeal against the entire judgment and decree unless his right of appeal had been lost by limitation or otherwise; the withdrawal of appeal in the circumstances did not amount to estoppel or waiver: (1983) 96 Mad.L.W. (S.N.) 85 (S.C.).

Where the defendant sought impleadment of a third party under O. 1, R. 10(2) of the Code of Civil Procedure because the plaintiff in replication had denied the defendant's counter-claim based on the issuance of the credit note to a third party at the plaintiff's suggestion, and had suggested that it was for the defendant to seek impleadment of the third party as a co-defendant, *held*, since the claim against the third party had already become time-barred, the

doctrine of estoppel could not be invoked against the plaintiff and the defendant's application was rightly disallowed in terms of the settled proposition of law; promissory estoppel cannot bind other person or saddle liability on him because of a third person's statement: A.I.R. 1995 All. 19.

Where plaintiffs filed an application for amendment of plaint and the lower Court adjudicating upon the merits of the amendment rejected the plea of amendment, *held*, the fact that the plaintiffs were parties to the process adopted by the lower Court and they placed evidence in support of their case would not estop them from assailing the validity of said order of lower Court: A.I.R. 1984 Mad. 19: (1983) 96 Mad.L.W. 560: (1984) 2 M.L.J. 547.

Abatement of suit—Death of one of several defendants—Interest of deceased defendant not shown to be separable—Even if defendants assert that deceased was not necessary party, it is open to them to plead that on plaintiff's own case entire suit has abated. 1966 Cr.L.J. 1098 (Pat.).

Ex parte decree in favour of a party claiming sirdari rights over disputed property—Appellate and revisional consolidation authorities while negativing claim of the party would bear in mind that *ex parte* decree works as an estoppel against whom it has been passed: 1983 All.L.J. 462.

Where during the pendency of a revision against an order for setting aside *ex parte* decree, the parties went to trial for obtaining a contested decree, *held*, they must be deemed to have relinquished their right of maintaining the *ex parte* decree: 1984 Pat.L.J.R. 57: (1984) 32 B.L.J.R. 50.

Demand on appellant for further process fee and filing of summonses for service of notice of appeal on respondents—Appellant submitting to order without claiming exemption under High Court Rules and allowing appeal to be dismissed for non-prosecution—Order for fresh Talbana held could not be attacked as erroneous: I.L.R. (1960) 10 Raj. 1492.

Where the suit is one on behalf of the community and the plaintiff does not claim any title or set up any personal right in him, no estoppel can be pleaded against him in his representative capacity by reason of any individual act he might have committed: 1959 Ker.L.J. 932.

Where the defendant not only failed to invoke the doctrine of estoppel based on a representation of his being a North Indian Brahman in recitals of an agreement but also that issue was raised, evidence was recorded and adverse finding was given, *held*, the defendant could not be allowed to plead estoppel against the plaintiff thereafter: A.I.R. 1973 S.C. 268: (1973) 1 S.C.C. 14.

Where during the pendency of the tenant's appeal against a decree of eviction and recovery of rent one of the appellants expired and on his appeal having abated, the remaining appellant's application for setting aside the abatement and bringing on record the deceased's legal representatives was also dismissed, *held*, it was not open to the applicants thereafter to contend that one of the surviving appellants, as per their written statement, was the *karta* and as such represented the entire family of the appellants and there was, thus, no abatement, for the appellate Court for purposes of abatement was not concerned with the pleadings but it was concerned with the findings of the Court below which found the deceased to be a co-tenant. [A.I.R. 1965 S.C. 1531; A.I.R. 1965 Raj. 132, Rel. on]: A.I.R. 1972 Gau. 77.

Though where a person who *ex hypothesis* has no title at all went into possession for a life-estate under a Will, he might be estopped from denying the remainder men's title; his son who enters into possession after his father's death without any title, his father having had nothing to pass to him cannot be affected by his father's estoppel. The mere fact that he would have succeeded as heir to his father if his father had left an heritable estate does make him a privy of his father for the purposes of the rule of estoppel: A.I.R. 1932 P.C. 172: 1932 All.L.J. 691: 59 I.A. 268: 56 Cal.L.J. 36: (1932) 34 Bom.L.R. 1299 (P.C.). *See* also 1932 All.L.J. 971: 63 M.L.J. 418 (P.C.).

Suit for possession of agricultural lands and *mesne profit*—Plea by defendant that he has been in possession under unregistered contract of sale not barred—Defence is available under S. 53-A of the T.P. Act, 1882—Plea not denied by S. 47, Hyderabad Tenancy and Agricultural Lands Act (XXI of 1950), S. 47: (1962) 2 An.W.R. 462: A.I.R. 1963 Andh. Pra. 232.

Where the alienee of the property from the previous lessee had the knowledge of the lessee having given an undertaking to the

lessor, *i.e.*, the Government for payment of damages when the forfeiture of the lease was restored on execution of the undertaking without which the permission to sell the property could not have been granted, *held*, the alienee was estopped from contending that he was not liable to pay damages: A.I.R. 1982 Del. 580.

Change of position—Will found invalid as Mahomedan wife renouncing of rights of inheritance—Binding nature of arrangement: 10 O.W.N. 201: A.I.R. 1933 Oudh 142.

Scope of S. 43, T.P. Act—Benefit under when available—Knowledge of facts how far required—Independent enquiry not necessary—Rule of estoppel—Consideration of. *See* 1956 An.W.R. 115.

Where the State Government directed the Market Committees not to press for collection of market-fee arrears on account of rice where fee had already been collected in the form of paddy, *held*, the Market Committees were estopped from recovering the market fee arrears from the traders: A.I.R. 1984 N.O.C. 312 (Andh. Pra.) (D.B.).

Villagers subscribing to mahazar, preceding grant of gomal land for other purposes—They cannot assail it subsequently: (1969) 2 Mys.L.J. 449.

In 1896 *A* selling his house and three shops to his daughter *B*—*A* taking the same on lease from *B* for 3 years—*A*'s heirs and their transferees continued in possession as tenants—Tenancy not determined—Transferee making new construction—Suit in 1956 for possession and damages by sons of *B* against *A*'s heirs and transferees—If sale of 1896 was genuine, claim held on facts not barred by plea of estoppel—Defendants must be fastened with knowledge of title of *B*'s sons—But aforesaid tenancy determined by efflux of time in 1899—*B*'s heir not taking steps to recover possession—Inference of holding over not open—Suit filed in 1956 being beyond 12 years from 1899 held to be barred by limitation under Art. 139, Limitation Act, 1908—From another approach in absence of proof by plaintiffs of their dispossession within 12 years prior to suit, suit was barred by Art. 142—[Limitation Act, 1908, Arts. 139, 142]—[T.P. Act, 1882, Ss. 103, 111 (*a*), 116]: A.I.R. 1968 All. 363.

Where it was clear that the petitioners prayed for the appointment of a Commission of Inquiry under the Act and the entire case was thereafter argued on that basis but later the State having found that the order of the Court has gone against the State, argued that petitioners had not approached the Court for appointment of Commission of Enquiry under Commissions of Inquiry Act, *held*, the State could not say that there was no prayer for appointment of Commission: A.I.R. 1993 Ori. 180: (1993) 75 Cut.L.T. 352 (D.B.).

Where an unlawfully constructed high rise building was sought to be demolished under S. 452 of the Hyderabad Municipal Corporation Act, 1956 and the builder objected on the ground that third party interests had crept in, *held*, the builder having prevented the Corporation by a restraint order from issuing a public notice cautioning the investors against making investments in the building, he was estopped from raising the objection against demolition: A.I.R. 1995 Andh. Pra. 17 (F.B.).

Carriage of goods by Railways—Declaration of value by consignor—Fixing of rate of carriage on basis of declaration—Loss of goods—Plea that value declared not true value—Estoppel: I.L.R. 15 Pat. 394: A.I.R. 1936 Pat. 393.

Where appellants-importers misdeclared the goods and thereafter made a statement that they did not dispute the laboratory test reports indicating misdeclaration and were ready to get the matter adjudicated straightway by waiving the notice to show cause against confiscation of goods and imposition of penalty and the goods were released to them, *held*, the valuation of the imported goods on the basis of the laboratory tests was not open to challenge: A.I.R. 1993 S.C. 1185.

Where in a proceeding regarding the right to succeed to the office of Sajadanashin to "Durgah Khawaja Saheb" Ajmer, the parties to the suit including the Durgah Committee, which had got itself impleaded, proceeded on the basis that the hereditary office of Sajadanashin was entitled to be claimed by descendants of the Saint by the rule of primogeniture, *held*, in appeal by special leave petition the Durgah Committee could not contend that it was not bound to follow the customary rules of succession and that the decision of the Courts below as to succession to the office of Sajadanashin was not binding on it. The Durgah Committee was as much a party to the suit as others and, thus, it was as much bound by the decision as others.

[A.I.R. 1981 Raj. 29, Affirmed]: A.I.R. 1987 S.C. 2213.

Where the temple owned no elephant from 1894 to 1940 and thereafter on presentation by Maharaja of Travancore, the temple elephant was painted *Vadagalai namam* to which the *Thengalai* sect started objecting, *held*, it could not be said that the *Thengalai* had acquiesced in the use of *Vadagalai namam* prior to 1940: A.I.R. 1978 Mad. 210: (1977) 2 M.L.J. 247 (D.B.).

Debtor adjudicated insolvent—His property situate in foreign State does not vest in receiver, without proper transfer in favour of receiver—In its absence insolvent would only be estopped from dealing with it: A.I.R. 1968 Guj. 101.

Certificate of registration granted under Ch. III-A of Forward Contracts (Regulation) Act, 1952 subject to a condition confining forward trading to specified commodities—No protest against condition, as there was no occasion for it in the course of its business—Petitioner entitled to object to that condition when it interfered with its business—Validity: 1966 All.L.J. 449.

Plaintiff describing land as *rayati* land in partition suit and claiming it as *prajadakhali* land in subsequent suit for possession—No evidence to show that plaintiff intentionally made false declaration in partition suit and defendant prejudiced by it—Declaration of land either as *rayati* or *prajadakhali* land not relevant in partition suit—Cannot operate as estoppel against plaintiff in suit for possession: 36 Cut.L.T. 33: A.I.R. 1970 Ori. 87.

Order under—Madras G.O. No. 1298, dated 28th April, 1956, para. 4, column 10—Marks to be awarded under—Depends upon facts of each case—Principles of estoppel will not apply: A.I.R. 1963 Mys. 278.

Monthly tenant building structure—If entitled to compensation on ejectment—Applicability of T.P Act, S. 51. *See* A.I.R. 1957 Pat. 331.

Permitting another to build on land—Suit to recover possession of land built upon is not maintainable—Plaintiff estopped and only entitled to a fair rent—A pre-emptor, party to suit by village landlords challenging sale—Sale confirmed by compromise decree—Estoppel: (1928-29) 33 Cal.W.N. 90: A.I.R. 1928 P.C. 190: I.L.R. 10 Lah. 75 (P.C.).

An executor who has entered upon his duties as such is estopped from pleading immunity from his obligation as executor, on the ground that no probate has been taken out by him: A.I.R. 1930 Mad. 956: 59 M.L.J. 596.

Where in a usufructuary mortgage deed the recital states that the plaintiff is mutwalli of the wakf, the property of which is the subject-matter of the mortgage and the document is acted upon and possession is transferred and sums of money are received by the plaintiff, the document amounts to a representation that the plaintiff as mutwalli is competent to make that transfer and he is, therefore, estopped from denying its validity: 1935 All.L.J. 217: A.I.R. 1935 All. 792. *See* also (1943-44) 48 Cal.W.N. 571: A.I.R. 1944 Cal. 305.

Plaintiff carrying on quarrying operations under yearly permits issued to him from time to time—Refusal by Government to issue further permit—Suit for declaration and injunction—*Ad interim* injunction restraining Government from interfering with plaintiff's right to quarry—Suit dismissed—Effect of—Quarrying operations during interim period are unauthorised under Rules—Plaintiff held liable for penalty under R. 18 (*iv*): (1963) 65 Punj.L.R. 33: A.I.R. 1963 Punj. 158.

A Burmese wife refrained from making any claim to her husband's property but referred to it as her husband's property and attested the mortgage-deed, and made payment of interest thereon, *held*, her conduct was definitely calculated to induce the mortgagee to believe that she had no interest in the subsequently claim interest in the mortgaged property or that the decree obtained by the creditor is inoperative against that interest: 154 I.C. 1061: A.I.R. 1935 Rang. 17.

Although the transfer of property for an immoral object is void, still in a suit for the recovery of the property by the transferor, *held*, the principle of equity enunciated in L.R. 16 Eq. 275, would prevent the Court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy: (1933) 35 Bom. L.R. 345: A.I.R. 1933 Bom. 209.

A mistake of law may be corrected: I.L.R. (1964) 14 Raj. 748: 1964 Raj.L.W. 346: A.I.R. 1964 Raj. 270 (D.B.).

116. Estoppel of tenant; and of licensee of person in possession.—No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

Section 116—Synopsis.

1. Scope and applicability.
2. "During continuance of tenancy"—Meaning of.
3. "Landlord"—Meaning of.
4. Benamidar as landlord.
5. "At the beginning of tenancy"—Meaning of.
6. "Immovable property"—What is.
7. No estoppel if possession is under illegal or void contract.
8. Estoppel where title is lost subsequent to commencement of tenancy.
9. Estoppel in case of person claiming derivative title.
10. Estoppel in case of attornment.
11. Attornment under mistake, etc.
12. Eviction by title paramount.
13. Eviction by equitable owner.
14. Plea of adverse possession.
15. Third party's title.
16. Estoppel after termination of tenancy.
17. Estoppel when only contract of tenancy is denied.
18. Applicability to person claiming under lessee or sub-lessee.
19. Estoppel when title is claimed not on relationship of landlord and tenant, but as vendor and vendee.
20. Joining of co-sharer, etc.
21. What amounts to disclaimer.
22. Construction of building by tenant.
23. Estoppel between mortgagor and mortgagee.
24. Estoppel between licensor and licensee.
25. Illustrative cases—(*a*) Where section 116 held to be applicable.
(*b*) Where section 116 held to be not applicable.
26. Miscellaneous.

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1. Scope and applicability.—*See* also Note 47 under S. 115. Scope and principle of section. *See* I.L.R. 19 Mad. 200; I.L.R. 37 All. 557: 29 M.L.J. 335 (P.C.); I.L.R. 44 Cal. 771; 35 Cal.L.J. 146: A.I.R. 1922 Cal. 237; 10 O.W.N. 48: A.I.R. 1933 Oudh 129; A.I.R. 1958 All. 54.

S. 116 of the Evidence Act lays down that no tenant of immovable property (or person claiming through him) shall during the continuance of the tenancy be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immovable property: (1972) 74 Punj.L.R. (Del.) 14: (1972) 8 Del.L.T. 36.

Under S. 116, a tenant of immovable property cannot during the continuance of his tenancy deny his landlord's title to the property at the commencement of the tenancy: (1975) 88 Mad.L.W. 60.

S. 116 does not furnish a ground for eviction. It merely enumerates the principle of estoppel which is merely an extension of the principle that no person is allowed to approbate and reprobate at the same time. The principle laid down in this section is that having become a tenant and holding on to the property on the basis of the landlord's title, the tenant is not entitled to repudiate or dispute the title of the landlord. This does not mean that if he does so by way of a defence in a suit falling within the purview of the Rent Act, there should be a decree forthwith for eviction. This rule of estoppel only means that a defence of such nature ought to be shut out and rejected by the Court: A.I.R. 1992 Bom. 93: (1991) 93 Bom.L.R. 175: 1991 Mah.L.J. 761.

The provisions of S. 116 are in two parts and operate against all persons who enter upon the property as tenants or as licensees of the persons in possession thereof. The later part of that section says that the person who enters upon any immovable property by the licence of the person in possession thereof, is not to be permitted to deny that such person had a title to such possession at the time when such licence was given. A person while in possession should on considerations of policy and principle be always

estopped from denying the title of the person who let him into that possession: A.I.R. 1973 Bom. 168: 1973 Mah.L.J. 233.

A denial of the landlord's title to the demised property by the tenant, in order to attract S. 116, must be in clear and unmistakable terms. [A.I.R. 1918 P.C. 1, Rel. on]: (1979) 1 Ren.C.R. 626: (1979) 2 Ren.C.J. 30: (1979) 2 Ren.L.R. 12 (Raj.).

Provisions of the section do not deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant—Various categories of persons mentioned in the section are precluded from denying that the lessor had a title at the date of the lease and there is no exception even in respect of a case where the lease itself discloses defect of title: 33 Cut.L.T. 72: I.L.R. (1966) Cut. 887: A.I.R. 1967 Ori. 92.

S. 116 deals with one cardinal and simple estoppel between landlord and tenant and between licensor and licensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation. The section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise, the section applies against the lessee, any assignee of the term and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect or title. The principle does not apply to disentitle a tenant to dispute the derivative title of one who claims to have since became entitled to the reversion, though in such cases there may be other grounds of estoppel, *e.g.*, by attornment, acceptance of rent, etc. In this sense it is true that the principle only applies to the landlord who "let the tenant in" as distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end. There is in English case-law some authority for the view that a tenant is only estopped from denying his landlord's title if at the time when he took his lease he was not already in possession of the land. But in S. 116 the Indian Legislature has formulated no such condition: 64 I.A. 311: I.L.R. (1938) 1 Cal. 1: A.I.R. 1937 P.C. 251: (1937) 2 M.L.J. 236 (P.C.), followed in A.I.R. 1957 Assam 188.

Ss. 115 and 116 are not exhaustive; there may be rules of estoppel applicable in India other than those contained in these sections; a man may be estopped not only from giving a particular evidence under the Act but also from doing any act or relying upon any particular argument or contention which the rules of justice, equity and good conscience prevent him from using as against his opponent. [A.I.R. 1915 P.C. 96, Rel. on]: A.I.R. 1974 Pat. 364: 1974 B.L.J.R. 388 (D.B.).

S. 116 is not exhaustive and does not contain the whole law of estoppel governing a landlord and a tenant: A.I.R. 1944 Pat. 77: I.L.R. 22 Pat. 513; (1927-28) 32 Cal.W.N. 867: A.I.R. 1928 Cal. 546; A.I.R. 1955 Nag. 234. The section in terms applies only to cases where the tenancy continues. A similar estoppel exists in the case of a tenant holding over and the tenant cannot deny his landlord's title while he continues in possession. He must either give up possession or must have been evicted by title paramount: I.L.R. 22 Pat. 513: A.I.R. 1944 Pat. 77. *See* also (1981) 2 M.P.W.N. 97.

The rule of estoppel between landlord and tenant is also extended under S. 116, in terms to licensee and, for the matter of that, to a person in permissive occupation of immovable property. Where in a suit, filed by the plaintiff seeking the recovery of suit land on which the defendant had a cowshed, the fact of defendant being in permissive occupation of that land was established in the favour of plaintiff, *held*, the defendant was estopped from denying the title of the plaintiff in view of the above finding: A.I.R. 1971 Assam 143 (D.B.).

S. 116 applies to the cases where the tenancy is either admitted or is not in controversy. This does not mean that a defendant who is alleged to be a tenant cannot deny that he is in fact not a tenant: 1959 Jab.L.J. 591: 1960 M.P.C. 96: 1961 M.P.L.J. 388.

Statutory tenant under Bombay Rent Act (1947) — Estoppel against — Applicability: (1974) 15 Guj.L.R. 675.

The provisions regarding estoppel contained in Ss. 115 to 117 of the Indian Evidence Act, 1872 are a mere shadow of what the modern principles of promissory estoppel have come to be. The greatest development in this area is that an independent action can now be found on the principle of promissory estoppel and it is no longer a principle available only as a shield. It can be used as weapon of offence. Gradually, the modern doctrine of promissory estoppel has developed to an extent that it is no longer necessary that the party seeking to enforce the said principle must have suffered a detriment. It is enough if the promisee has altered his position on the faith of the representation: A.I.R. 1992 Del. 28 (D.B.).

S. 116 does not require that the landlord, pleading estoppel, should show that the tenant, against whom estoppel is set up, was let into possession of the disputed property by him (the landlord). The section applies irrespective of the fact that tenant at the time of creation of the tenancy was or was not in possession of the demised property: A.I.R. 1957 Cal. 128; A.I.R. 1957 Assam 188.

Since the doctrine of tenant's estoppel embodied in S. 116 estops even a person already in possession as a tenant under one landlord from denying the title of his subsequent landlord once he was acknowledged by the tenant as his landlord by attornment or conduct, *held*, it is not incumbent on the landlord seeking the tenant's eviction under S. 23-A(*b*) of the M.P. Accommodation Control Act, 1961 to plead in the eviction petition of his being owner of the accommodation and to establish the same by evidence *aliunde*: (1995-1) 115 Mad.L.W. 178 (S.C.).

There is no warrant for holding that the estoppel under S. 116 only arises in favour of landlord who puts the tenant into possession. It is wide enough to cover any case of a grantee who occupies and enjoys under a grant disputing the grantor's title: I.L.R. (1945) Bom. 343: (1945) 47 Bom.L.R. 209: A.I.R. 1945 Bom. 399.

Principle of estoppel embodied in S. 116 applies also to cases under the House Rent Control Acts. Thus, in those cases also the tenant must first vacate the premises and then only they can question the title of the landlord and not when continuing in the house. [A.I.R. 1952 Ori. 95, Disting.]: A.I.R. 1979 Ori. 101 (D.B.).

It is well settled that, in a suit for ejectment and arrears of rent, the basis of the claim is the contract of tenancy. That being so, when, the suit is between the original parties to that contract and there has been no transfer of title of the lessor, the question of title of the landlord is outside the scope of the suit, though evidence about title of the lessor is a relevant fact for proof or disproof of the disputed contract of tenancy: A.I.R. 1971 Madh. Pra. 172: 1971 M.P.L.J. 438 (D.B.).

It cannot be said that even though the relationship of landlord and tenant is proved, it is still open to the tenant-defendant to raise the question of title and insist on the suit being converted into a title suit as distinguished from a suit by a landlord against his tenant. [A.I.R. 1968 Pat. 415 (F.B.) and (1903) I.L.R. 25 All. 498 (F.B.), Disting.]: A.I.R. 1974 Pat. 195.

S. 116 bars a tenant to question the title of his landlord on the ground that at the time when he granted the lease to him the landlord had no title in him: (1963) 65 Punj.L.R. 595.

The section embodies the principle of estoppel arising from the contract of tenancy It is based upon a healthy and salutary principle of law and justice that a tenant who could not have got possession but for his contract of tenancy admitting the right of the landlord, should not be allowed to launch his landlord in inequitable situation taking undue advantage of the possession that he got and any probable defect in the title of his landlord. Of course, he can deny his title after he gives up the possession having thus restored *status quo ante*. All that is necessary for the application of the above principle is that there was a contract of tenancy and that the tenant took possession of the land under the title or with the permission of the landlord or the person then in possession. Possession and permission being established estoppel would bind the tenant during the continuance of the tenancy and until he surrenders his possession. Evidently both the landlord and the persons in possession at the time of the contract are within the protection of the provision. A person in possession within the meaning of the section need not to be a full owner; he may be a mortgagee, lessee or any other person having right to or is in actual possession. However defective the title of such a person or even the landlord

may be at the time of the creation of the tenancy, the person inducted under the term of the contract cannot be permitted to rely on that defect to his advantage or to perpetuate his possession or to act in detriment to the landlord's right: A.I.R. 1959 Andh. Pra. 92: 1959 An.W.R. 148.

During the continuance of the tenancy, a tenant will not be permitted to deny the title of the landlord at the beginning of the tenancy. Further, during the continuance of the tenancy, the tenant cannot acquire by prescription a permanent right of occupancy in derogation of the landlord's title by mere assertion of such a right to the knowledge of the landlord: (1966) 1 S.C.W.R. 309: (1966) 1 S.C.A. 323: 1966 S.C.D. 903: (1966) 2 An.L.T. 291: A.I.R. 1966 S.C. 629. *See* also (1979) 2 Ren.C.J. 310: (1979) 2 Ren.C.R. 423 (Raj.).

A tenant is estopped under S. 116, Evidence Act from challenging the landlord's title to demised property during the currency of lease. A tenant may, however, question derivative title of successor of the landlord ordinarily but when the title in the demised property devolves on a person by virtue of a lawful decree against the landlord, such derivation of title cannot be questioned by the lessee so long as that decree stands as a valid decree: A.I.R. 1970 Assam 102 (D.B.).

It is true that once a valid and subsisting lease is established between the parties, the lessee may be bound by the principle of estoppel and may be debarred from disputing the question of title of the lessor, but that does not prevent the alleged lessee to deny the lease and to deny his own status as a lessee. He is bound by the rule of estoppel only when he acts as a lessee and in that capacity, tries to refuse the title of his own lessor. That well-established principle of estoppel as between lessor and lessee as enacted in S. 116 of the Evidence Act does not prevent any defendant to make out the case that he has never been a lessee, and the lease deed purporting to make him a lessee was never a valid document, and in that behalf, to plead such circumstances as may invalidate the lease or otherwise make it null and void: 12 B.R. 389: 223 I.C. 303: A.I.R. 1947 Pat. 45.

To invoke S. 116, a landlord need not have inducted his tenant into actual possession by execution of the lease deed; the section would be attracted even if the tenant was already in possession; however, such a tenant can avoid the lease on the ground of fraud, coercion, etc. without actually surrendering possession of the land; the rule of approbation and reprobation is not attracted: A.I.R. 1960 J.&K. 132.

Once it is held, that the defendant was allowed by the plaintiff to continue in possession of a portion of the suit house under his occupation as tenant, the defendant is then estopped from challenging the title of the plaintiff in a suit for possession as long as the defendant continued to be in possession of the house: 1961 M.P.L.J. (Notes) 207: 1961 Jab.L.J. 1292; A.I.R. 1978 Pat. 82: 1978 B.B.C.J. (H.C.) 15: 1978 Pat.L.J.R. 226 (D.B.); (1971) 37 Cut.L.T. 1197.

Where the defendant had admitted before the municipal authorities that he was a tenant and the trust was the owner of the property, *held*, in a suit for possession, he was estopped from denying title of the trust by operation of S. 116: (1994) 3 Cur.Civ.Cas. 639 (Andh. Pra.) (D.B.).

Where the tenants who were admittedly inducted on to the plot by and had accepted the plaintiff's paramount title and executed a *kirayanama* in his favour and paid rent to him, *held*, the tenants were estopped from defeating the landlord's title on the ground that his title had since after commencement of the tenancy been terminated by the operation of law under Bihar Land Reforms Act, 1950, and the entire proprietary interest had vested in the State of Bihar: A.I.R. 1984 Pat. 116: 1984 Pat.L.J.R. 250: 1984 B.B.C.J. (H.C.) 153 (D.B.).

Tenant cannot deny title of the landlord at the beginning of tenancy and he cannot acquire ownership by adverse possession merely because of entries in record-of-rights: 1983 Punj.L.J. 247.

Even a trespasser can create a tenancy in favour of another person; thus, if a trespasser inducts a genuine person as a tenant, the relationship between the two would be of "landlord" and "tenant", by virtue of S. 116, the tenant would be estopped from denying the landlord's title at the commencement of the tenancy even though the landlord is none other than a rank trespasser; against the real owner, the "landlord" will have no title to the land; he will have no defence in a suit for possession by the owner but *vis-a-vis* his own tenant, S. 116 confers upon the trespasser a

complete title. His own tenant cannot question his title even after the formal termination of his tenancy unless and until he has surrendered possession to the "landlord": A.I.R. 1987 Bom. 142: (1987) 1 Bom.C.R. 547.

The bar of estoppel under the section continues until the tenant actually goes out of occupation by handing over possession. The protection given to the landlord does not come to an end by reason of his having given a registered notice to quit: A.I.R. 1959 Andh. Pra. 92: (1959) 1 An.W.R. 148.

S. 116 presupposes that the person affected by the estoppel is a tenant. Estoppel under the section arises therefore only when or after the tenancy is admitted or proved: I.L.R. (1943) Nag. 340: A.I.R. 1943 Nag. 265. *See* also 1944 All.L.J. (Supp.) 15; 1942 Nag.L.J. 136.

The tenant is precluded from filing a suit for a declaration of his title if a suit is filed against him for ejectment during the continuance of the tenancy and is decreed against him: A.I.R. 1928 Rang. 162. If a tenant has been let into possession by a landlord he cannot deny and set up adverse title: (1915-16) 20 Cal.W.N. 1335; I.L.R. 34 Bom. 329; I.L.R. 28 Mad. 526; I.L.R. 51 Bom. 43: A.I.R. 1927 Bom. 129; 103 I.C. 421: A.I.R. 1927 Lah. 626.

If a tenant desires to challenge the title of the landlord, he must quit the land: A.I.R. 1928 Rang. 162.

A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. Even if the tenant was already in possession and was not let into possession by the landlord the estoppel under S. 116 applies: 1961 M.P.C. 136: 1961 Jab.L.J. 230.

The consensus of judicial opinion both in India and in England is that before surrendering or solemnly renouncing possession the tenant shall not be permitted to set up a title in a third person or *jus tertii;* it has been repeatedly held that possession must be surrendered before any defect in the lessor's title is allowed to be proved. This rule is, however, subject to exceptions: (*i*) where a plaintiff or a defendant does not seek either to evict or to defend his title as a landlord on the strength of a tenancy but on the strength of his title and the erstwhile tenant having acquired an indefeasible right in himself is opposing the stand on the strength of a title in himself, say, as a vendee; (*ii*) where a tenant has been evicted by the holder of a paramount title; (*iii*) where under a threat or compulsion of being evicted by the true owner or holder of better title, the tenant attorns to such third person with notice to his original lessor. In either of these cases, the tenant need not give up his possession before challenging the original lessor's title; it would be deemed to have been surrendered and a new title created. [A.I.R. 1915 P.C. 96, Rel. on]: A.I.R. 1974 Pat. 364: 1974 B.L.J.R. 338 (D.B.).

Tenant can set up his own title against third person though not against landlord: I.L.R. 52 All. 464: A.I.R. 1930 All. 299.

Where admittedly the lease deed was entered into between the plaintiff and the defendant and the latter was paying rent to the former and he was accepting it, *held,* in a suit for eviction by the plaintiff, the defendant could not challenge his title: A.I.R. 1994 Del. 255; (1991) 2 M.L.J. 134; (1990) 2 M.L.J. 140: (1990-2) 106 Mad.L.W. 332: A.I.R. 1991 Mad. 229; A.I.R. 1976 Cal. 189: (1975-76) 80 Cal.W.N. 193; 1975 B.L.J.R. 227: 1975 B.B.C.J. 90 .

Suit for rent and eviction—Relationship of landlord and tenant admitted by defendant—He cannot dispute landlord's title—Court would be justified in declining to decide question of title raised by defendant: A.I.R. 1955 Him. Pra. 44.

A tenant cannot be permitted to show that in granting him the lease, the landlord acted as agent of another person who was the real owner, and that the liability to pay rent to the lessor cannot be discharged by payment to that alleged owner: A.I.R. 1941 Mad. 607: (1941) 1 M.L.J. 554.

Once a complete relationship of landlord and tenant is established, the rule of estoppel comes into operation and prevents the tenant from denying the authority and title which he admitted to rest in the landlord who inducted him into possession of the land: 73 Cal.L.J. 281: A.I.R. 1941 Cal. 408. *See* also 46 Mys.H.C.R. 547; 49 Mys.H.C.R. 287.

Section is applicable to the case of immovable property only: I.L.R. 4 Rang. 503: A.I.R. 1927 Rang. 94.

Tenant when may dispute tenancy under a leased deed. *See* (1978) 1 M.P.W.N. 243.

S. 116, Evidence Act, estops a tenant from disputing the title of the landlord at the date of lease but it presupposes that the person affected by the estoppel is a tenant. Where the defendant does not accept the position that he was a tenant and to neutralise the effect of the admission made by him in the lease, he relies on the recitals of another document of sale of the same date and he contends that the lease does not embody the whole of the agreement between parties and the lease was only a part of an agreement, the nature of which can be discovered only by the construction of the sale deed, the section will not come into play: A.I.R. 1953 Bhopal 18.

A tenant is only estopped from denying the subsistence and validity of an estate in the landlord sufficient to warrant the demise; he is not further estopped, as, for example, from denying the landlord's right to alienate the property: A.I.R. 1961 J.&K. 34.

Landlord and tenant—Denial of title—Estoppel: (1970) 2 M.L.J. 562.

It is not only an owner but also any other person having a transferable interest in the property, who is competent to grant a licence. The tenancy rights as such are transferable though if they are transferred without landlord's consent in writing, the tenant may incur a liability under the relevant Rent Control Acts; but the person to whom the licence is granted cannot deny the tenant's right to grant it. [1969 Cur.L.J. 589 (Punj.), Rel. on]; it is not open to the licensee to contend that the grantor, being a statutory tenant, was not competent to grant the licence. [A.I.R. 1965 S.C. 414, Disting.]: A.I.R. 1982 P.&H. 542.

When the plaintiff files the suit expressly proceeding on the basis that the defendant is a tenant under him and wants the relief of possession alleging that the tenancy has been validly determined and pays the Court-fee on that basis, the plaintiff could get the relief of possession only if he proves the tenancy. If on a plea by the defendant a question of title arises, it can be gone into only for the purpose of determining as to whether the relationship of tenancy subsisted between the plaintiff and the defendant. If it is to be found that the relationship of tenancy between the plaintiff and the defendant does not subsist, the plaintiff must fail in the suit as instituted by him and the suit cannot be converted into a suit for declaration of title and for recovery of possession on the basis of the title. [(1914) 1 Mad.L.W. 641; (1930) I.L.R. 67 Cal. 349, Foll.]: (1981) 94 Mad.L.W. 502.

Person in possession of property in fiduciary capacity—Is estopped from questioning title of person from whom he got possession: A.I.R. 1968 Madh. Pra. 81.

Once it is found by Courts of fact that the defendant had been inducted into the disputed house as a tenant by the plaintiff represented by marfatdars under S. 116 of the Evidence Act, the defendant-tenant would be estopped and not entitled to challenge the plaintiff's status of landlord: (1970) 1 Cut.W.R. 454.

Where in an eviction suit, the defendant pleaded that as he was heavily indebted to several creditors, a sale deed and a rent note were executed in collusion with the plaintiff to defraud the creditors, *held*, in the instant case, it was open to the tenant to prove that the relationship of landlord and tenant did not subsist between him and the plaintiff at any time, in view of the pleadings of the defendant that the said documents were executed to defraud the creditors of the latter, the defendant was not estopped from leading evidence in that respect. [A.I.R. 1962 S.C. 370, Foll.]: A.I.R. 1973 Raj. 56: 1972 W.L.N. 451: 1972 Raj.L.W. 469.

Tenant is not estopped from denying the title of his landlord when his prior admission of title in favour of his landlord is found to have been obtained by misrepresentation by the landlord: 1962 Nag. L.J. (Notes) 47.

Tenant denying the title of landlord—Permissible limits—If denial is in permissible limits, estoppel cannot be applied to tenant—Penalty of forfeiture when applies: A.I.R. 1969 Madh. Pra. 32.

Lessors also are estopped from denying validity of lease: A.I.R. 1926 Cal. 882: 94 I.C. 661. Verbal lease for more than one year—Tenants in possession—Liability for rent—Invalidity of lease—Effect of: 148 I.C. 684: A.I.R. 1934 Pat. 369.

A tenant is not estopped merely because, by the tenancy he acknowledges the title of his landlord. He may always explain and thereby render inconclusive acts done through mistake or misapprehension. It is permissible to a tenant to deny his lessor's title if it is shown that he executed the lease in ignorance: 177 I.C. 599: A.I.R. 1938 Rang. 227. *See* 1972 M.P.L.J. 164.

A tenant who has executed a lease but had not been let into possession by the lessor is estopped from denying the lessor's title, except on proof of ignorance of the lessor's title, or fraud, misrepresentation or any matter which rendered the contract voidable: A.I.R. 1952 Kutch 16 (2).

Where a person in possession of land executes a kabuliyat, he is bound by the kabuliyat and estopped from challenging the title of his landlord unless he can prove fraud, misrepresentation, coercion or mistake. [1935 O.W.N. 449, Foll.]: 1937 O.W.N. 1030: A.I.R. 1937 Oudh 505.

Defendant executing kabuliyat in favour of plaintiff—Defendant is estopped under S. 116 from challenging that plaintiff is his landholder entitled to receive rent from him: 1952 R.D. (B.R.) 372: 1952 All.L.J. (Rev.) 329.

Where the tenant had accepted relationship of landlord and tenant in the original written statement, *held*, he cannot be allowed to amend the written statement to contend that no such relationship existed between them: 1981 B.B.C.J. 472.

If the tenant takes possession of the premises as such, he is bound to return possession to his landlord and cannot be allowed to set up a title in himself or in a third person. Thus, where the tenant in execution of the decree for ejectment obtained against him by the landlord, contended that the order of ejectment was not executable as allotment of the suit property in favour of the landlord was cancelled by an order of Chief Settlement Commissioner, *held*, once the tenant took the premises on rent from landlord, then clearly there was a relationship of landlord and tenant between the parties and by virtue of S. 116, the tenant was estopped from disputing the ownership of his landlord: (1993-2) 104 Punj.L.R. 483.

Where the petitioner, who had taken land on lease from the Gram Panchayat, challenged the title of the Gram Panchayat claiming its ownership in himself on the ground that the land in question was part of the area reserved by Consolidation Authorities for income of Gram Panchayat without awarding compensation to the proprietors of the village on whose holdings cut was imposed for providing that area and thus, the Panchayat was not entitled to lease it out, *held*, as the petitioner got into possession of the land, as a successful bidder, in the auction for lease, he could not turn round to challenge the title of the Gram Panchayat in regard to its right to possess the land and could not stop it from re-auctioning the land in question: 1987 Punj.L.J. 614 (D.B.).

If a kanomdar attempts to resist a suit for redemption on the ground that his landlord has lost his title by reason of a Court sale of his interest in the property, it is not enough for the kanomdar, who is in the position of a lessee and a mortgagee to show that a third party had become the purchaser of the plaintiff's interest in the property. He must go further and prove that as the result of his purchase, there was an eviction of him by title paramount or any equivalent of some such eviction and that he attorned to the holder of the title paramount. If he does not prove these facts he still continues under the original tenancy and the bar imposed by S. 116, Evidence Act, operates during the continuance of the tenancy which is not determined automatically by the Court sale. He would be estopped under S. 116, until there is eviction by superior title or until he surrenders possession: (1945) 58 Mad.L.W. 167 (1): (1945) 1 M.L.J. 269.

Where a third person, inducted in a flat on the basis of leave and licence by a member of the co-operative society in breach of the bye-laws, was sued by the society for recovery of possession and he assailed the eviction decree obtained by the society on the ground that the member was a tenant under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1973, and such decree passed by the civil Court was without jurisdiction, *held*, the member was not a tenant under the society and as such the Rent Controller had no jurisdiction to try the suit; the licensee was estopped from denying the title of the member-his licensor; the decree was not without jurisdiction: A.I.R. 1980 Bom. 374: 1980 Mah.L.J. 539: 1980 Bom.C.R. 493 (D.B.).

There is a presumption in law that the tenant continues to hold over till by some tangible act he asserts his title and that is permissible only when he surrenders his right as a tenant and alleges hostile title to the knowledge of the lessor. Where the plaintiff-tenant itself took the impugned property on lease from the Municipal Committee and continued to pay rent to it and never surrendered

the possession to the lessor-Municipal Committee but, subsequently, asserted its title as an owner, *held*, the plaintiff-tenant could not be allowed to urge that the Municipal Committee was not the owner of the suit-property, specially when in an earlier litigation the Municipal Committee took a positive stand that it was the owner and its claim was not disputed and was not put in issue by the plaintiff-tenant: (1990) 2 Rev.L.R. 352.

In view of S. 116, the tenant cannot deny right of a person to be a landlord with whose consent he had entered into the premises. Thus, where the landlord sought ejectment of the tenant on the ground of non-payment of rent and the tenant denied the relationship of landlord and tenant and alleged that rent note, execution of which was proved, was void as it had been tampered with, *held*, the landlord might not be able to enforce his rights under the rent note, but the same was certainly admissible to show the nature of tenant's possession and it showed, that the respondents had entered into possession of the demised premises as tenants. Their possession of the demised premises as tenants continued to be so unless and until they surrendered the possession to the landlord, which had not been done yet. So the tenants, once they accepted their status as such, were estopped from denying the same: (1990-1) 97 Punj.L.R. 206.

The plaintiffs, who were the tenants of a land agreed with defendant 3 to buy the lands and obtained an extension of time to pay the price and also applied to him to continue them as tenants of the land. Defendant 3 acted in all this as an agent of the heirs of the landlord and all the negotiations took place before the defendants 1 to 5 purchased the land. *Held*, that the acts of the plaintiffs could not amount to an admission of the title of the defendants 1 to 5 and neither did they prove the presence of the ingredients necessary to bring S. 115 into play and, therefore, there could be no waiver or estoppel: A.I.R. 1957 Manipur 25.

Mere deposit of rent under S. 17(1) of the W.B. Premises Tenancy Act, 1956 cannot estop the tenant from raising a dispute that there is no relationship of tenant and landlord. [(1960-61) 65 Cal.W.N. 149 and I.L.R. (1967) Cal. 449, Rel. on]: A.I.R. 1972 Cal. 446: (1971-72) 76 Cal.W.N. 397.

Irrespective of the operation of S. 116 of the Evidence Act which is a branch of adjective law, the landlord, in order to get a decree for eviction on the ground mentioned in S. 13(1) (*ff*) of the West Bengal Premises Tenancy Act, 1956, has to prove that he is the owner of the suit premises. [(1972-73) 77 Cal.W.N. 817, Disting.]: A.I.R. 1984 Cal. 392: (1983-84) 88 Cal.W.N. 367.

Bar under S. 116 is not applicable to the question of *bona fide* need in a suit for eviction on that ground: (1994) 2 S.C.C. (Supp.) 638.

Where a lessee encroaches upon the lessor's land adjoining the leasehold land, *held*, the lessee is estopped from denying the lessor's title on the encroached land; S. 116 is attracted: 1982 All.L.J. 245.

Where in a suit for ejectment by the landlord, the claim for possession is in substance founded on an allegation of tenancy and the refusal of the tenant to vacate after the determination of the tenancy and not on the deed of sale since, *held*, the defendant cannot raise a question of title; reference by the plaintiff to his ownership under a deed of sale is wholly unnecessary: 1955 Nag. L.J. 314: A.I.R. 1955 Nag. 234.

A person admitting in the cross-objections and also admitting before Municipal Authorities under a document, to be a tenant, *held*, is estopped from claiming to be owner of the property against the lessor-trust even if he had a registered sale deed which had been validly executed by the alleged Managing Trustee in his favour: 1994 (Supp.) 3 S.C.C. 746; 1981 B.L.J.R. 653: 1981 B.L.J. 584: 1981 B.B.C.J. 373.

2. "During continuance of tenancy"—Meaning of.—The expression "during the continuance of the tenancy" in S. 116, Evidence Act, means "during the continuance of the possession" that was received by or under the tenancy in question. Where the tenancy has long ago ceased to exist and the tenant does not continue in possession on the strength or in pursuance of the tenancy, he is not debarred from raising the question of competence and validity of the title of the lessor. The rule of estoppel contained in S. 116 will not apply in such a case: A.I.R 1952 Ori. 95.

3. "Landlord"—Meaning of.—In law even assuming that a third party has title to any extent in the suit property, where the contract is one entered into between the

plaintiff and the defendant and actual possession was given by the plaintiff to the defendant in his own right; the plaintiff and not the third party must be regarded as the landlord of the defendant for the purpose of S. 116. [I.L.R. 31 Mad. 461 and A.I.R. 1915 Mad. 48 (1): 26 M.L.J. 597, Dist.; (1941) 1 M.L.J. 554: A.I.R. 1941 Mad. 607, Rel. on]: A.I.R. 1959 Andh. Pra. 92: (1959) 1 An.W.R. 148.

The granting of receipts in the ordinary course of business by a landlord to his tenant is not an admission of such a formal and deliberate character as to prevent the former from denying the relationship of tenancy: L.R. 4 All. 174 (Rev.).

Where before conveyance deed could be granted in favour of an allottee of evacuee/ rehabilitation property, the allottee gave vacant possession of the property in dispute to a tenant, *held*, the relationship of landlord and tenant came into being between the parties and the tenant was estopped from disputing the title of the landlord: A.I.R. 1982 P.&H. 251: (1982) 84 Punj.L.R. 118.

4. Benamidar as landlord.—If a tenant is inducted on a land by a person, the tenant cannot question the title of that person who has so inducted him on the land. The tenant is, thus, estopped from raising the question that person letting him into possession is merely a benamidar: 63 I.C. 763: (1935-36) 40 Cal.W.N. 460: A.I.R. 1936 Cal. 93. *See* also I.L.R. 40 Mad. 561; I.L.R. 24 Cal. 711; 26 M.L.J. 587: I.L.R. 58 Cal. 1371: A.I.R. 1932 Cal. 167; (1934) 36 Bom.L.R. 1074: A.I.R. 1934 Bom. 144.

A alleged that *B* as the benamidar of *C* who was the tenant of the disputed premises under the superior landlord *D* was *A*'s ostensible landlord and *A* was really a tenant under *C*. *Held*, that the bar of estoppel under S. 116 would apply against *A* only if *B* was *A*'s landlord and inducting landlord and estoppel under S. 116 could not be extended beyond that: (1959-60) 64 Cal.W.N. 199.

5. "At the beginning of tenancy"—Meaning of.—*See* 15 Pat.L.T. 519: A.I.R. 1934 Pat. 555. *See* also 1939 All.L.J. 913: A.I.R. 1939 All. 670.

The words "at the beginning of tenancy" in S. 116, Evidence Act do not give a ground for the contention that when a person already in possession of land, becomes tenant to another, there is no estoppel against his denying his landlords' title. It is, therefore, too much to contend that a tenant in possession, if he has in fact attorned to a landlord, would still be entitled to challenge his derivative title, because at the beginning of the tenancy he was not let into occupation by the landlord in question. The beginning of the tenancy in such a case would refer to the beginning of the new tenancy between the tenant and the landlord by virtue of the attornment, and the tenant's occupation of the land thence forward would be referable to that attornment: A.I.R. 1957 Assam 188.

6. "Immovable property"—What is.—A "coal land" possesses all the essential attributes of immovable property and, therefore, mining leases would not be outside the normal concept of a lease and would come well within the Transfer of Property Act and, accordingly a lessee of a mining lease becomes the tenant of the landlord and the first part of S. 116 would be attracted. Even assuming that the case would not come under the first part of S. 116, the case would attract the second part of the section if it is found that the lessee was put in possession of the land by the landlord. The position would undoubtedly be different if the lessee succeeds in showing that there has been eviction by title paramount or something equivalent to it or even if there has been really any effective breach on landlord's part of his covenant of quiet enjoyment so as to disentitle him (the landlord) to raise the plea of estoppel: A.I.R. 1957 Cal. 128.

7. No estoppel if possession is under illegal or void contract.—The rule of estoppel enunciated in S. 116 is subject to the general proposition that it will not avail against any statute. Therefore, if the estoppel pleaded can be proved to contravene the law, *e.g.*, the Law of Contracts, the plea of estoppel will not avail. And it will be open to the tenant to avoid the contract of tenancy if it is subject to any of the infirmities enumerated in Ss. 13 to 20 of the Contract Act. So also, the tenant can urge the provisions of S. 11 of J.&K. Common Lands Regulation Act as a bar to the title of landlord: A.I.R. 1960 J.&K. 132.

In order to invoke the principle of estoppel embodied in S. 116, the real question to be decided is not whether the tenant was let into possession by the landlord but whether a valid tenancy has arisen. The tenant may

show that no valid tenancy has been created between the landlord and himself because the lease was executed under a mistake or in consequence of a fraud, misrepresentation or coercion practised on him by the landlord. But in the absence of any such circumstance as would avoid a contract, the execution of a lease or a verbal agreement to hold as a tenant would constitute a valid tenancy and bring in the estoppel: I.L.R. (1953) Hyd. 288: A.I.R. 1953 Hyd. 241.

Where lease was executed through ignorance or fraud, there is no estoppel: 91 I.C. 669: A.I.R. 1926 Cal. 720.

Where a lessor sued the lessee on a lease which was void under S. 156 of the U.P. Zamindari Abolition Act, 1951, *held*, the rule of estoppel was not attracted; the lessee was well within his right to assail the lessor's title: 1981 All.L.J. 839.

8. Estoppel where title is lost subsequent to commencement of tenancy.—The estoppel contemplated by S. 116 is confined to the time when the tenancy commenced, a tenant can always plead that the landlord who had originally title to the property had lost such title by any act of his or by operation of any law: A.I.R. 1956 Cal. 148.

S. 116 only precludes a tenant from denying his landlord's title at the time of the creation of the tenancy, but does not debar the tenant from pleading that subsequent to the creation of the tenancy, the landlord's title has been lost or defeated. It does not prevent the tenant from pleading that the title of the landlord has terminated or come to an end by act of parties or by operation of law: A.I.R. 1950 Mys. 9; 1939 All.L.J. 913: A.I.R. 1939 All. 670.

The words "during the continuance of tenancy" and the words "at the beginning of the tenancy" in S. 116 make it clear that estoppel operates only during the continuance of the tenancy and is confined to the landlord's title at the beginning of the tenancy. The section does not prevent a tenant from setting up an adverse title at some subsequent date: A.I.R. 1950 Ajmer 53.

S. 116 only precludes a tenant from denying his landlord's title at the beginning of the tenancy and not at any subsequent point of time. Where on account of the happening of subsequent events, the landlord comes to be deprived of his title, it will be open to the tenant to plead the subsequent loss of title on the part of the landlord, and S. 116 does not bar such a plea: A.I.R. 1960 J.&.K. 132; (1984) 1 Cal.L.J. 393.

The estoppel contemplated by S. 116 is restricted by the denial of title at the commencement of the tenancy and by implication it follows that a tenant is not estopped from contending that the title of the lessor had since come to an end: A.I.R. 1987 S.C. 1656: (1987) 1 U.J. (S.C.) 694: (1987) 4 S.C.C. 319; (1984) 2 Cal.H.N. 170.

Though S. 116 absolutely forbids a tenant from denying his landlord's title to the immovable property at the commencement of the tenancy but there is also a countervailing doctrine evolved by law to protect the tenant from the duel liability to pay rent to the real title holder as well as to the person who granted him the lease; in such a circumstance, he can show, though strictly speaking not under S. 116, that by subsequent development the lessor's title stood terminated and vested in the holder of the paramount title; however, the tenant could not raise such a plea where the loss of the lessor's title had occurred by a decree negativing the lessor's right as a trustee over the immovable property passed prior to the creation of the lease: (1988) 1 An.W.R. 47.

It is well settled that the word "at the beginning of tenancy" in S. 116 of the Evidence Act do not prohibit the tenant from raising a contention that subsequent to the date of the tenancy, the landlord has lost his title to the property. Thus, where the Kuthakapattom grant in respect of the lands was cancelled subsequent to the sub-lease, *held*, in such a case the tenant was entitled to put forward the contention that the landlord had lost his title to the property subsequent to the date of the lease by reason of the cancellation of the Kuthakapattom grant by the Government: (1974) 1 Ker.L.J. 13 (D.B.).

Estoppel contemplated by S. 116 is restricted to the denial to title of the landlord at the commencement of the tenancy and by implication it follows that a tenant is not estopped from contending that the landlord had no title before the tenancy commenced or the title of the landlord has since come to an end. Found on facts, the tenant's averments did not amount to denial of the landlord's title: (1979) 1 Ren.C.R. 626: (1979) 2 Ren.C.J. 30: (1979) 2 Ren.L.R. 12 (Raj.).

The estoppel contemplated by S. 116 of the Evidence Act is restricted to the denial of title at the commencement of the tenancy and by implication, it follows that a tenant is not estopped from contending that the landlord had no title before the tenancy commenced or that the title of the lessor has since come to an end. Where the tenant did not deny the Inamdar's title at the grant of the lease but contended that his title stood extinguished by the subsequently enacted Madras Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963 and a notification thereunder, *held*, the tenant was not estopped from so denying the landlord's title without first restoring possession to the Inamdar; S. 116 is not attracted: A.I.R. 1970 Mad. 396: (1969) 82 Mad.L.W. 716.

S. 116 prohibits a tenant from challenging the validity of the landlord's title at the beginning of the tenancy. In other words, the estoppel in S. 116 refers to the title at the beginning of the tenancy. Where a permanent lease granted to the tenant by a *mutwali* of the Bihar Suba Sunni Majlish-e-Wakf was declared by competent Courts that the grant was void, *held*, S. 116 was not attracted; the tenant could certainly challenge the title of the *mutwali* at the time of the commencement of the tenancy; S. 115 places no bar on the tenant: A.I.R. 1977 Pat. 247.

Claim for possession and rent—Tenant is not estopped from pleading subsequent loss of title by lessor and his consequent loss of right to the reliefs. *See* A.I.R. 1953 Trav.-Co. 574.

S. 116 only estops a tenant from pleading that at the time of leasing the land, his lessor had no title; if the lessor loses possession and the tenant becomes liable to another for the rent, he is not estopped from disputing his lessor's claim: 1936 R.D 384. *See* also 186 I.C. 274; 1940 All.W.R. (B.R.) 171.

Neither S. 116 of the Evidence Act nor any analogous principle of estoppel stands in the way of the tenant to take up the plea that subsequent to the commencement of the tenancy, there has been extinction of the title of the landlord. Where the title of the plaintiff has been extinguished by resumption on part of Government subsequent to the commencement of the tenancy, the result is that the plaintiff has no title to disputed property, nor is the defendant debarred by principle of estoppel in questioning the existence of title. Therefore, the plaintiff's suit either for eviction or for realisation of rent must fail. It is not necessary that the tenant must surrender possession before resorting to the plea of extinction of title subsequent to the commencement of the tenancy: (1969) 35 Cut.L.T. 580.

S. 116 prohibits the tenant of immovable property from denying the title of his landlord to such immovable property at the beginning of the tenancy. That section imposes no bar on a tenant where he seeks to question the title of his landlord on the ground that after the tenancy had begun, it had come to an end on account of certain events which had happened subsequent to the establishment of the tenancy. It must follow as a corollary that where the tenant does succeed in showing that the landlord's title has in fact come to an end, the plaintiff's suit for recovery of rent based on the relationship of landlord and tenant is bound to be dismissed.

Thus, where a tenant is inducted on the premises purchased by the decree-holder in execution of his decree against the judgment-debtor, in a suit brought for ejectment and rent by the purchaser against the tenant, the tenant can prove that the execution sale in favour of the decree-holder is declared void *ab initio* by reason of his non-compliance with the requirement of O. 21, R. 85, C.P. Code. As such a challange to the title of the purchaser is based on events which have happened subsequent to the sale. S. 116 of the Evidence Act does not come in the way of the tenant so as to prevent him from showing that the purchaser had no title in question or that it had come to an end: 1963 Raj.L.W. 355: I.L.R. (1963) 13 Raj. 881: A.I.R. 1963 Raj. 209.

It is open to the tenant even without surrendering possession to show that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title-holder or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he had attorned to the paramount title-holder.

The defendant executed a kadapa in favour of the plaintiff on the 31st of August, 1947. On the date when the kadapa was executed , the land was situated in the 'estate'. Subsequently, the estate was taken over by the Government under the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), sometime

in September, 1949. On the 24th August, 1950, the Supervising Tahsildar issued a notice, both to the 1st plaintiff as well as to the defendant under S. 7 of the Madras Land Encroachment Act (III of 1905), calling upon both the first plaintiff and the defendant to show cause why action under S. 5 or S. 6 of the Act should not be taken. The first plaintiff submitted a statement where in she claimed that her predecessors-in-title had been in possession of the property and this property was sold to her under a sale deed of the year 1915. This claim of the plaintiff was accepted by the Supervising Deputy Tahsildar. As a result of this order passed by the Supervising Tahsildar, not only was there no eviction of the plaintiff but her title to the land in dispute was affirmed while the claim of the defendant to the land was rejected. *Held*, that the defendant was estopped from denying the title of the plaintiff under S. 116, Evidence Act. The effect of the order of the Supervising Tahsildar was that the notice of eviction issued under S. 7 never took effect so that the principle stated above was not applicable to the case: 1956 An.W.R. 1090: A.I.R. 1957 Andh. Pra. 961. *See* also A.I.R. 1957 Raj. 357.

The principle of S. 116 does not apply to prevent a tenant from pleading that the title of the original lessor has since come to an end. Thus, where the proprietor of the village leased out an abadi site to the defendant but the disputed site was thereafter transferred by him to his wife without any consideration and subsequently the plaintiffs as successors-in-interest of the transferee-wife brought a suit for possession against the defendant-tenants and the defendants challenged the title of transferee eventhough they had paid rent to her on earlier occasion, *held*, the defendant-tenant could question the capacity of the proprietor to make the transfer of property to his wife and estoppel under S. 116 would not operate against him. Further, even if it was assumed that principle of S. 116 was applicable still the wife of the proprietor or her successors-in-interest were not entitled to recover possession of disputed site as the abadi sites vested in State by virtue of provisions of the M.P. Abolition of Proprietory Rights (Estates, Mahals, Alienated Lands) Act, 1951: A.I.R. 1971 Madh. Pra. 142 (D.B.).

Where on dissolution of a firm, the premises belonging to the firm fell to the share of the continuing partner but subsequently the retiring partner inducted tenants in a portion of the premises to whom the tenants paid rent but subsequently faced with criminal prosecution and on the basis of the dissolution deed, they executed a rent note in favour of the continuing partner on enhanced rate of rent, *held*, the tenants were not estopped from denying the retiring partner's title to the demised premises; the estoppel contemplated by S. 116 is restricted to the denial of title at the commencement of the tenancy; it follows by implication that the tenant is not estopped from contending that their lessor's title had since come to an end: A.I.R. 1987 S.C. 1656: (1987) 1 U.J. (S.C.) 694: (1987) 4 S.C.C. 319.

9. Estoppel in case of person claiming derivative title.—S. 116 does not estop a tenant from denying the right, as his landlord, of a person who claims to have succeeded to the landlord who put the tenant in possession :(1939) 41 Punj.L.R. 346: A.I.R. 1939 Lah. 49. *See* also A.I.R. 1940 Lah. 341; (1978) 1 M.P.W.N. 143.

S. 116 does not prevent the tenant from showing that the landlord who claims a derivative title and who did not himself induct the tenant into the land, has no title: A.I.R. 1957 Manipur 25. If once the relation of landlord and tenant is established between the parties, the tenant would be estopped from disputing the landlord's title. There are no words in S. 116 to show that the tenant must have been put into possession by the landlord in order to estop the tenant from disputing the landlord's title: (1928) 30 Bom.L.R. 741: A.I.R. 1928 Bom. 265; (1934) 36 Bom.L.R. 1074: A.I.R. 1935 Bom.144. *See* also 139 I.C. 46: (1931) 33 Punj.L.R. 799.

There is nothing in S. 116 which extends the rule of estoppel enacted in that section to a person who claims to be the representative of the landlord by assignment. By merely purchasing the landlord's interest, the purchaser does not, *ipso facto*, become a landlord entitled to the benefit of S. 116. A landlord-tenant relationship will have to be established between the purchaser and the tenant before S. 116 can successfully be called in aid. If the tenant attorns to the purchaser, thereby recognizing him as his landlord, the provisions of S. 116 would unquestionably come into play: A.I.R. 1961 J.&K. 34.

The doctrine of estoppel under S. 116 of the Evidence Act applies where the tenant has been let into possession by the landlord. But where the landlord himself did not induct the tenant into property but claims his position under a derivative title, such as assignee, donee, lessee, heir, etc., there is no estoppel against tenant. So a tenant already in possession is entitled to show that the plaintiff does not possess the derivative title he claims, but it is in some other person: 1979 Ren.C.J. 27: 1979 M.P.L.J. 155: 1979 Jab.L.J. 126: (1979) 1 Ren.C.R. 508: (1979) 2 Ren.L.R. 640 (D.B.).

S. 116 does not apply where a landlord has transferred his property, in which there is a tenant, to another person. Therefore, tenant is not estopped from denying title of purchaser from original landlord: (1978) 4 All.L.R. 96: (1978) 1 Ren.C.J. 434: A.I.R. 1978 N.O.C. 153.

The doctrine of estoppel ordinarily applies where the lessor had himself inducted the tenant into the immovable property; but where the lessor's rights are founded on a derivative title as that of an assignee, donee, vendee, heir, etc., the tenant already in possession can challenge the derivative title by showing that the real owner is somebody else, subject, however, to the rule of S. 116. The section does not permit the tenant, during the continuance of the tenancy, to deny his landlord's title at the beginning of the tenancy; a transferee from such a landlord also can invoke S. 116 in so far it relates to the title of the original landlord who had inducted the tenant. But the tenant is entitled to show that the claimant had not in fact secured title from the original landlord or that the transfer was ineffective for some other valid reason. Further, the impediment in the way of the tenant is confined to the stage when the tenancy commenced; he is not forbidden to plead that the landlord has lost the title subsequently. Thus, where in an eviction suit the tenant did not challenge the derivative title of the transferee-plaintiff but challenged the title of the transferor-landlord, *held*, the tenant was estopped under S. 116. [A.I.R. 1987 S.C. 2192, Disting.]: A.I.R. 1990 S.C. 636: (1990-2) 31 Guj.L.R. 865.

The policy of S. 116 is that if person brought into possession as a tenant by the landlord, is permitted to question the title of the landlord at the time of the settlement, then extreme confusion will result in the matter of relationship of the landlord and tenant. Therefore, the equitable principle of estoppel is incorporated in S. 116. However, when the tenant in his reply to the quit notice of the donee of the landlord does not set up his own title, rather asserts the donor as the landlord and questions the genuineness of the gift, he does not deny the relationship of landlord and tenant to entail forfeiture or estoppel. He is, thus, entitled to raise the plea of non-service of a valid notice under S. 106 of the Transfer of Property Act in an eviction suit: A.I.R. 1969 Pat. 257.

The estoppel of tenant is limited to the landlord's title at the commencement and during the subsistence of tenancy and the law is not applicable when there is a cesser of the landlord's title and a new landlord steps in. Where in an eviction suit, the defendant-tenant in cross-examination admitted that the plaintiff became landlord by purchase of the suit-property but plaintiff-landlord failed to establish either his title and ownership over the suit property or the relationship of landlord and tenant with respect to the defendant and the defendant had never paid any amount as rent to the plaintiff, *held*, the admission of tenant in cross-examination, would not operate as estoppel under S. 116: (1984) 1 Cal.L.J. 393: A.I.R. 1984 N.O.C. 227.

Where the rent suit is brought by the daughters claiming to be heirs to the leasehold rights alleged to be the stridhan of their mother, though the tenants cannot dispute the title of their mother at the commencement of the lease they can dispute the derivative title of the plaintiffs. It is in such a case incumbent upon the plaintiffs to prove that the leasehold rights in question were the stridhan of their mother and they are entitled to inherit the said rights according to Hindu law: A.I.R. 1940 Lah. 341.

S. 109 of the Transfer of Property Act does not say anything about the estoppel of the tenant from denying the title of the assignee: (1987-88) 92 Cal.W.N. 215.

Tenant can challenge derivative title of his landlord but is estopped from challenging title of the landlord who let him out: (1981) 2 M.P.W.N. 74.

Landlord filing a suit on the basis of derivative title—What are the possible limits to challenge such title. *See* (1979) 1 M.P.W.N. 189.

Principle of estoppel does not apply where tenant claims to be landlord on basis of derivative title, but it will be attracted if tenant has attorned to new owner of premises: (1988) 2 Raj.L.R. 633 (Raj.).

10. Estoppel in case of attornment.—Person attorning to lessors as tenant cannot question title of lessors: 100 I.C. 93: A.I.R. 1927 Cal. 941. *See* also A.I.R. 1937 Oudh 505; A.I.R. 1941 Mad. 607: (1941) 1 M.L.J. 554; 26 All.L.J. 1255: A.I.R. 1928 All. 650.

In a suit for eviction by landlord, the tenant is estopped from questioning the title of the landlord because of S. 116. That section applies and estops even a person already in possession as tenant under one landlord from denying the title of his subsequent landlord when once he acknowledges him as his landlord by attronment or conduct. Therefore, a tenant of immovable property under landlord who becomes a tenant under another landlord by accepting him to be the owner who had derived title from the former landlord, cannot be permitted to deny the latter's title, even when he is sought to be evicted by the latter on a permitted ground: (1994) 4 S.C.C. 250; (1995-1) 115 Mad.L.W. 178 (D.B.).

Mere attornment after previous possession as proprietor would not raise estoppel: A.I.R. 1928 Pat. 284: 113 I.C. 703.

It cannot be said that the principle of estoppel embodied in S. 116 is limited in its application only to the state of things when the property is first let out by the original landlord. There is no warrant for construing the words, "at the beginning of the tenancy", occurring in said section as implying only the point of time when the tenant was first let into the property. These words, do not exclude from their purview cases of attornment. In relation to the successors-in-interest of the original landlord equally the provisions of S. 116 are available if the tenant attorns to the successors-in-interest. *Qua* such successors the words "at the beginning of the tenancy" must be deemed to refer to the relationship of landlord and tenant which was established between the tenant and the successors-in-interest upon the latter's acquiring the interest of the original landlord. Thus, where defendant tenant attorned to one "GN" and treated him as his sole landlord, *held*, the defendant was estopped from contending that the plaintiff who only stepped into the shoes of "GN" was not the sole landlord. [A.I.R. 1923 All. 53; A.I.R. 1957 Assam 188, Rel. on]: A.I.R. 1980 All. 320, affirmed in A.I.R. 1988 S.C. 1413: (1989-1) 9 Guj.L.H. 229; A.I.R. 1990 Pat. 26: (1989) 2 B.L.J. 587.

In spite of the fact of payment of rent by tenants to the person claiming to be landlords on the strength of title derived from the original landlord, it is open to the tenants to show that such payment was made in ignorance of the correct position in law and in fact the persons claiming title have not derived the title claimed by them. But where there has been payment of rent and no case of fraud or misrepresentation is made out, the fact of payment of rent is *prima facie* evidence to show that the title was actually derived. When that is the position, the onus shifts to the tenants to prove that in fact title has not been derived: 1958 Cal.L.J. 265.

A tenant, who is inducted by a person as such, cannot challenge the successor's title if he attorns to the status of the successor-in-interest as landlord. Payment of rent without objection estops the tenant from challenging the title of the landlord. [(1986)1 All.R.C. 173; (1986) 2 All.R.C. 315, Rel. on]: (1992) 20 All.L.R. 911; A.I.R. 1982 N.O.C. 81: 1982 M.P.L.J. 645; 1983 M.P.L.J. 350: 1983 Jab.L.J. 342.

Although a tenant may have been put in possession by one lessor and there is a transfer of that interest to another person, if the tenant in possession attorns to the new transferee as a person entitled to receive rent from him, the principle of estoppel will apply and the tenant will not have the right to question the title of such a plaintiff-lessor to whom he was attorned: A.I.R. 1974 Pat. 195; (1902-3) 7 Cal.W.N. 596.

Where the plaintiff's predecessor-in-interest had inducted the tenant in the suit-premises and after the execution of the sale deed by which the plaintiff became the owner of that property, the rent was being paid to him, *held*, on filing of the eviction suit, the tenant could not challenge the title of the plaintiff, as by payment of rent to him the tenant had accepted the plaintiff as his landlord. [(1988) 3 S.C.C. 137, Rel. on]: (1989-2) 37 B.L.J.R. 316; (1972-73) 77 Cal.W.N. 817.

S. 116 does not deal or profess to deal with all kinds of estoppel which may arise between landlord and tenant. Where original

landlord sold the suit premises to the plaintiff and gave a notice of such sale to his statutory tenant and the tenant attorned in favour of the plaintiff-transferee by paying rents to him and always showed his willingness to pay the rent and to execute a fresh rent note in plaintiff's favour, but in a suit for ejectment by the plaintiff, the defendant denied plaintiff's title to the suit premises, *held*, as the tenant attorned to the plaintiff and thereby recognised him as his landlord, he could not challenge the title of the plaintiff to the suit property. [A.I.R. 1937 Mad. 865, Disting.; A.I.R. 1961 J.&K. 34 and A.I.R. 1963 Raj. 209, Foll.]: A.I.R. 1971 Raj. 55: 1970 Raj.L.W. 250; (1974) 40 Cut.L.T. 888 (D.B.).

Where on sale of the suit premises the tenant started paying rent to the vendee (new landlord) regularly but on re-sale of the said premises, he challenged the title of the Ist vendee also, *held*, the tenant had not only admitted the sale in favour of the Ist vendee but also had attorned to him and started paying rent to him. Thus, the tenant having attorned to the Ist vendee, was estopped from denying his title: 1983 M.P.L.J. 350; A.I.R. 1978 Karn. 13: (1977) 1 Karn.L.J. 429.

Where S. 116 of the Evidence Act would not apply in terms because the landlord who has sued for ejectment is not the original landlord who let in the tenant, but is one who has derived his title from such landlord, the tenant may not be estopped from disputing his title. But where there has been attornment to such a landlord, the tenant's right to dispute his title would be subject to his proving that such attornment was due to mistake, misrepresentation, fraud or ignorance: A.I.R. 1988 Cal. 392: (1987-88) 92 Cal.W.N. 956; A.I.R. 1982 N.O.C. 81 : 1982 M.P.L.J. 645.

A written rent-note or a fresh leasing out is not an essential requirement of attornment which may come into being by payment of rent or by recognition of a person as one's landlord. Thus, where after the death of original landlord, the rent was being paid by the tenant to one of the co-owners-heirs of the property who was issuing the rent receipts in his name after the demise of original landlord, *held*, though no fresh tenancy had been created between that co-owner of the property and the tenant and the existing lease was continued the tenant had attorned in the favour of the plaintiff-co-owner by consistently paying rent to him and therefore, the tenant was now estopped from challenging his position as landlord: 1975 Raj.L.W. 96.

If a person attorns in favour of a stranger, from that time onwards the stranger would be entitled to claim the benefit of the provisions of S. 116 on the ground that he himself had become landlord from such date. [A.I.R. 1937 P.C. 251, Foll.]: A.I.R. 1973 Mys. 145 (D.B.).

Where in an eviction suit, the tenant who was paying the rent to the plaintiff, adoptive son of the deceased-landlord, and accepting from him duly signed receipts of rent, disputed the plaintiff's title, *held*, a person receiving rent is to be regarded as a landlord. Thus, when the tenant paid rent to the plaintiff he accepted his title as a landlord of the premises occupied by him. Therefore, he was estopped from denying his title: 1985 M.P.L.J. 459; 1977 Mah.L.J. (Note) 18.

Where the defendant's father who held a shop as a tenant under the predecessor-in-title of the plaintiff fell in arrears of rent, and the defendant undertook to pay the arrears and to execute a sarkhat, it must be deemed that there was surrender by the father of the defendant followed by the defendant being let into possession under the lease executed by him in favour of the plaintiff. The defendant, in such circumstances, is estopped from denying the title of the lessor: I.L.R. 13 Luck. 76: 1937 O.W.N. 49: A.I.R. 1937 Oudh 113. *See* also (1937-38) 42 Cal.W.N. 1022.

Where *A*, the tenant of *B*, after *B*'s death, executed a rent deed in favour of *C*, the beneficiary under the Will executed by *B*, *A* is estopped from denying the title of *C*: 1969 Ren. C.R. 791: 1969 Ker.L.R. 423.

Where the tenant was in occupation of the demised premises admittedly under the donor and paying rent to him and after the gift of the premises she was paying rent to the donee and there was no evidence that the tenant had paid the rent to the donee under some mis-apprehension or mistake and even had called upon the donee to satisfy about the gift, *held*, the payment of rent by, and conduct of, the tenant to the donee clearly raises the inference of attornment in favour of the donee; the tenant is estopped by act, conduct and acquiescence from challenging the donee's title: A.I.R. 1975 Raj. 32: 1974 Raj.L.W. 200.

A joint family property was let out to the tenant by the father of the two plaintiffs-brothers. The plaintiffs acquired the said property after their father had effected a partition in his family. The tenant of that property was informed about the said partition and he attorning in the favour of both the landlords started paying rent to both of them according to their respective shares. But on filing of an eviction suit, the tenant took the plea that the said partition was sham and further challenged the title of the father of the plaintiffs as well, *held*, the tenant could not deny the title of father after he had once accepted him as the owner and had taken the house from him. Similarly, after attornment and apportioning the rent as per partition deed he became the tenant of the plaintiff in relation to their own share in the tenanted premises. The relationship of landlord and tenant between the parties, therefore, became direct and hence the tenant would be subjected to the same limitations as in relation to title of original landlord. Therefore, the tenant was not entitled to challenge the ownership of the plaintiffs, after having acted upon the partition and dividing the tenancy: A.I.R. 1993 Madh. Pra. 46: 1993 M.P.L.J. 260.

Suit for rent by a proprietor not registered as such under S. 78 of the Bengal Land Registration Act—Maintainability—Estoppel—Defendant having once paid rent and accepted such proprietor as landlord is estopped from challenging the right of the landlord: I.L.R. (1963) Cut. 550.

Where an evacuee property on lease with a tenant was sold by the custodian to third parties who in their turn sold it to the plaintiff and the tenant had attorned to the plaintiff, *held*, S. 116 would be attracted; the tenant is estopped from contending that the plaintiff was not his landlord and that the vendees from the custodian were co-sharers of the property: 1972 M.P.L.J. 187.

Where a lease deed clearly stated HUF to be owner of the premises which was let out by *karta* of HUF and there was no subsequent change in the status of parties and subsequently tenant challenged the ownership of the HUF, *held*, the tenant was estopped from taking up said contention: A.I.R. 1994 N.O.C. 297 (Del.).

11. Attornment under mistake, etc.—Where a tenant being already in possession has made an attornment or acknowledgment of the tenancy he may show that he did so through ignorance, mistake or the like: 112 I.C 382; 150 I.C. 898: A.I.R. 1934 Rang. 139; A.I.R. 1937 Pat. 27; 167 I.C. 141: A.I.R. 1937 Oudh 505: 1937 O.W.N. 1030 or that the contract of tenancy is void: (1928) 30 Bom.L.R. 7411: A.I.R. 1928 Bom. 265.

Such a tenant may set up adverse possession against new landlord without surrendering possession to him: 167 I.C. 141: A.I.R. 1937 Pat. 27.

Doctrine of estoppel by attornment can be shown not to have come into operation by pleading and proving such facts which have vitiating effect on contracts, for example, misrepresentation, coercion, fraud, mistake, etc.: A.I.R. 1982 N.O.C. 81: 1982 M.P.L.J. 645.

Where the person receiving the payment was not the person who let the payer into possession, but some one who is claiming title by succession, the mere act of payment as and for rent, without more, is not conclusive and does not estop the payer from afterwards repudiating the payee's title if he can explain away the payment by showing that he made it in mistake, ignorance or incomplete knowledge of the circumstances of payee's title or of other material facts: A.I.R. 1981 Cal. 413: (1980) 2 Cal.L.J. 518 (D.B.).

Even a mere attornment creates an estoppel against the tenant but such estoppel is not the same as the statutory estoppel under S. 116. There are other kinds of estoppel between tenant and landlord falling outside the scope of S. 116. Such an estoppel would not prevent the tenant from showing that he attorned in ignorance of the fact that the person to whom he attorned had no title. A mere attornment does not create a new tenancy. The only effect of a mere attornment is the substitution of a new landlord in place of the old and the tenancy continues on the same terms: I.L.R. (1945) Bom. 343: A.I.R. 1945 Bom. 399; 1959 B.L.J.R. 376: A.I.R. 1959 Pat. 562.

12. Eviction by title paramount.—Eviction by title paramount meant an eviction due to the fact that the lessor had no title to grant the lease, and the paramount title is the title paramount to the lessor which destroys the effect of the grant and with it corresponding liability for payment of rent, so that mere eviction from, or a deprivation of the use and enjoyment of the demised premises, or part

of them, whether such eviction be lawful or unlawful, is insufficient, where the lessors' title is not affected or called in question. When there has been eviction by title paramount, the lessee is not estopped from denying the title of his lessor. However, in order to claim any relief on the ground of eviction by paramount title, the tenant must establish that the person who wanted to evict him had a better title than his lessor. If there is nothing to show that the evictor had any better title, nor is there anything to show that the tenant gave as required by S. 108 (*n*), T.P. Act, any notice to the lessor about the claim put forward by the evictor so as to enable him to protect his own interest or that the tenant made any enquiry as to the title of the two rival claimants, the applicability of the doctrine of estoppel cannot be challenged by the tenant on the ground of eviction by title paramount: 1959 B.L.J.R. 376: A.I.R. 1959 Pat. 562.

Title paramount cannot be rested on a fact other than the one which had come into existence subsequent to the creation of tenancy.

Strictly speaking S. 116 cannot be described as being subject to the rule of title paramount, because while S. 116, deals with a situation that was obtaining at the beginning of the lease, the title paramount is concerned with the situation that has subsequently developed by reason of the termination of a lessor's title: (1981) 1 An.W.R. 47.

A tenant cannot escape estoppel merely by saying that his tenancy under the landlord was terminated either by delivery of possession under a decree for possession or by the landlord's own act in determining the tenancy and bringing the suit for ejectment. Nor can he escape it merely by saying that he came to an arrangement with a third person claiming a paramount title and attorned to him. The estoppel, however, disappears if the landlord's title is extinguished subsequent to the inception of the tenancy, or if there is eviction by title paramount. No physical dispossession by the person claiming paramount title is necessary, if the true owner as named is armed with a legal process of eviction which cannot be lawfully resisted, even though the tenant is put out of possession, the threat to put him out of possession amounts in law to eviction. If, under such circumstances, the tenant, openly and to the knowledge of his landlord, attorns to the true owners, the estoppel is gone. The attornment, however, must be under compulsion, and the party evicting, must have a good title and the tenant must have quitted against his will: I.L.R. 22 Pat. 513: A.I.R. 1944 Pat. 77. *See* also (1959) 61 Punj.L.R. 780: A.I.R. 1959 Punj. 564.

The principle of estoppel laid down in S. 116 of the Evidence Act does not extend to the derivative title of the persons claiming through the landlord. Though the section restricts the estoppel to the period during which the tenancy continues, the duration to the estoppel continues so long as the tenant has not openly restored possession by surrender to his landlord. But the estoppel is restricted to the denial of the title of the landlord at the commencement of the tenancy. It is, therefore, open to a tenant even without surrendering possession to show that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title holder or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he had attorned to the paramount title holder, and he can set up such threat of eviction by way of defence either to an action for rent or to a suit in ejectment. In a suit for possession of property with arrears of rent, the defendant relied upon the sale deeds each for one half of the property by reason of which he becomes the purchaser of the property and therefore, contended that the relationship of lessor and lessee between him and the plaintiff was determined and the suit based on tenancy could not be decreed. *Held*, (*i*) with respect to one half of the property, the transaction of sale in favour of the defendant was a mere voluntary act on the part of the defendant as there was no assertion of title by a paramount title holder and a consequent threat of eviction. (*ii*) but as regards the other half, the defendant was faced with the situation that after the expiry of the term fixed under the lease deed and before he became a tenant holding over there was a suit filed by the sons of the purchaser of this half portion claiming partition and separate possession in which the defendant was impleaded as a party. The purchase by the defendant from the plaintiffs in that suit was after the suit was filed and it was only thereafter that the suit was reported settled. There was, therefore, a serious threat of eviction by the paramount title holder and the defendant was, therefore, obliged, in order to avert

eviction, to purchase the property. If the property was not purchased by the defendant, the suit would have proceeded to trial and the defendant would have been evicted from a half portion of the house, the plaintiffs in that suit having a *prima facie* proof of title to the property. The purchase is not, therefore, a voluntary act on the part of the defendant and he can rely on it as a defence in the suit. (*iii*) The plaintiff, however, cannot get possession of the other half share as it is not possible to partition and deliver a half share in a suit based on tenancy. In such a case the whole of the rent is not suspended but has to be apportioned. But as there is no continuance of the tenancy, the plaintiff is not entitled to rent but only to damages for use and occupation and as this was not the basis of the suit no relief can be given to the plaintiff: I.L.R. (1954) Mad. 341: A.I.R. 1954 Mad. 402: (1953) 2 M.L.J. 511, followed in 1956 An.W.R. 1090.

Where the tenancy has been determined by eviction by title paramount, no question of estoppel arises under S. 116: A.I.R. 1949 P.C. 124: (1948-49) 53 Cal.W.N. 883. But *see infra*. A tenant cannot plead eviction by title paramount and escape the estoppel under S. 116 by pleading that he has attorned to another when it is voluntary: 1946 Nag.L.J. 609: I.L.R. (1946) Nag. 991: 229 I.C. 138: A.I.R. 1947 Nag. 188.

Threat of eviction by title paramount—Defence to action for rent—Conditions, *see* (1950) 2 M.L.J. 605.

A tenant may dispute his landlord's title if he has been evicted by title paramount or if under threat of eviction by a party having a title paramount he has attorned as tenant. But if the tenant was attorned voluntarily, he is estopped from denying the landlord's title: A.I.R. 1934 Mad. 197: 66 M.L.J. 355; (1982) 2 M.L.J. 282.

It is only so long as the tenancy is subsisting and the tenant is in possession, that a tenant cannot set up the title of a third person. Where, before the lease is to take effect the lessee discovers that the lessor had no title and takes a new lease from the real owner and enters into possession thereunder, he is not estopped from denying the first lessor's title: (1937) 1 M.L.J. 679: A.I.R. 1937 Mad. 882: I.L.R. (1937) Mad. 638 (F.B.). *See* also 17 Mys.L.J. 310.

No estoppel in case of tenant evicted actually or constructively by true owner: 23 Mad.L.W. 296: A.I.R. 1926 Mad. 187.

The estoppel under S. 116 is restricted to the denial of title at the tenancy's commencement; thus, it follows that the tenant even without surrendering possession can show that the landlord's title thereafter came to an end or that he had been evicted by the holder of a paramount title or that without actual eviction or dispossession, he had under the threat, attorned to the paramount title-holder. Eviction by title paramount does not necessarily require the tenant's dispossession or a suit therefor; it is enough if there was a threat of eviction which made the tenant attorn to the real owner; such defence is permissible both in action for rent as well as for ejectment. But if the tenant had given up possession voluntarily to the paramount title-holder, he is not entitled to invoke this rule. [1986 L.S. (Andh. Pra.) 286, Reversed]: A.I.R. 1987 S.C. 2192: (1987) 4 S.C.C. 424.

When there is an actual threat of eviction or an imminent danger of eviction, if a person denies the title of the landlord, it will constitute an exception of S. 116. Thus, where the tenant was inducted in the suit premises by the plaintiff claiming to be the owner of the suit property and the tenant had been paying rent to the petitioner continuously but when he received a notice under S. 7 of the Tamil Nadu Land Encroachment Act, 1905 from the Government he stopped payment of rent to the plaintiff and when an eviction suit was filed he denied the plaintiff's title, *held*, as the said notice clearly referred to superstructure as an unauthorised construction, it was clear that it was only on threat of eviction that the tenant was obliged to deny the title of the landlord. Thus, the tenant's conduct was clearly *bona fide*. [(1950) 2 M.L.J. 605 at 606, Rel. on]: (1982) 95 Mad.L.W. 678.

An eviction order against the lessee by itself does not determine the lessee's title to realise rent from the sub-lessee; such an order before its execution does not amount to an eviction by title paramount. Though a lessee under S. 116 is precluded from disputing his lessor's title on the date of the lease, he can plead the lessor's subsequent loss of title as a result of eviction by title paramount. But a mere decree or order for possession by

itself cannot constitute eviction by title paramount unless there was delivery of actual or symbolic dispossession consequent upon the decree or order for possession. Thus, to overcome the bar of estoppel it is always necessary for the lessee or the sub-lessee as in this case, to establish as a fact that his relationship with his immediate landlord had been disrupted not only *de jure* but also *de facto*. Therefore, where a lessee allowed time to vacate the premises had let it out to a sub-lessee, *held*, the sub-lessee was estopped till the expiry of time so granted from disputing the lessee's title. [(1958-59) 63 Cal.W.N. 192; A.I.R. 1949 P.C. 124 and A.I.R. 1932 Mad. 297, Rel. on]: A.I.R. 1985 Cal. 37: (1984) 2 Cal.H.N. 170: (1983-84) 88 Cal.W.N. 938 (D.B.).

A tenant under threat of eviction from the paramount title holder, can certainly set up title in that paramount title-holder; thus, where a tenant was served notice under S. 7 of the Land Encroachment Act by the Government as the true owner, the plea of estoppel under S. 116 will not be available to the landlord. But where the lease agreement was entered after the service of such a notice, *held*, the lessee could not raise the plea of paramount title. [(1937) 2 M.L.J. 286; A.I.R. 1937 P.C. 251, Rel. on]: (1987) 1 M.L.J. 357: (1986) 99 Mad.L.W. 929.

Where the lessor and the lessee received notice from the true owner that the usufructuary mortgage under which the lessor was in possession had been declared invalid by a Court, the plea of estoppel under S. 116 of the Evidence Act would not enure after such notice. But the lessee would be liable to pay the rent to the lessor till they receive the notice from the true owner: (1958) 1 M.L.J. 406: A.I.R. 1958 Mad. 518. In the absence of any circumstances as would avoid a contract, the execution of a lease to hold as a tenant brings in the estoppel mentioned in S. 116. Further, the principle of estoppel applicable is the same whether a man is let into possession or whether he has continued in such possession by specific agreement between himself and his landlord: A.I.R. 1953 Sau. 53; I.L.R. (1952) Raj. 58: A.I.R. 1952 Raj. 115.

Where lands belonging to the Government were leased by a Panchayat to a number of tenants under a specified authority given by the Government to the Panchayat for a specified period, the Panchayat will have no right over the land or claim arrears of rent from the occupants after the expiry of the authority given to it by the Government in that regard. If after the expiry of the period for which the Panchayat was empowered to lease the land and collect rent, the Government issues notices to the occupants under the Land Encroachment Act and collects kist from them, it is apparent that the Government as the true owner has evicted the tenants let into possession by the Panchayat. In such circumstances the tenants will not be estopped from contending that the Panchayat is no longer entitled to collect rent from them. The rule of estoppel laid down under S. 116 of the Evidence Act is not absolute. It is well settled that where the true owner evicts the tenant let into possession by another, the tenant could attorn to the true owner and set up his title in answer to a suit filed by the landlord who let him in possession. The only limitation is that so long as the tenancy is subsisting, the tenant is not entitled to set up a *jus tertii* in a third person. A notice under S. 7 of the Land Encroachment Act by the Government amounts in law to eviction and payment of kist by the persons in possession to the Government would be sufficient to entitle them to plead *jus tertii*, though they might have been let into possession by someone else and though there may not be the relationship of landlord and tenant between them and the Government. *Held*, on the facts of the case, that the persons originally let into possession by the Panchayat were not estopped from setting up title in the Government: (1970) 1 M.L.J. 444: (1969) 82 Mad.L.W. 683.

Where the suit premises, which originally belonged to the Government, being a road *poromboke*, came to be assigned in favour of the Municipality and the defendant who had encroached upon the said property let it out to the plaintiff and when he filed an eviction suit, the plaintiff-tenant contended that it was well open to him to set up title in the paramount title holder, *viz.*, the Municipality, *held*, as a title suit between the defendant and the Municipality was still pending, the plaintiff could not deny the defendant's title.[A.I.R. 1954 Mad. 402; (1970) 1 M.L.J. 444, Disting.] : A.I.R. 1977 Mad. 138: (1976) 2 M.L.J. 393.

Where in a suit for recovery of arrears of rent filed by the plaintiff-lessee against his tenant, the tenant pleaded that as the true owner of the impugned premises had obtained an order for eviction against him

from Rent Controller, he was not liable to pay any rent to the plaintiff thereafter, *held*, in the circumstances the tenant was entitled to take up said plea and the plaintiff, as landlord, could not rely on the law of estoppel incorporated in S. 116 as operating against the tenant. [A.I.R. 1926 Mad. 187; (1958) 1 M.L.J. 406, Foll.]: (1978) 91 Mad.L.W. 504: (1978) 2 M.L.J. 185.

Where a *patta* originally granted by the Board of Revenue, subsequently cancelled by the Government, which cancellation was set aside by the High Court with directions to the settlement authorities which would decide whether the land leased to the Panchayat for a bus stand by a private person vested in the Government under the T.N. Estates (Abolition and Conversion into Ryotwari) Act, 1948 and that decision was still pending, *held*, whether the Panchayat could impugn the private landlord's title to the land would depend on the decision as and when made; case remanded: (1986) 99 Mad.L.W. 800.

13. Eviction by equitable owner.—Where a vendor purchasing a freehold industrial estate by payment of full consideration but without execution of the sale deed in order to save stamp duty leased it out to the tenant and in the landlord's suit for damages for breach of covenant, the tenant challenged the maintainability of the suit on the plea that the landlord had no title, *held*, the landlord having become equitable owner, the tenant was estopped from challenging his equitable title; this rule of estoppel continued to operate after the expiry of the lease unless, after the termination of the lessee's possession, a claim was made against him by holder of a title paramount in respect of some part of the period of the lease: (1977) 1 Q.B. 580: (1977) 2 All E.R. 293 (C.A.). A valid contract of tenancy having been created, the tenant would be estopped under the contract even though some other person, for example, the reminderman or a mortgagee might be able to assert a title paramount against the tenant who had been given, as between himself and his landlord, a perfectly valid tenancy: (1958) 1 Q.B. 107. The principle of equitable estoppel is wider than that governed by the ambit of S. 116 of the Evidence Act and the absence of a registered lease deed for the renewed period would make no difference as regards the bar of estoppel against the lessee: A.I.R. 1986 Bom. 359: (1984) 2 Bom.C.R. 788 (D.B.).

14. Plea of adverse possession.—Once the person enters into premises as tenant, he cannot set up adverse possession against the landlord or against any person claiming through landlord unless he has firstly surrendered the possession: 1988 Mah.L.J. 250; (1991) 1 Ker.L.T. (S.N.) 47 (Case No. 66). But when he is asserting his ownership by adverse possession over portions other than the portions which form a part of his tenanted accommodation, *held*, provisions of S. 116 are not attracted: (1994) 54 Del.L.T. 552.

Adverse possession cannot be set up by the tenant against the landlord: 45 I.C. 656; 30 I.C. 218.

Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of the lease unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such a title. A failure to pay rent to the lessor during the period of the lease does not alone operate to create in favour of the lessee a title by adverse possession. If a lessee holds over after the expiry of the lease and if no subsequent arrangement is arrived at between him and his lessor by which a new tenancy is created, time begins to run under Art. 139, Sch. II of the Limitation Act, against the lessor from the date of the expiry of the lease: 1959 B.L.J.R. 244: A.I.R. 1959 Pat. 500.

Adverse possession if can be set up by tenant: A.I.R. 1957 All. 346.

A tenant in order to claim title in himself by adverse possession must first establish that he surrendered the tenancy to the landlord. Without establishing the fact of surrender, it is not open to him to deny the landlord's title and claim an adverse title from the mere fact of his continuing in possession. [A.I.R. 1915 P.C. 96 and A.I.R. 1966 S.C. 629, Foll.]: A.I.R. 1973 Mad. 305: (1973) 1 M.L.J. 248: (1973) 86 Mad.L.W. 740.

S. 116 only estops a tenant from disputing his landlord's title during the continuance of the tenancy. Where the tenancy originated in a lease, the estoppel continues even after the expiration of the period of the lease, unless the tenant has openly surrendered possession or has at least given notice to his landlord that he claims under his own title. But in the absence of evidence to prove that the tenant paid rent to the landlord after the expiry

of lease, or that the landlord assented to the possession of the tenant after the determination of the lease, or that the tenant accepted the title of the landlord after that it cannot be inferred that the relationship of landlord and tenant continued after such determination and Art. 139 of the Limitation Act bars any suit to recover possession from the tenant after the expiry of twelve years from the date when the tenancy was determined. When the tenant has proved that the tenancy has been determined by efflux of time, it is for the landlord to prove that any tenancy was created or arose after such date: 176 I.C. 84: A.I.R. 1938 Mad. 73.

No question of estoppel arises when the tenant continuing in possession after expiry of lease, claims title by adverse possession against the plaintiff landlord in a suit for ejectment, since there is no denial on the part of the defendant of the plaintiff's title when the settlement was made: A.I.R. 1960 Pat. 156.

Where in a suit for possession based on title by the vendee, the defendants in occupation of the premises pleaded adverse possession and it was shown that in an earlier suit between the vendor and the defendants, the latter were held to be licensees of the vendor, *held*, the earlier finding being *res judicata*, the defendants were estopped from denying the plaintiff's title whose purchase of the premises from the original owner was proved: A.I.R. 1980 All. 210.

15. Third party's title.—Plea of title in third person, *see* 7 Cal.W.N. 596: 15 M.L.J. 368. In a suit in ejectment where the defendant relies on the title of a third party having no other title to rely on, it is always open to the plaintiff to displace the title of the person so set up by showing that he was party to the litigation which has negatived that title. Whatever would estop or bar the person whose title is set up must also bar the person pleading *jus tertii* where the estoppel is by record, deed or *in pais*: 1937 Mad.W.N. 299: A.I.R. 1937 Mad. 544.

In cases where there is a contractual relationship of landlord and tenant and the defendant has been inducted into possession of the suit property as tenant by the plaintiff and the rule of estoppel contained in S. 116, Evidence Act operates against the tenant no question of impleading a third person as a party setting up title to the suit property can arise because any enquiry about the title of a third party would be completely shut out by reason of the rule of estoppel and in such cases the third person would not be a proper party within the meaning of O. 1, R. 10(2). However, in cases where the plaintiff claims title to the suit property on the basis of inheritance, assignment etc., and the tenant has not attorned to him and the rule of estoppel does not operate against him, enabling himself to set up the title of a third person, such third person in appropriate cases can be regarded as proper party whose presence before the Court will be necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. In such cases there would be no question of converting a simple suit into a suit of title and no controversy beyond the scope of the suit would be introduced as after his joinder the main evidence in the suit and the main enquiry will remain the same as before his addition. In such cases the Court would not be exercising its discretion improperly to implead him as a party as he would be a proper party: I.L.R. (1969) 19 Raj. 515: 1969 Raj.L.W. 121: A.I.R. 1969 Raj. 131.

Merely, because a third party seeks to raise some controversy about the licensor's title could not entitle a licensee who has been inducted by a licensor to question the title of the licensor. Thus, where in a suit for eviction the Courts below had found that it was the plaintiff who had inducted the defendant as a licensee, *held*, merely because brother of the plaintiff had appeared as a witness in the case and raised some dispute about the title of the suit property, the defendant could not take advantage of the situation and deny the title of the plaintiff: A.I.R. 1977 All. 458: (1977) 3 All.L.R. 292.

Where in a suit, filed by the tenant to restrain the landlord from taking possession of the premises otherwise than in due course of law and from causing obstruction in enjoyment of property, the tenant had applied for the addition of another person as second defendant without seeking any relief against him who was disputing title of the landlord, *held*, the tenant, by his application for impleading such a third party could not introduce the said dispute in the suit filed by him against a person whom he had specifically called as his landlord, since that third party was not a necessary party and, thus, his application for addition of party was not

maintainable: A.I.R. 1983 N.O.C. 52: (1982) 23 Guj.L.R. 120: (1982) 2 Guj.L.H. 729.

16. Estoppel after termination of tenancy.—The tenant's estoppel operates even after the termination of the tenancy and even though the defendant is sued as a trespasser: A.I.R. 1934 Cal. 499.

The fact that the tenancy came to an end by reason of forfeiture and the landlord served a notice asking the tenant to vacate the house does not make any difference to the applicability of the rule of estoppel which is grounded on the tenant being still on the premises which he had obtained from the landlord. The estoppel continues so long as the tenant does not surrender possession to the landlord: A.I.R. 1955 Nag. 234: 1955 Nag. L.J. 314.

Where in a suit for eviction, the tenant contended that his tenancy having been determined by a notice to quit under S. 106 of the Transfer of Property Act, he was no longer a tenant, had no estate or interest in the premises occupied by him, and he could therefore, deny the landlord's title, *held*, the tenant had become a "statutory tenant"; he is still precluded from denying the plaintiff's title at the beginning of the tenancy, to the property let out; S. 116 is attracted. [A.I.R. 1937 P.C. 251, Rel. on; A.I.R. 1972 S.C. 2526, Disting.]: A.I.R. 1975 Pat. 177: 1975 B.L.J.R. 227.

Where landlord filed a suit for possession against tenant on expiry of lease and the tenant challenged the title of the landlord, *held*, as the tenant was still in occupation of the demised premises, it could not challenge landlord's title to the premises though lease had expired. [A.I.R. 1934 Cal. 499; A.I.R. 1915 P.C. 96 and A.I.R. 1979 Ori. 101, Expl.; A.I.R. 1952 Ori. 95, Rel. on]: A.I.R. 1985 Cal. 209.

A tenant inducted into possession by the landlord is not permitted to deny the landlord's title till even after the determination of his tenancy by efflux of time so long as he does not restore possession to the landlord; the lessee is under obligation by virtue of S. 108 (*q*) of the Transfer of Property Act to put the landlord back into possession of the demised property upon his ceasing to be the tenant. [A.I.R. 1955 Nag. 234; 1961 Jab.L.J. 1292; A.I.R. 1979 Ori. 101, Rel. on]: A.I.R. 1992 Madh. Pra. 303: 1993 M.P.L.J. 550.

However defective it may be, tenant holding over is in no better position: I.L.R. 6 Rang. 657: A.I.R. 1929 Rang. 15. *See* also (1927-28) 32 Cal.W.N. 867: A.I.R. 1928 Cal. 546.

Lease—Tenant holding over—is a tenant at sufferance and not a trespasser—Tenant stopping to pay rent and paying certain taxes as an owner—Effect—Nature of possession of tenant—No adverse possession—Adverse possession starts only after lease is determined by handing over possession of premises to landlord—Tenancy continues—Tenant estopped from denying the title of the landlord while tenancy is subsisting: A.I.R. 1966 Pat. 8.

A tenant in possession cannot even after the expiration of his lease deny his landlord's title without actually and openly surrendering possession to him: (1958-59) 63 Cal.W.N. 192; A.I.R. 1959 Pat. 562. Tenant cannot deny landlord's title until and only until he surrenders possession: 101 I.C. 771: A.I.R. 1927 Oudh 544; 97 I.C. 992 (N.) *See* also 1938 Nag.L.J. 317: A.I.R. 1938 Nag. 506: 104 I.C. 892; A.I.R. 1928 Mad. 58; I.L.R. 55 Mad. 601: A.I.R. 1932 Mad. 298: 62 M.L.J. 313; A.I.R. 1934 Lah. 445.

The scope of a suit by a landlord for possession from his tenant, including a tenant holding over, after the determination of the lease envisaged by S. 7 (*ix*)(*cc*) of the Court-fees Act is limited and the Court will not go into the question of the title of the landlord as on the date of the contract of tenancy, though that question may be considered incidentally for determining, if disputed, whether the contract was made. Even apart from the restricted scope of this suit, it is not open to the defendant to deny that the plaintiff had title to the house on the date on which the contract of tenancy was made: 1961 M.P.C. 136: 1961 Jab.L.J. 230.

17. Estoppel when only contract of tenancy is denied.—S. 116 presupposes provable contract of tenancy. When there is no denial of the landlord's title but only a denial of a contract of tenancy, the section is not a bar. There can be no estoppel on a matter of law: A.I.R. 1936 Nag. 174. *See* also 1944 R.D. 377: 1944 All.W.R. (Rev.) 200.

18. Applicability to person claiming under lessee or sub-lessee.—The representatives-in-interest of the lessee are estopped from questioning the title of the lessor, even if the lessee had not been inducted on the land by the lessor: (1937-38) 42 Cal.W.N. 1032.

When a tenant cannot deny the tenancy and cannot set up adverse title in himself, a person claiming under him or functioning as his agent or representative cannot also do so: A.I.R. 1973 Mys. 145 (D.B.).

The principle of S. 116 can also be applied to sub-tenants *vis-a-vis* their principles (tenant), but the words "during the continuance of the tenancy" are of great significance and make it clear that where there is no legal tenancy or sub-tenancy, the provisions of the section shall be inapplicable. The relationship as between tenant and sub-tenant can be created only by contract valid according to the law in force at the time of execution of such contract, or can be created or continued by operation of law. The existence of such relationship can also be implied from the act of the parties so long as the implied contract is not invalid that is, not against the law. Where the agreement leading to the execution of the sub-lease is void and unenforceable being a contract against the law, it is not valid and cannot make the sub-tenant a sub-tenant of the tenant. For this reason the subsequent conduct of the sub-tenant cannot be used against him. To put it differently, there is no legal sub-tenancy, and there can be no question of the continuance of sub-tenancy, and the so called sub-tenant cannot be deemed to be estopped from challenging the status of the so-called tenant for so long as he is in possession of the premises in question: A.I.R. 1964 All. 395.

Disclaimer by sub-tenant resulting in forfeiture bringing about termination of tenancy—He cannot claim to hold land as sub-lessee: 1963 Jab.L.J. 358.

In view of S. 116, it is not open to sub-tenant who has executed a kabuliyat to deny the title and rights of the original tenants to lease land: 1942 O.W.N. (B.R.) 381: 1942 R.D. 470.

The plaintiff filed a suit for eviction against the tenant and a sub-tenant, who had been inducted by the tenant and though the tenant admitted that the plaintiff was the landlord, but the sub-tenant contended that a third party was the landlord of the tenant, *held*, the position relating to the persons claiming through the tenant is not better than the tenant himself because the right of the sub-lessee or inducted person cannot be better than the person through whom he claims. Thus, the sub-tenant was estopped from challenging the plaintiff's title in view of S. 116: A.I.R. 1973 Bom. 168: 1973 Mah.L.J 233.

Where the plaintiffs admitted that they got the suit-property under a lease from the tenants of that property, *held*, they could not later on set up a case of acquisition of title by adverse possession against the landlord because a lessee cannot be permitted to deny his lessor's title. [A.I.R. 1915 P.C. 96 and A.I.R. 1935 P.C. 59, Foll.]: A.I.R. 1972 Ori. 134: (1971) 37 Cut.L.T. 1197.

19. Estoppel when title is claimed not on relationship of landlord and tenant, but as vendor and vendee.—S. 116 cannot be pleaded as a bar to the tenant purchasing, by paying consideration, the share of the co-sharer of the landlord. If the vendor of the tenant had a share in the property, there is no bar to his purchasing the share of his vendor and, thus, claiming title of a part of the property. It does not constitute a denial of the title of the landlord on the date of the tenancy: I.L.R. (1962) 14 Assam 453: A.I.R 1962 Assam. 137.

The rule of estoppel embodied in S. 116 of the Evidence Act only applies to the denial of the title of the landiord at the beginning of the tenancy. The doctrine which operates between landlord and tenant has no application to the same parties even while the tenancy exists when the question of title arose between them not in the relationship of landlord and tenant, but of vendor and purchaser: A.I.R. 1945 Mad. 321: (1945) 1 M.L.J. 475. *See* also I.L.R. (1946) Mad. 44; (1980) 93 Mad.L.W. 854 (D.B.).

A tenant may resist eviction sought to be enforced by his landlord in a suit instituted for the purpose by raising a plea that his landlord's title has come to an end or been extinguished subsequent to the commencement of his tenancy, notwithstanding S. 116. The extinction of the landlord's title may come about either by voluntary or involuntary transfer of the title of the landlord or by operation of any law for the time being in force. It is obvious that there will be no difference in the legal effect of the extinguishment of the landlord's title even though such title vests in the tenant by the very mode which puts an end to it in the landlord. Thus, where in a suit for eviction and realisation of arrears of rent, the tenant pleaded acquisition of paramount title to the suit house subsequent to his alleged tenancy, *held*, such a

plea does not fall within the bar contemplated by S. 116. [A.I.R. 1937 P.C. 251, Rel. on; (1969) 35 Cut.L.T. 580; A.I.R. 1952 Ori. 95; A.I.R. 1963 Raj. 209, Foll.]: A.I.R. 1973 Ori. 44.

Where the tenant, not denying the title of the landlord in respect of those portions which form part of the tenanted accommodation, asserts his ownership by adverse possession over portions other than the portions which form a part of his tenanted accommodation, *held*, the provisions of S. 116 would not be available to the landlord. [A.I.R. 1957 Cal. 67, Rel. on]: (1994-2) 107 Punj.L.R. 50 (Del.).

Where defendants became vendees of the portion of the property which was let out to them under a sale deed registered prior in time to the sale deed registered in favour of plaintiff though it was executed prior to that executed in defendant's favour, *held*, the defendants could not be denied of their tenancy rights on the portion of the property which they were occupying as tenants prior to the sale in favour of the plaintiff, merely on the ground that they had taken a plea that they had become owners of the property in dispute under a sale deed and were not tenants under the plaintiff. The defendants might have been under a *bona fide* belief that since their sale deed was registered earlier in point of time than to that of the plaintiff, they had become the owners: A.I.R. 1991 P.&H. 291: 1991 Punj.L.J. 286: (1991-1) 99 Punj.L.R. 615.

20. Joining of co-sharer, etc.—Where a lessee from one of the joint *sir* holders is sued by the *sir* holder, he is estopped from contending that all the *sir* holders should have been joined as plaintiffs: 1949 R.D. 193.

Where in an eviction suit, the tenant took the plea that the landlord being only a co-sharer owner of the suit-property was not entitled to a decree for eviction, *held*, the tenant in such a suit cannot deny that the landlord had title to the premises at the commencement of the tenancy because under the general law in a suit between landlord and tenant, the question of title to the leased property is irrelevant and therefore, on the plea of non-impleading of other co-owners, the eviction suit could not be dismissed. [(1975) 1 Cal.L.J. 413, Affirm.]: A.I.R. 1976 S.C. 2335: (1976) 4 S.C.C. 184: 1976 U.J. (S.C.) 899.

Where defendant-tenant executed a kerayanama in favour of plaintiff-landlord acknowledging him as his sole landlord, *held*, tenant was estopped from contending subsequently that suit for eviction filed by plaintiff-landlord was bad on the ground that plaintiff alone was not the sole landlord and he must have impleaded other sharers also in the suit: A.I.R. 1981 Pat. 275.

Where respondent, one of the co-owners of the disputed premises, filed an eviction suit against appellant-tenant and the tenant contended that suit was incompetent in absence of other co-owner though the co-owner did not object to said claim of the respondent, *held*, the tenant was estopped from putting forth such a plea as rent had all along been collected by the respondent-landlord who filed the eviction suit: A.I.R. 1989 S.C. 758: (1989) 1 S.C.C. 494: (1989) 37 Del.L.T. 305.

Where a tenant inducted his brother in his business in the demised premises as a partner and on partition of business between the two brothers, the tenancy fell in the share of the newly inducted partner who in his turn sold the business all with the tenancy to a third party, *held*, S. 116 would be attracted against all the three of them; none of them can deny the title of the landlord who had created the tenancy in the first instance. [A.I.R. 1959 Andh. Pra. 92, Rel. on]: A.I.R. 1972 P.&H. 408: 1972 Cur.L.J. 543.

Two brothers, partners of plaintiff-firm, were joint tenants of the premises in question. One of them in his capacity as partner of the plaintiff-firm executed agreements of tenancy in favour of defendant. The conduct of the defendant throughout had been that it purported to take the tenancy not from the two brothers in their individual capacity but from the plaintiff-firm. When the plaintiff firm terminated the tenancy of the defendant, it contended that it was not the firm but the two brothers in their individual capacity who were the joint landlords of the defendant and quit notice given by the firm was not valid. *Held*, the defendant was estopped from denying the title of the plaintiff-firm in the impugned premises: A.I.R. 1987 Bom. 142: (1987) 1 Bom.C.R. 547.

Hyderabad Tenancy and Agricultural Lands Act (XXI of 1950), S. 44—Land leased by family of two brothers—Subsequently brothers dividing estate—One brother who had leased land cannot ask for resumption of total of whole land—Tenant not estopped

from showing divisions between brothers: 1964 Mah.L.J. (Notes) 37.

21. What amounts to disclaimer.—Denial of a mere derivative title does not amount to disclaimer of title: 1979 M.P.L.J. 155; 1991 M.P.L.R. 123; 1989 M.P.R.C.J. 164; 1982 M.P.R.C.J. (Note) 136. The law is that to amount to "disclaimer of title", so as to attract the penalty of forfeiture of lease also providing a ground for ejectment within the meaning of S. 12(1)(*c*) of the M.P. Accommodation Control Act, 1961, the tenant's act must take one of the two shapes; (*i*) the tenant may assert title in the suit premises in himself; (*ii*) the tenant may set up title in a third person. In both the cases, the act of the tenant would manifest denial of the title of his landlord in the suit property. The denial if clear and unequivocal and not vague would indubitably affect the interest of the landlord adversely and substantially. The tenant merely denying the landlord's title bonafidely with the object of seeking information of such title or with the object of having such title established before a Court of law so as to protect himself would not attract the charge of disclaimer of title: A.I.R. 1992 Madh. Pra. 115.

22. Construction of building by tenant.—(*See* also S. 115, Note 12, *supra*). Where a tenant constructed a building and continued to occupy when the owner was divested of his right over the land by a statutory notification but even thereafter the tenant by mistake continued to execute rent chits in favour of his erstwhile landlord, *held*, S. 116 was not attracted; the tenant was not estopped from contending that his erstwhile landlord has no title in the building and there was no relationship of landlord and tenant as between them: I.L.R. (1967) 1 Mad. 624.

23. Estoppel between mortgagor and mortgagee.—(*See* also Note 61 under S. 115). The principle of estoppel under S. 116 which applies to the case of a landlord and tenant apply equally to the case of a mortgagor and mortgagee in possession; a mortgagee is precluded from denying the title of the mortgagor during the pendency of the mortgage. This principle, however, will not apply when there is an eviction by title paramount. To constitute an eviction by a person claiming under a paramount title, it is not necessary that the tenant should be put out of possession or ejectment should be brought about. Threat of eviction is sufficient: 54 Mys H.C.R. 114.

A mortgagee cannot deny the title of his mortgagor on the date of the mortgage. It is, however, open to him to assert that on the death of the mortgagor, persons who are his heirs under the Hindu law did not succeed to his occupancy rights in accordance with the special rules laid down in Act XII of 1881: 122 I.C. 414: A.I.R. 1930 All. 108. *See* also 38 Mad.L.W. 266: A.I.R. 1933 Mad. 635; (1940) 53 Mad.L.W. 492: (1941) 1 M.L.J. 554. It is not open to a mortgagor or to his successors in interest to deny his mortgagee's title A.I.R. 1949 Nag. 81: 1949 Nag.L.J. 212: I.L.R. (1948) Nag. 290.

It is well-established that a mortgagee who has been put in possession by the mortgagor pursuant to a mortgage is estopped so long as that relationship continues between them from denying the mortgagor's title to the property. That rule prevents the mortgagee from disputing the title of the mortgagor and its application cannot be avoided by going into the very question and finding that the mortgagor had no title on the date of the execution of the mortgage: (1962) 1 M.L.J. 229: (1962) 75 Mad.L.W. 236: A.I.R. 1962 Mad. 395.

The rule of estoppel that a mortgagee is not entitled to dispute the title of the mortgagor cannot be invoked in a case where the mortgagor's suit for possession is not based on the mortgage but is one in repudiation of the mortgage. [(1940-41) 45 Cal.W.N. 470; A.I.R. 1937 Oudh 431, Rel. on]: 1970 Raj.L.W. 115: 1969 W.L.N. 597.

A shop was rented out to the respondent on a rent of Rs. 5 per month by the petitioner. That shop had been usufructuarily mortgaged to the petitioner by the Jeer of the Manavala Mamuni Mutt of Srivilliputtur for a period of five years from 23rd May, 1941, for a sum of Rs. 550, without however, obtaining the sanction under S. 76 of the Madras Hindu Religious Endowments Act. On that ground, the usufructuary mortgage in favour of the petitioner was held to be void, on 31st March, 1945, by the Sub-Court of Ramanathapuram at Madurai, and this was confirmed by the High Court on 6th October, 1950. On 9th August, 1945, notice was given to both the petitioner and the respondent by the Mutt. The respondent attorned to the Mutt on or about 12th August, 1945. The

petitioner did not reply to the Mutt's notice and kept quiet. The petitioner filed a suit for arrears of rent against the respondent on the ground that the respondent having accepted the lease from him and treated him as landlord, was estopped from denying his title till he had surrendered possession of the shop to him, or till he was actually evicted therefrom in due course of law by the rightful owner, the Mutt or was deemed to have been so evicted. *Held*, that a lease by an unauthorised person of properties over which he has no title to another, will not entitle him to receive the rent stipulated under the lease for all time to come, till 12th August, 1945, the respondent was bound to pay the rent to the petitioner who had given the lease to him, as he had not received any notice from the true owner, and had not also surrendered his possession and had, of course, not been evicted. The respondent really feared eviction by the true owner if he did not attorn to him after he had received the notice on 12th August, 1945. A real threat of eviction believed in by the respondent would be enough justification for the respondent's attornment, and would make it not a voluntary act on his part but an act necessitated by the exigencies of circumstances: (1958) 1 M.L.J. 406: A.I.R. 1958 Mad. 518.

24. Estoppel between licensor and licensee.—The rule that tenant cannot deny his landlord's title extends to the case of a person coming in by permission as licensee: (1958) 60 Bom.L.R. 1150: I.L.R. (1958) Bom. 1356: A.I.R. 1960 Bom. 238. S. 116 merely states that the licensee ought not to deny the title of the licensor. It does not state that every licence is revocable at the instance of the lessor. Consequently, the licensee is not prevented from asserting that he must not be turned out: I.L.R. 7 Rang. 617: A.I.R. 1930 Rang. 29. As to licensee's estoppel, *see* I.L.R. 39 Cal. 439; I.L.R. 42 Cal. 262. *See* also 60 I.A. 297: I.L.R. 60 Cal. 980: 64 M.L.J. 103 (P.C.).

In an action for use and occupation, the tenant who occupies land by the licences of another ought not to be allowed to call upon the other to show title under which he let the land. This is not a mere technical rule, but is founded on public convenience and policy: A.I.R. 1959 Manipur 27.

Restoration of property to evacuee—Effect on right of lessee recognised as such by Custodian before restoration—Licensee of lessee—Another lease created in favour of licensee after restoration by person to whom property is restored—Right of former and subsisting lessee not affected by fresh lease—Protection of former lessee's rights under S. 48, T.P. Act—Extension of principle of estoppel to licensee—Former lessor is entitled to obtain possession of premises from his licensee: (1962) 64 Punj.L.R. 680.

25. Illustrative cases—(*a*) Where section 116 held to be applicable.—Where the plaintiff's suit for ejectment and possession was founded on the allegation of tenancy and refusal of the defendants to vacate after the determination of the tenancy and not on the basis of title, *held*, in such a case, the defendants were estopped from raising a question of title and the fact that the plaintiff had paid *ad valorem* Court-fees on the market value of the premises could not preclude him from invoking the rule of estoppel against the defendants. [A.I.R. 1955 Nag. 234, Rel. on]: A.I.R. 1980 Madh. Pra. 117.

(*b*). Where section 116 is held to be not applicable.—Where the plaintiffs were neither original owners who put the defendant in possession nor were purchasers from the person who inducted the defendant in the suit property and the defendant tenant had not clearly expressly and unequivocally denied the title of the plaintiffs-landlord but had merely called upon the plaintiffs to prove their title and ownership, *held*, it could not be said that the defendant had incurred liability of eviction under S. 116 of the Evidence Act: A.I.R. 1994 Guj. 18.

Eviction of tenant on ground of disclaimer of title—Real owner transferring rent premises under sham and bogus sale deed—Neither S. 109, T.P. Act nor S. 116, Evidence Act attracted—Suit for eviction dismissed: (1979) 1 Ren.C.J. 27 (Ker.) (D.B.).

Where tenant was not inducted by the landlord and neither the rent receipts nor the contract of tenancy was proved, *held*, rule of estoppel was not applicable: 1983 M.P.W.N. 84.

Where in a suit for eviction the defendant admitted to be a tenant in disputed property with a further saying that he has never paid rent to plaintiff, *held*, relationship not established; such admission is of no consequence and does not operate as estoppel: 1982 M.P.W.N. 472.

Tenant of service land attached to a post—Person holding post ceasing to hold

the same—Tenant is not precluded from saying that such person is not a landlord: A.I.R. 1964 Manipur 33.

26. Miscellaneous.—Ejectment suit by landlord—Adverse rights claimed by tenant—Independent suit is the remedy: (1927-28) 32 Cal.W.N. 867: A.I.R. 1928 Cal. 546; (1930-31) 35 Cal.W.N. 652. Suit for ejectment—Plaintiff paying Court-fee under S. 7 (*v*), Court-fees Act and not under S. 7(*ix*) (*cc*)—Fact does not preclude plaintiff from invoking rule of estoppel: 1955 Nag. L.J. 314: A.I.R. 1955 Nag. 234.

Party acquiring by adverse possession—Permissive possession after, no estoppel: A.I.R. 1929 Rang. 170. A lessee of land is under an obligation to surrender possession of the premises to his lessor from whom he derived possession; and until he fulfils that obligation, he is bound to pay his lessor either rent or damages for use and occupation. It is no doubt open to the sub-lessee to show that his title having expired he has surrendered possession to the original landlord from whom his lessor derived possession or to a person claiming by title paramount. In such cases no question of estoppel would arise; but when he is unable to plead a valid defence to his obligation to surrender possession, it would not be open to him to resist his lessor's demand for damages for the use and occupation during the period he has been in possession until he surrenders possession to the lessor. Even though therefore, the original lessee's title may have expired, by the expiration of the term of his lease, until the sub-lessee shows that he has renounced the obligation of surrendering possession to him by commencing to hold under some other person either the landlord of the original lessee (*i.e.*, his lessor) or a person claiming by title paramount or by delivering possession to him, the mere fact that the original lessee's title has expired is no defence to a suit by him against the sub-lessee for arrears of rent or damages for use and occupation: A.I.R. 1937 Mad. 478: (1937) 1 M.L.J. 566.

Estoppel between landlord and tenant—Previous denial of landlord's title in rent suit—Subsequent suit for eviction—By previous denial tenant is deemed to have waived his right to notice to quit: 1969 Ren. C.R. 791: 1969 Ker.L.R. 423.

Disclaimer by sub-tenant resulting in forfeiture bringing about termination of tenancy—He cannot claim to hold land as sub-lessee: 1963 Jab.L.J. 358.

Where in a petition under Art. 226 of the Constitution of India, a new plea was raised by the petitioner-tenant that the suit-property was held by him in his own right, *held*, as said plea was neither raised earlier before Estate Officer of Cantonment Board nor in appeal, it could not be raised by the petitioner for the first time in writ petition. Further, as the petitioner himself had claimed to have occupied the suit-property as lessee, he could not question the title of Cantonment Board in view of S. 116: A.I.R. 1990 N.O.C. 64 (Madh. Pra.) (D.B.).

After accepting a person as his landlord, the tenant cannot question the title of such person during the continuance of tenancy. Where the disputed premises were under lease with the landlord and the tenancy started long after expiry of lease and thereafter the landlord obtained order of eviction against tenant but in revision the tenant pleaded for the first time that the landlord had no title to the premises at the commencement of the tenancy, *held*, the tenant could have taken said plea on the very date when the petition for eviction was filed by the landlord or at the earlier stage. The plea could not be agitated for the first time in revision: A.I.R. 1977 N.O.C. 216: (1977) 1 Karn.L.J. 5.

Where the documents relating to leases and kabuliatnamas were inter-parties, *held*, any recitals therein describing the managers of the inam as owners could not be decisive of the nature of the property. Further, for, exercising rights under a lease, the lessor need not be the owner and a non-owner like a manager, a mortgagee with possession and any other person with possession even without title can lease out the properties and for that reason, he cannot be treated as the owner. At the best, the recitals in the lease-deeds and kabuliatnamas raise an estoppel against the tenant under S. 116, but do not operate as estoppel against any other person: (1993) 3 An.L.T. 56: (1993) 3 A.P.L.J. 169 (D.B.).

As a general rule, a suit based on tenancy and relationship of landlord and tenant should be decided on that basis alone; it should not be converted into a title suit. But where the tenant herself sets up a title adverse to the landlord, does not object to the framing of the issue of title, knowingly leads

117. Estoppel of acceptor of bill of exchange, bailee or licensee.—No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence.

Explanation (*1*).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (*2*).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

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evidence thereon and gets an adverse finding from the trial Court, *held*, he cannot be permitted to contend in appeal or revision that no decree for possession could be granted: A.I.R. 1986 Raj. 187: 1986 Raj.L.R. 623 (F.B.).

Where the tenant in an eviction suit denied the relationship of the tenant and landlord as also the landlord's title to the property and both the pleas were found on evidence to be in the plaintiff's favour, *held*, the tenant was estopped from denying the plaintiff's title; decree of possession granted. [1984 B.B.C.J. (H.C.) 498, Rel. on]: A.I.R. 1985 Pat. 126.

Where the predecessor-in-interest of the respondents was admittedly a lessee under the petitioner as per revenue records and in consequence of S. 5 or S. 7 of the Bihar Land Reforms Act, 1950 as amended in 1959, the petitioner became a statutory tenant under the State of Bihar, an inference which could not be disputed by any decision under the Bihar Land Reforms Act, *held*, it was not open to the respondents to deny the title of the petitioner to the lands on the basis of the decision to the contrary under the Bihar Municipal Survey Act; the petitioner's status as a statutory tenant under the State of Bihar could be changed only under the Bihar Land Reforms Act: (1991-1) 39 B.L.J.R. 428.

Suit by lessee—Estoppel—Lessee can sue provided claim of party other than lessor is consistent with the title of the lessor at the commencement of lease: (1963-64) 68 Cal.W.N. 965.

Suit for a declaration that tenancy of plaintiffs in certain premises subsists and that creation of tenancy in favour of second defendant by landlord, *i.e.*, first defendant, in breach of terms of partnership between plaintiffs and second defendant is nullity—One *K* being joint tenant with the plaintiffs in the tenancy in their favour—*K* is necessary party to the suit—Second defendant not being trespasser or tenant on sufferance under plaintiffs and *K*—Plaintiffs cannot sue in their own name alone—Though a lessee inducted by a lessor cannot challenge his grantor's title, the frame of the suit being driving away a partner for breaking the terms of partnership that point did not arise—The well-settled practice in Calcutta High Court was to give a decree for joint possession together with the trespasser and leaving it to the plaintiff to work out his further rights by a suit for partition: (1963-64) 68 Cal.W.N. 786.

S purchasing land at auction sale in name of his son—Land let out by *S* to predecessor-in-interest of defendants—Plaintiffs, deriving their title through *S*, bringing suit against defendants for assessment of fair and equitable rent—Defendants, *held*, were estopped from challenging title of *S* under S. 116, Evidence Act—Plea of bar under S. 66, C.P. Code, *held*, could not be entertained at instance of defendants and suit could not be defeated as not maintainable under that section: A.I.R. 1961 Cal. 151.

Section 117—Notes.

The provisions regarding estoppel contained in Ss. 115 to 117 of the Indian Evidence Act, 1872 are a mere shadow of what the modern principles of promissory estoppel have come to be. The greatest development in this area is that an independent action can now be found on the principle of promissory estoppel and it is no longer a principle available only as a shield. It can be used as weapon of offence. Gradually the modern doctrine of promissory estoppel has developed to an extent that it is no longer necessary that the party seeking to enforce the said principle must have suffered a detriment. It is enough if the promisee has altered his position on the faith of the representation: A.I.R. 1992 Del. 28 (D.B.).

CHAPTER IX

OF WITNESSES

118. Who may testify.—All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

See I.L.R. 36 Bom. 455: 12 I.C. 257 (estoppel between banker and customer). It is not open to the defendant to show that the signatory was in reality acting for an undisclosed principal, whether the defendant is a drawer or an acceptor: 23 Sind L.R. 478: A.I.R. 1929 Sind 172 (1).

Bailor and bailee—Automobile garage receiving car for repair—Garage owner is estopped from challenging title of person from whom car was received: (1963-64) 68 Cal.W.N. 554: A.I.R. 1964 Cal. 374.

Possession of a person in fiduciary capacity—Is that of either a licensee or bailee: A.I.R. 1968 Madh. Pra. 81.

Defendant in its proposal form dated 23rd March, 1960 stating that Telco with which there was a hire-purchase agreement of truck had released it—Accepting proposal form hire-purchase agreement was entered into on the same day—Under conditions of agreement defendant admitted plaintiff to be owner of truck, characterising himself as a bailee of vehicle—Release of truck could only be obtained from Telco when payment, which was arranged to be paid through plaintiff, was made—Truck was released either on 25th March or 30th March, 1960—*Held*, that the defendant could and did transfer ownership of vehicle to plaintiff on or before 23rd March, 1960 although technically and in law he became its owner a few days later—He could not deny either the transfer of ownership or fact that plaintiff was owner of vehicle on the day when he entered into hire-purchase agreement—Facts in proposal form and agreement, *held*, indicated that ownership had been transferred by defendant by necessary implication and implied contract to plaintiff: A.I.R. 1970 Pat. 7 (D.B.).

Section 118—Synopsis.

1. Scope and applicability.
2. Competency of child witness.
3. Necessity of corroboration of evidence of child witness.
4. Preliminary enquiry to test competency of child witness.
5. Administering oath to a child witness.
6. Illustrative cases—(*a*) Where child witness's evidence was accepted.
(*b*) Where child witness's evidence was not accepted.
7. Evidence of victim of rape.
8. Lunatic witness.
9. Leper's evidence.
10. Accused as witness.
11. Accomplice's evidence.
12. Credibility of witness—General.

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1. Scope and applicability.—S. 118, suggests that in India the rule generally is in favour of the admission of all the evidence of doubtful character though the weight to be attached will be a matter for the Court's discretion: 34 I.C. 976: (1916) 18 Bom.L.R. 266.

S. 118 provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or of any other cause of the same kind: 1992 Cal.Cr.L.R. 5: 1992 Cr.L.J. 2493: (1991) 2 Crimes 671 (D.B.).

According to the provisions of S. 118, if a witness is declared incapable of giving evidence due to insanity or any other reason, it is the duty of the Court to record its finding that the witness is incompetent to give his or her statement, and is also incapable of giving answers put to him or her. The fact that the witness has become incompetent to testify and so incapable of giving evidence, must be proved strictly: 1988 Rec.Cr.C. 198 (Raj.).

"Witness"—Meaning of: A.I.R. 1957 All. 396.

A general power-of-attorney holder of a party, cannot be said to be in the category of persons who are incapable of being witnesses as provided by S. 118, only on the ground that he holds the power-of-attorney; he is quite competent to depose before a Tribunal or a Court: (1982) 2 Guj.L.H. 711: (1982-2) 23 Guj.L.R. 337: A.I.R. 1983 N.O.C. 108.

2. Competency of child witness.—Evidence substantially true not infrequently assumes too perfect a form and witnesses, such as children, not infrequently get a story by heart which is nonetheless a true story. The real tests are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case: 52 Cr.L.J. 917: A.I.R. 1951 Punj. 399.

As to child witness, *see* 15 Cr.L.J. 11: I.L.R. 38 Mad. 550; I.L.R. (1941) 2 Cal. 180: A.I.R. 1942 Cal. 214; I.L.R. 16 Bom. 359; I.L.R. 16 Mad. 105; I.L.R. 10 All. 207; 3 Pat.L.T. 649: 66 I.C. 73: A.I.R. 1923 Pat. 91; A.I.R. 1965 Punj. 291: (1965) 2 Cr.L.J. 127; A.I.R. 1957 Ker. 153: 1957 M.L.J. (Cr.) 418; A.I.R. 1928 Lah. 903; A.I.R. 1930 Lah. 337.

The Act does not prescribe any particular age as a demarcating line for treating a witness incompetent to testify by reason of his or her tender years. The intellectual capacity of a child to understand questions and to give rational answers thereto is the sole test of testimonial competency: 1992 Cal.Cr.L.R. 5: 1992 Cr.L.J. 2493: (1991) 2 Crimes 671 (D.B.). *See* also 1993 (Supp.) 1 S.C.C. 78; 1993 (Supp.) 3 S.C.C. 667.

The competence of a child witness depends not so much on its years but its ability to understand the importance of taking an oath and the consequences of making a false statement; there is no precise age to determine competence of a witness; it depends on its capacity and intelligence to differentiate between the truth and falsehood as also the duty to speak the truth as assessed by the trial Judge; some of these methods cannot be photographed into the record: 1979 W.L.N. (U.C.) 252: I.L.R. (1979) 29 Raj. 992 (D.B.).

A child is always to be regarded as a dangerous witness because he may not understand the sanctity of oath and comprehend the danger and impiety of falsehood and also because he can easily be taught to relate a situation with the conviction that he has in fact seen it. Each cannot be laid down as an infallible rule that in no case the evidence of a child below a particular age should be accepted or acted upon; every case must depend on its own facts. If in a particular case the possibility of the witness having been tutored can with certainty be excluded and his evidence is free from any defect, is fairly impressive and can safely be regarded as true disclosure of the facts as they occurred, it ought not to be rejected simply because it has come from the mouth of a boy or a girl of tender age. The competency of a child to give evidence is not regulated by the age but by the degree of understanding he appears to possess, and no fixed rule can be laid down as to the credit that should be assigned to his testimony. Obviously the question depends upon a number of circumstances, such as the possibility of tutoring, the consistency of the evidence, how far has it stood the test of cross-examination and how far it fits in with the rest of the evidence: 1953 Cr.L.J. 1835: A.I.R. 1953 Pepsu 193; I.L.R. (1971) 21 Raj. 1274: 1971 Raj.L.W. 589.

It is well settled that the evidence of children is notoriously dangerous unless immediately available and unless received before the possibility of coaching is eliminated. There should be closer scrutiny of the evidence of child witnesses before the same is accepted by a Court of law. If a child, which has itself seen something of the occurrence, hears the conversation of other persons they become deeply engraved on its own mind and ultimately it believes it has itself seen what the others have related: I.L.R. 32 Pat. 217: A.I.R. 1953 Pat. 246; I.L.R. (1954) Trav.-Co. 1200: A.I.R. 1955 Trav.-Co. 6. *See* also 1957 M.L.J. (Cr.) 418: A.I.R. 1957 Ker. 153; I.L.R. (1955) Andhra 203.

The evidence of child witnesses is dangerous in the extreme and they live not unoften in a climate of make believe so that if they are inducted into the belief that a certain event or events has or have happened in a certain manner whether they have themselves seen the same or not then they easily mistake what they had been asked to believe for what they may not have seen themselves and are persuaded to testify to or speak of such things as if they have seen them for themselves while what has really happened is that they have been made or coached to think that

things did happen or must have happened in a given manner. Therefore, the evidence of a child should be accepted with great caution. Where the evidence of the two children witnesses of tender age who were alleged to be the eye-witnesses was contradictory and their evidence and conduct was of such nature which lead to conclusion that they were not the eye-witnesses to the occurrence and were couched up to say certain things irrespective of whether they saw or not; their evidence could be of no use to prosecution and no unhesitating reliance could be placed upon such evidence: I.L.R. (1966) 16 Raj. 252: 1966 Raj.L.W. 382.

There is a general belief that a child is artless, innocent and uncrafty. But at the same time, a child is susceptible to external influences and can be easily tutored as what he is to speak in a Court. Once the child has been influenced and tutored to give a particular statement, he fails to distinguish between what he has seen and what he has been tutored due to his raw understanding and softness of brain. Therefore, while assessing and evaluating the testimony of a child witness, the possibility of his being tutored and influenced, especially when there is an opportunity for doing so, will have to be consistently kept in view. If after carefully scrutinizing the testimony of a child witness, it appears pure, serene and unpolluted from external influences, it is entitled to the highest credit. But S. 118 makes the understanding as the sole test of competency of a witness. Therefore, the competency of a child to give evidence depends not on his age but the degree of his understanding. The section lays emphasis on the understanding and not on the age of a witness: 1985 Raj.L.W. 601: (1985) 1 W.L.N. 581: 1985 Cr.L.R. 428 (D.B.).

Although the unsworn testimony of a child is admissible, it must be received with great caution. Children of tender age, generally speaking are pliable and their evidence can easily be shaped and moulded. They can be made to repeat glibly a story put into their mind. They do not possess the discretion to distinguish between what they witnessed and what they have heard. It is, therefore, desirable that absolute reliance should not be placed on the evidence of a solitary child witness. If, after carefully scrutinising the evidence, the Court comes to the conclusion that there is a great impress to truth in it, there is no bar in law in the way of accepting the evidence of a child witness. The Court should look for corroboration as a matter of caution and not as a rule of law. Thus, where there was sufficient corroboration to the evidence of the child witness and his evidence gave the impression of truth, *held*, it could not be said that simply because he was a child witness his evidence could not be looked into: (1994) 2 An.L.T. 261: 1993 Cr.L.J. 3496 (D.B.).

A child is not an incompetent witness whose evidence may have to be discarded always. They are generally considered to be prone to tutoring, and when something is repeated to them by their elders, they begin to imagining them and really feel them to be the truth. Their innocent brains are like blank papers and can retain anything written over them by repeated communication. But that does not mean that they cannot remember anything. The memories of children are also better and what they see specially when under strain, they seldom forget for a long time unless it is overwritten by some effort. It is not that what they state is always result of imagination but the same may sometimes be an effect of imagination created by others. And for that, one needs another to cast that imagination and then lastly the duty of Court would be to work out the portions improved and deel with them according to law: 1993 Cr.L.J. 3709 (All.) (D.B.).

Though no precise criteria for appraising the evidence of a child witness can be laid down, yet one broad test is whether there was possibility of any tutoring. If this test is found in the positive, the Court will not, as a rule of prudence, convict the accused on a murder charge on the basis of child evidence unless it is corroborated to material extent in material particulars, directly connecting the accused with the crime. At the same time, if otherwise the testimony of a child witness is not shown to be tainted with any such infirmities, it calls for due credence. A child in the innocent purity of its mind and unsophistication is more likely to come forth with version which is unbiased, unsoiled, natural and forthright. It is less prone to manipulation, motivation and spirit of vendetta. It can as well be spontaneous and inspiring, once the child is enabled to over-come the initial shock and awe, and ensured protection, security, compassion, and given confidence to come out with what was seen.

Further, some of the children are fairly intelligent, truthful and straight forward, and there is no reason to start with a presumption of untrustworthiness in the assessment of their evidence. The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth. Courts should also, while permitting full scope for cross-examination of such witnesses, be careful to see that they are not subjected to unnecessary confusion, harassment or unduly made conscious of the awe of formal Court atmosphere and the public gaze: (1981) 20 Del.L.T. (S.N.) 55 (D.B.).

The Court is at liberty to test the capacity of a witness to depose by putting proper questions. It has to ascertain in the best way it can whether from the extent of his intellectual capacity and understanding he is able to give a rational account of what he has seen or heard on a particular occasion. If a person of tender years can satisfy those requirements, his competency as a witness is established. The question whether a witness has intelligence enough to understand the import and significance of questions or to give rational answers is not the same as the competency to testify. The Court has a discretion to form its own opinion whether a child witness has sufficient understanding to be qualified to be a witness. The question of the capacity of the witness to testify is a question for the Judge himself to decide and not for the jury although after he has decided in favour of the competency of the witness, it is for the jury to determine the amount of credit to be given to the statements made by such a witness: 1988 Rec.Cr.C. 198 (Raj.).

Child witnesses are easily susceptible to tutoring and to telling imaginative stories and their evidence must, therefore, be scrutinised with extreme care and caution before being acted upon as true and dependable. For appraising the evidence of a child witness, the first test is whether there is any evidence of tutoring. If this test is found to be positive, the Court should not convict an accused on a serious charge like murder, relying solely upon the evidence of a child witness, unless it is corroborated in material particulars connecting the accused with the crime. This precaution should be taken even if there is no infirmity in the evidence of a child witness: 1988 Cr.L.J. 1301 (Cal.) (D.B.).

It is judicially recognised that a child witness is often times a dangerous witness. Any mistake and discrepancy in the statement of a child witness is ascribed to innocence or failure to understand by the child and undue weight is given to what may merely be a well taught lesson. Hence, it is a rule of caution to accept the evidence of child witness only when satisfaction is reached that it is free from tutoring and upon close scrutiny it is found to bear the stamp of naturalness and truth. But where there was no scope of tutoring the child witness because of the check furnished by the F.I.R. in which information given by child witness to her father about the occurrence was recorded and said child witness had exhibited a lot of understanding and maturity in her evidence, *held*, her evidence did not suffer from infirmity usually attached to the evidence of a child witness. [A.I.R. 1930 Oudh 406, Rel. on]: 1992 M.P.L.J. 512 (D.B.).

A child's evidence is not inadmissible merely because no oath was administered to it. The only test of competency is capacity to understand questions and to give rational answers: (1974) 40 Cut.L.T. 491: (1974) 1 Cut.W.R. 428 (D.B.).

A witness aged 11 years is a child witness, but is nonetheless a competent witness. The Court has to ascertain, in the best way it could, whether from the extent of her intellectual capacity and understanding, the witness was able to give a rational account of what the witness had seen, heard of what was done at the particular occasion. The only test of competency is the capacity to understand the questions put and to give rational answers. The decision on that question primarily rests on the trial Judge who sees the witness, notices the manner and the apparent intelligence or lack of intelligence of the witness, and can also resort, to any examination which will tend to disclose her capacity and intelligence, as well as his/her understanding of the obligation of oath. In short, he has to formulate his opinion as to whether the witness understood the duty of speaking the truth, although he or she might not understand the nature of the oath or affirmation.

If the finding of the trial Judge is to the effect that the witness had the capacity to understand the questions and to answer them

in a rational manner, the competency under the law is fully established. But the question of credibility, of course, still remains to be satisfied. For this corroboration is required about the statements made by the witness: (1977) 2 Kam.L.J. 341.

In a case where from the answers given by the child witness to some questions put to him, it was clear that he did not understand them and from other questions and answers it appeared that the statement of the child witness could not safely be relied on as a piece of evidence, he was not a competent witness within the meaning of S. 118 and his statement could not be deemed to be admissible evidence in the case. The question whether the trial Judge's conclusion regarding the competency or otherwise of a child-witness can be considered by the appellate Court also and it is, therefore, very desirable that the trial Judge in such a case should preserve on the record apart from the child witness's evidence in the case, some other questions and answers which could help the Court of appeal to come to the conclusion whether or not the trial Judge's decision in regard to the competency of the child witness was right or erroneous: A.I.R. 1968 All. 58.

As pointed out in A.I.R. 1965 Punj. 291 minor discrepancies in testimony of the child witnesses are proof of its truth rather than a badge of falsehood: A.I.R. 1971 Him. Pra. 17: 1971 Sim.L.J. 211: 1971 Cr.L.J. 1750.

The evidence of a child witness should be accepted with great caution: 1959 All.W.R. (H.C.) 602: 1959 All.Cr.R. 503: 1959 All.L.J. 736.

It cannot be said that each and every child witness must without distinction be described as untrustworthy. The real test for either accepting or rejecting the testimony of a child is to see how consistent the story spoken to by it is, how the evidence stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case: 1960 Ker.L.T. 435: 1960 Ker.L.J. 377

The test for accepting the testimony of a child witness is whether the child is of sufficient understanding and intellectual capacity to relate what the child has seen or heard at a particular time. If the child can satisfy this condition, the competency of the child as a witness is established; the mere circumstance that the child is unable to comprehend either the spiritual or the legal implications of an oath or a solemn affirmation in consequence of tender age would not render the child incompetent to give evidence of facts within the child's personal knowledge. The inability of the child or omission to explain the difference between truth and falsehood which are abstract notions is not a proper or sufficient ground by itself to disqualify the child from being a witness: 55 Mys.H.C.R. 134.

Though the evidence of a child witness can be relied upon, Courts must be careful to examine the evidence to exclude the possibility of any tutoring: 1959 An.L.T. 851: 1960 Cr.L.J. 1302: A.I.R. 1960 Andh. Pra. 490.

There are exceptions to the general rule that it is dangerous to place implicit reliance on the evidence of a child witness. The Court should consider the evidence regard being had to the facts of the given case, because the question if what the child witness stated was a truthful version of the occurrence and not a tutored one had to be decided on the fact of the particular case. Much depends on the age, understanding of the child, opportunity to witness, the occurrence and the time that elapsed between the occurrence and the version thereof related by him: 1982 Ker.L.T. 692.

Evidence of child witness—Admissibility—Factors to be considered. *See* 1984 Cr.L.J. (N.O.C.) 140 (Cal.).

It is a matter of common knowledge that most of the girls in Orissa attain puberty in between 12th and 13th years. Ordinarily, at that age, girls have full power of understanding and to give rational answers: I.L.R. (1962) Cut. 726: (1963) 2 Cr.L.J. 294: A.I.R. 1963 Ori. 144.

Where the only eye-witness was a teenager girl, *held*, her evidence has to be scrutinised with care and caution: A.I.R. 1973 S.C. 55: (1973) 3 S.C.C. 219.

Evidence of a child witness cannot corroborate another child witness: (1978) 2 M.P.W.N. 43.

When testimony of a child witness is natural, it can certainly be relied upon: (1978) 2 M.P.W.N. 139.

3. Necessity of corroboration of evidence of child witness.—The tender years of the

child, coupled with other circumstances appearing in the case such as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary, but this is a question of fact in every case. Corroboration is not a rule of practice but of practice. The Court should not lightly rely upon an uncorroborated evidence of child witness unless after adopting all precautions it is considered reliable. The statement of a child witness should be scrutinized with "extreme care and caution" when he is the only eye-witness. [A.I.R. 1946 P.C. 3, Rel. on]: 1983 Raj.L.W. 80; 1982 Cr.L.J. (N.O.C.) 39 (Gau.).

The evidence of a child witness should be accepted with great caution. Where the evidence of child witness is not corroborated by any other independent evidence, it will not be safe to rely on such evidence. [A.I.R. 1930 Oudh 406; A.I.R. 1977 S.C. 135, Rel. on]: 1982 M.P.L.J. 772 (D.B.).

The evidence of children is notoriously dangerous unless immediately available. There should be a closer scrutiny of the evidence of child witness than the evidence of other witnesses, before the same is accepted by a Court of law. Where there are major discrepancies in their evidence and their conduct in the circumstances of the case was also extraordinary, in the absence of any independent corroboration of their evidence, it is unsafe to base a conviction on it: 27 Cut.L.T. 169.

Per *P.B. Mukerji, J.*—A child witness is a competent witness under the law unless the Court considers that by reason of tender years such witness is prevented from understanding the questions or from giving rational answers to such questions. A Judge should warn the jury that it is unsafe to act entirely on the uncorroborated evidence of a child witness. But this again is not a rule of law and it is proper and competent in a Court of law for the Judge or the jury to be so satisfied even after bearing the caution in mind that the child witness is a witness of truth and of facts and in that case to accept such testimony: I.L.R. (1953) 1 Cal. 330.

With regard to a child witness, the rule of prudence is well established that corroboration is essential before there can be a conviction. This rule, which according to the cases has hardened into one of law, is not that corroboration is essential, but that the necessity of corroboration, as a matter of prudence, except where circumstances make it safe to dispense with it, must be present to the mind of the Judge and the jury, in jury cases, and it must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand. Thus, where there were serious infirmities in the testimony of the girl child of 16 years, *held*, her testimony could not be believed without corroboration. [A.I.R. 1952 S.C. 54, Rel. on]: 1979 Bom.C.R. 6 (D.B.).

A child is a competent witness and although legally there is no bar to accepting the uncorroborated testimony of a child witness, yet prudence requires that Courts should not act on the uncorroborated evidence of a child whether sworn or unsworn. It would therefore, be a matter of enquiry for the Court to ascertain as to whether the testimony of the child witness can be absolutely relied upon. For this, certain precautions have been prescribed and the trial Judge is expected to observe such precautions so that not only he is satisfied as to the veracity of the witness, but the Court before which the case goes in appeal is also in a position to ascertain the merit of evidence in order to uphold or reject the opinion thus formulated by the trial Judge: (1972) 2 Sim.L.J. 216 (D.B.).

It is a sound rule in practice not to act on the uncorroborated evidence of a child whether sworn or unsworn but this is a rule of prudence and not of law: I.L.R. (1954) Trav.-Co. 1200: A.I.R. 1955 Trav.-Co. 6; 1959 All.L.J. 239: A.I.R. 1959 All. 409. *Held*, that the witness aged about 4 years and 3 months was prevented from understanding the questions put to him, and that it was not safe to act on his evidence without corroboration since there was likelihood of his being tutored: A.I.R. 1954 Punj. 282: I.L.R. (1955) Punj. 369. The unsworn testimony of a child is not adequately corroborated by similar

evidence of other children: I.L.R. (1956) Andhra 203.

There is no bar legally to accept even the uncorroborated testimony of child witness and only prudence requires that the Court should not act on the uncorroborated evidence of a child.

It is very desirable that a trial Judge should preserve on record, apart from the evidence of the child witness in the case, the questions he put to the witness in the preliminary examination and the answers, which would help the appellate Court to come to the conclusion whether or not the trial Judge's decision in regard to the competency of the child witness was right or wrong: 1960 Ker.L.T. 430: 1960 Cr.L.J. 1213: A.I.R. 1960 Ker. 301.

The weight to be attached to the evidence of a child-witness will depend on the circumstances of each case. It cannot be held that the unsworn testimony of a child witness must always be corroborated by some sworn testimony. Such corroboration can be by the unsworn testimony of another child witness. However, the evidence of both the child witnesses is to be looked at with care and acted upon with caution: 1968 Raj.L.W. 1: 1968 Cr.L.J. 270.

Normally, evidence of child witnesses should not be accepted as it is notoriously dangerous unless immediately available and unless narrated before any possibility of coaching is eliminated; there should be closer scrutiny of the evidence of child witness before the same is accepted by a Court of law. In the Indian Evidence Act, the evidence of a child witness is made admissible whether corroborated or not. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law: I.L.R. (1962) Cut. 726: (1963) 2 Cr.L.J. 294: A.I.R. 1963 Ori. 144; I.L.R. (1962) Cut. 505.

The rule of corroboration of the statement of a child witness is not a rule of practice but it is rather a rule of prudence. That rule has been crystallized with the experience of Judges who very often find such witnesses under influence and their testimony tainted by extraneous circumstances. If the statement of a child witness inspires confidence and there is unlikelihood of tutoring and his demeanour is found straight forward by the trial Judge, no corroboration would be required of his statement. The tender years of the child which is the victim of the sexual offence coupled with the other circumstances rather render corroboration unnecessary, which, of course, is a question of fact in every case: A.I.R. 1971 Him. Pra. 17: 1971 Sim.L.J. 211: 1971 Cr.L.J. 1750.

There is no rule of law that evidence of a child witness cannot in any circumstances be acted upon without any corroboration of direct nature, but corroboration of proved circumstantial evidence or a confession, would be enough to base a conviction. Child of 12 years of age can be a competent witness with intellectual capacity and capability of giving rational account of what he has seen or heard. Where a child witness was capable of giving reasonable account as found from his straight forward deposition and his version was found consistent at the investigation stage as well as at the trial, *held*, his evidence could be relied upon: 1992 Cr.L.J. 733: (1992) 3 Rec.Cr.R. 29 (Gau.) (D.B.).

Generally speaking, the evidence of a child witness requires corroboration in some material particulars implicating the accused. In the Indian Evidence Act, there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence, a Court can act upon it; corroboration unless required by law, goes only to add to the weight and value of the evidence. It is a sound rule of practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law: (1978) 1 Karn.L.J. 183 (D.B.).

Even if there are no infirmities in the evidence of a young boy, it is desirable to seek corroboration of his evidence in view of his tender age. There are many circumstances and situations in which it is unwise to found settled conclusions on the testimony of one person alone. The reasons are diverse. The central principle of criminal law is that a person should only be convicted of a crime if those in whose hands the decision rests are sure that his guilt has been established. It is, therefore, dangerous to convict a person for an offence of murder on the uncorroborated evidence of a child of tender age, more so when he improves his statement before the Sessions Judge, on his statement before the

Police. [1971 Cr.L.J. 927 (S.C.), Rel. on; (1972) 3 All E.R. 1056, Appl.]: 1975 Raj.L.W. 415: I.L.R. (1975) Raj. 403: 1976 Cr.L.J. 667 (D.B.).

Where the conviction of accused under S. 302, I.P. Code was based on the sole evidence of a child eye-witness of tender age and it appeared that the child did not disclose the identity of accused soon enough till she was examined by Police many days after the occurrence though she had many opportunities and there were many infirmities in her evidence, which was uncorroborated as regards the identification of the accused, *held*, that it was unsafe to convict the accused on the uncorroborated evidence of the child: I.L.R. (1962) Cut. 505.

Conviction on evidence of sole testimony of child witness, *held*, is not impermissible: 1983 Cr.L.J. 1515 (Gau.). *See* also (1979) 16 Del.L.T. 122 (S.C.).

Where an offence was committed during night and the entire case rested on a child witness who stated that she saw the accused in the lantern's light but fact of the lantern burning was not stated nor the accused were named to the Police and there were also other contradictions in her evidence, *held*, the accused could not be convicted on her evidence: A.I.R. 1992 S.C. 1131: 1992 Cr.L.J. 1426: 1993 S.C.C. (Cr.) 209.

4. Preliminary enquiry to test competency of child witness.—The Court should satisfy itself before recording his statement that he understands what is meant by truth and also whether he is intelligent to answer questions and remember what has taken place: 1952 Raj.L.W. 20.

It is necessary for a Court before examining a child of tender years, as witness to satisfy itself that the child is sufficiently intellectually developed to comprehend what he has seen and to give an intelligent account of it to the Court. It is the duty of the Court to ascertain before recording his statement that he understood questions put to him and was capable of giving rational answers: A.I.R. 1952 Raj. 153: I.L.R. (1951) Raj. 844.

S. 118 vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding; but this discretion must be exercised in a judicial manner. No doubt, the proposition that the competency of the witness to understand and give rational answers should be tested by Court by interrogating him before his examination is commenced, is not quite justified by the provisions of the section. But such a course should be pursued where the circumstance of the case make it plainly desirable: I.L.R. (1939) 2 Cal. 569: (1938-39) 43 Cal.W.N. 117: A.I.R. 1940 Cal. 182.

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions. The inability could be due to tender age, extreme old age or other reasons. The wholesome procedure of putting preliminary questions to test the capacity is not the best test to ascertain that capacity. The best test is the evidence itself and the manner in which it is given. In testing the capacity of child witnesses to testify if questions are put, they must be proper questions. The questions must be to ascertain in the best way whether from the extent of his intellectual capacity and understanding he is able to give rational account of what he has seen or heard on a particular occasion. A person of tender age if satisfies the above requirements, his capacity is established: (1991) 2 Ker.L.J. 838: (1991) 2 Ker.L.T. 838.

Though ordinarily a preliminary examination as to competency of a child witness is to be made to see whether it is capable of understanding questions and giving rational answers, it cannot be held that without such preliminary examination, its statement is inadmissible. Thus, when a child witness is not expressly held to be competent and has not been preliminarily examined but it gives rational answers to questions, its statement cannot be rejected on the ground that it is not a competent witness: 1968 Raj.L.W. 1: 1968 Cr.L.J. 270.

The omission to question such a witness before he is examined or the failure to record the opinion of the Judge as to whether the witness understood the duty of speaking the truth may not by itself vitiate the judgment. The credibility of the witness has to be judged in the light of the circumstances in each case: A.I.R. 1955 Trav.-Co. 81: 1954 Ker.L.T. 758: 1955 Cr.L.J. 842. *See* also I.L.R. 41 Cal. 406 [Absence of such examination does not invalidate trial.]

Under S. 118 of the Evidence Act, it is imperative that the Court should test the

competency of a child witness before examining him. It should test his intellectual capacity by putting a few simple and ordinary questions and also judge the competency of the witness during the course of his examination and say something to that effect after the statement is over so that the appellate Court may feel satisfied as to the capacity of the child to give evidence: 1950 Raj.L.W. 357: A.I.R. 1951 Raj. 37.

S. 118 has been worded negatively. If the Court would consider that a particular witness does not understand the question put to him and fails to give rational answers to those questions, the Court would not proceed to take evidence of that witness. Where there is no record of the Court's opinion that the child understands the questions put to him but yet the Court proceeds to record the evidence, it must be taken that the Court considered the witness as competent to testify. There is no provision in law to ask preliminary questions to test the capacity of a child witness to testify, though it is always a wholesome course to be adopted. If in fact the child is examined as a witness, the best test of his capacity to testify is the evidence itself and the manner in which it is given. There is nothing illegal in the procedure if the Court satisfies itself by recording the evidence straightway without resorting to preliminary questions. The failure to record the opinion as to the competency of the child-witness alone will not be the reason to treat the evidence inadmissible: (1964) 1 Cr.L.J. 422: A.I.R. 1964 Ori. 100; 1971 All.W.R. 61 (D.B.).

Where a young child is called as a witness, the first step for the Judge or Magistrate to take is to satisfy himself by questioning the child that it is a competent witness within the meaning of S. 118: 1940 Rang.L.R. 104: A.I.R. 1939 Rang. 402; (1918) 20 Bom.L.R. 365. *See* also 15 Mys.L.J. 217: 42 Mys.H.C.R. 295.

It is very desirable that a trial Judge, who has a child witness before him should preserve on the record, apart from the child witness evidence in the case, some other questions and answers which could help the Court of Appeal to come to the conclusion whether or not the trial Judge's decision in regard to the competency of the child witness was right or erroneous: 1959 All.L.J. 239: 1959 Cr.L.J. 796: A.I.R. 1959 All. 409; 1982 Ker.L.T. 692 (D.B.).

It is a rule of prudence, though there is no legal requirement, that not only it is desirable that a preliminary examination of a child witness should be made by the Court but that a formal record of such examination should also be maintained. In a criminal prosecution, where the fate of the accused depends on the testimony of such a witness, the imperative necessity of *voir dire* has been underlined with greater emphasis for obvious reasons. It may be that the incompetence of such a witness to depose to the *res gestae* or his ignorance about the duty to speak the truth may often come out during the examination of the witness. However, it is always desirable to resort to a preliminary examination which will tend to disclose his capacity and intelligence, for, such an examination may expose even a witness who has been fully tutored and who, on that amount, might be able to stand the test of cross-examination. The record of such preliminary examination, if maintained, will enable the appellate Court which does not have the opportunity to watch the demeanour of the witness, to apply its own mind and to review the decision of the trial Court Judge, if need arises on these matters. It is for these reasons that *voir dire* and the maintenance of its formal record have been accepted as an established rule of practice in our Courts.

Judges and Magistrates should, therefore, always resort to *voir dire* and maintain its record and also record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. Even if it is not rejected outright, the appellate Court might experience a handicap in the process of assessment of the evidence of such witness: (1976) 17 Guj.L.R. 254.

Where in order to ascertain the level of understanding of child witness the trial Judge conducted a preliminary examination but it omitted to record questions put to her in said examination and only answers were recorded, *held*, such an omission would not make evidence of child witness unworthy of acceptance: 1995 Cr.L.J. 1432 (Bom.) (D.B.).

Where there is no record of the Court's opinion that the child understands the questions put to him but yet the Court proceeds to record the evidence, it must be taken that the Court considered the witness as competent to testify. There is no provision in law to ask preliminary questions to test the capacity of a child witness to testify, though it is always a wholesome course to be adopted. The object of such preliminary questioning is not to legalise the evidence but only to save time

of the Court not to further progress in the examination of such witness if it is satisfied that the child is not a competent witness. If in fact the child is examined as a witness, the best test of his capacity to testify is the evidence itself and the manner in which it is given. [A.I.R. 1964 Ori. 100, Rel. on]: (1971) 37 Cut.L.T. 765.

The omission of the trial Judge to put questions to a child witness, unconnected with the case to satisfy himself whether the witness is able to understand the questions and to return coherent answers, and to incorporate the preliminary examination in the record, would not render the evidence of child witness inadmissible or unreliable. The competency of the child witness can be ascertained even at the appellate stage by going through the statement of the witness: 1973 Cr.L.J. 1466.

It is necessary for a Court before examining a child of tender years as witness to satisfy itself that the child is sufficiently intellectually developed to comprehend what he or she has seen and to give an intelligent account of it to the Court. If the Court is of the opinion that by reason of tender years and defective or immature understanding the child could not have perceived the particular incident to prove which he or she is produced as a witness, the Court should not only refrain from administering the oath to him or her but should also decline to examine him or her as a witness: 1979 W.L.N. (U.C.) 252: I.L.R. (1979) 29 Raj. 992 (D.B.).

When a witness is a person of tender years or extreme old age or a person who suffers from disease or other abnormality of the body or mind, the Court is alerted to test his competency. Similarly, where a witness is a child, the Court is alerted on the need to decide whether oath can be administered. Ordinarily, this satisfaction is to be arrived at by preliminary examination of the witness by the Court. This does not mean that in the absence of preliminary examination the evidence becomes inadmissible since the general rule is in favour of the competency and satisfaction, if necessary, can be arrived in the course of the evidence. However, trial Courts would do well to conduct preliminary examination to satisfy themselves in regard to the competency under S. 118 as well as under the proviso to S. 4(1) of the Oaths Act. It is highly desirable to bring on record the questions and answers put to the witness and to make a record of the satisfaction of the Court. Even in the absence of specific record of preliminary questions or the satisfaction the appellate Court could examine the nature and tenor of the evidence recorded, the manner in which the witness faced in cross-examination and satisfy itself about the competency under both the provisions: 1994 Cr.L.J. 432 (Gau.) (D.B.).

While it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth, such an opinion of the Magistrate or Judge can also be gathered from the circumstances even when there is no such formal certificate. In the present case, though the actual questions put by the Sessions Judge have not been recorded, it is clear from the note made by him before examining this witness that he had questioned her for the purpose of ascertaining whether she knew the nature of the oath, the child witness appears to have stated before the Judge that she had come to speak about what she saw and that if she should tell a lie, God would punish her. The Judge had taken her evidence after solemn affirmation. Having regard to these circumstances and also from the way she has given evidence, it is clear that she was a competent witness and that there is no valid ground against the admissibility of her evidence: 1959 M.L.J. (Cr.) 986: A.I.R. 1960 Mys. 48: 1960 Cr.L.J. 373.

When young children of about 13 or 14 years of age are produced in law Courts as witnesses, it is the duty of the Presiding Officers to ascertain whether they are competent witnesses before they are examined and this can be done by putting a few questions to them in order to find out whether they are intelligent enough to understand what they had seen and afterwards inform the Court thereof. In the case of village boys, it is all the more necessary on account of their low intelligence and power of perception: A.I.R. 1952 Bhopal 25: 1952 Cr.L.J. 1366.

The Evidence Act does not prescribe any particular age as a demarcating line for treating a witness incompetent to testify by reason of his or her tender years. The intellectual capacity of a child to understand questions and to give rational answers thereto is the sole test of testimonial competency. The provisions of S. 4 of the Oaths Act read with

S. 118 of the Evidence Act rather indicate that a child aged 12 years or above is normally expected to have attained a minimum faculty of understanding so as to engender a *prima facie* presumption of his testimonial competency. Normally, when a child below 12 years of age appears before a Court as a witness, the Court should before administering oath or affirmation to him satisfy itself by putting appropriate questions that he can understand ordinary questions and give intelligible and rational answers thereto. Where, however, the witness appears to be aged 12 years or more such examination on the *voir dire, i.e.*, preliminary examination by the Judge before administering oath, may not be necessary except where the Judge has reason to doubt his testimonial competency or where an objection is raised at the very beginning about such competency of the witness. Such objection may, however, be taken also during the continuance of the examination of the witness. Where in a murder case, no objection regarding the testimonial competency of child witness, aged 12/13 years was at all taken at any stage in the trial Court, and the trial Judge also never doubted the testimonial competency of the witness and her evidence read as a whole did not militate against such competency of her and her evidence was also corroborated by other eye-witnesses as well as by circumstances including prompt reporting of the culprit's name to the Police, *held*, her evidence was clearly admissible: 1992 Cr.L.J. 2493: 1992 Cal.Cr.L.R. 5: (1991) 2 Crimes 671 (D.B.).

Though the Judge should always, when dispensing with an oath, make a clear record that he was satisfied that the child understands the duty to speak the truth and should also state his reason for thinking so. But the evidence of a child witness recorded without putting a few preliminary questions to satisfy as to his competency cannot, as a matter of law, be treated as washed off the record altogether. Thus, where on a careful examination of the answers given by the child witness in his cross-examination it was found that he was in a position to understand the questions put to him and that he was in a position to understand the distinction between truth and untruth and that he was able to give coherent answers, *held*, the omission of the trial Judge to put preliminary questions to the child witness to satisfy himself whether the witness was able to understand the questions and give coherent answers and his failure to incorporate the preliminary questions and answers in the deposition did not render the evidence of the child witness either inadmissible of unreliable. [1972 A.P. High Court Notes 266; 1973 Cr.L.J. 1466 (All.); 1983 Cr.L.J. 773 (Cal.), Rel. on]: (1994) 2 An.L.T. 261: 1993 Cr.L.J. 3496 (D.B.); 1977 Raj.L.W. 146.

The failure of the Judge to record the questions put by him to a child witness to elicit his competency to depose and the answers given by him to such questions is not a serious irregularity especially when the Judge has made a note that as a result of questioning the witness he was satisfied that he could understand the question put to him and that he was competent to give evidence. Though it may be desirable to make a record of such questions and answers the failure to record the same is not fatal. The decision primarily rests with the trial Judge: I.L.R. (1954) Trav.-Co. 1200: A.I.R. 1955 Trav.-Co. 6.

When a Court has got to deal with a child witness, before deciding that the witness is a competent witness, Court must come to the conclusion that, by reason of his age, the child is not intellectually deficient. The law does not cast a duty upon a Judge, to ascertain by way of *voir dire*, the competency of a person to be a witness. In a large majority of cases, the presumption would be that the person is a competent witness. But, when the Court has got to deal with a child witness who is only five years old, it would not be proper to rely on any such presumption. In such a case it is desirable that the Judge should undertake a *voir dire* with a view to satisfy himself that the witness is a competent witness. Of course, the view which the Judge would form at the preliminary enquiry would not be the final view and the Judge might have to change that view if the examination and the cross-examination reveals his incompetency: (1961) 1 Cr.L.J. 57: A.I.R. 1961 Guj. 11.

Although there is no provision, to have a preliminary examination of a child witness, such a course is desirable and should be resorted to, because it offers an opportunity to the Court to asses the mental capacity of the child witness. Failure to do this in a particular case, however, does not vitiate the proceedings. Although legally there is no bar in accepting the uncorroborated testimony of a child witness yet prudence requires that

Courts should not act on the uncorroborated evidence of a child whether sworn or unsworn: (1960) 1 Ker.L.R. 95: 1960 Ker.L.J. 137: 1960 Ker.L.T. 80: I.L.R. (1960) Ker. 256.

While it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth, such an opinion of the Magistrate or Judge can also be gathered from the circumstances even when there is no such formal certificate: 1959 M.L.J. (Cr.) 986: A.I.R. 1960 Mys. 48.

In order to be satisfied with the credentiality of a child witness, the Court is required to take safeguard as a necessary condition precedent so as to be satisfied about a child being conscious of the difference between right and wrong, truth and untruth and the sanctity of an oath administered to him. The Judge or Magistrate must record an opinion that the child understands the duty of speaking the truth.

In order to make the former statement admissible under S. 157 it is not necessary that the witness to be corroborated must also, besides making the former statement at or about the time the fact took place, say in Court in his testimony that he had made the former statement: 1992 Cal.Cr.L.R. 106.

It is Court's duty to first ascertain the intellectual capacity and capability of the child witness of giving rational answers: 1982 M.P.W.N. 452.

Failure of Judge to certify that child understood duty of speaking truth—Evidence will still be admissible: 1982 Cr.L.J. (N.O.C.) 39 (Gau.).

Where there is no preliminary examination, it is the recorded statement of a child, which ordinarily furnishes sufficient material to judge the competency of that witness. If the recorded statement of a child witness shows that he or she has a rational understanding, it cannot be wiped off merely on account of the absence of *voir dire*. Thus, where though no preliminary examination was made by the trial Court to ascertain the competency of the victim-child witness, to testify as to whether she understood the sanctity of oath and yet she was examined as witness after administration of the oath and she had given rational answers, *held*, the absence of *voir dire* did not render *ipso facto* her statement inadmissible: 1984 Raj.L.W. 10.

The Court has a discretion to form its own opinion whether a child witness has sufficient understanding to be qualified to be a witness. The question of the capacity of the witness to testify is a question for the Judge himself to decide and not for the Jury, although after he has decided in favour of the competency of the witness, it is for the Jury to determine the amount of credit to be given to the statements made by such a witness: 1959 Cr.L.J. 584: A.I.R. 1959 Cal. 306.

5. Administering oath to a child witness.—As to competency to testify of a person who is unable to understand oath and its significance, *see* 10 O.C. 337: 7 Cr.L.J. 89; (1918) 20 Bom.L.R. 305.

Child witness—Omission to administer oath—Effect—Court should accept it with caution and should require substantial corroboration before acting upon it: 35 Cut.L.T. 18: 1969 Cr.L.J. 626: I.L.R. (1969) Cut. 66: A.I.R. 1969 Ori. 105.

Notwithstanding S. 5 of the Oaths Act, a child's evidence is not inadmissible merely on the ground that no oath was administered to him. S. 13 of the Oaths Act governs such cases: 22 I.C. 737: I.L.R. 38 Mad. 550.

S. 5 of the Indian Oaths Act mandates that oath or affirmation shall be made, among others, by all witnesses who are examined by a Court. The proviso to the section lays down so far as relevant, that where the witness is a child under twelve years of age and the Court is of opinion that though he understands the duty of speaking the truth he does not understand the nature of an oath or affirmation, the foregoing provisions of S. 5 and the provisions of S. 6 which permit, in certain circumstances, an affirmation instead of an oath, shall not apply to such a witness, but the absence of an oath or affirmation shall not render inadmissible his evidence. Thus, where the trial Judge's note only indicated at the best that he tested the competency of the witness to testify but not his understanding of the oath or affirmation, *held*, the two are different and not synonymous. Without testing this latter understanding the learned Judge administered oath. This is an irregular procedure even though it will not affect the validity of the testimony. [1960 Ker.L.T. 430,

Rel. on]: 1983 Ker.L.T. 594. *See* also 1979 B.B.C.J. 701 (D.B.).

It is settled law that competency of a child witness depends on the capacity of understanding and consistency of the witness. It is also to be seen how far it fits with the rest of the evidence and it is a matter of prudence to weigh the evidence of a child witness to be accepted by the Judge. Further, administering or not administering an oath to a child witness does not effect the admissibility and competency of a child witness. Thus, where from her demeanours and deposition on record and from the extent of her intellectual capacity and understanding, child witness, aged 9 years, was found able to give rational account of what she had seen at the time of occurrence and she gave rational answers to the questions put to her in her cross-examination and her evidence was corroborated by another eye-witness in giving true account of occurrence, *held*, the trial Court was competent to administer oath to such a witness and her evidence could be relied upon to bring home the conviction of the accused. [A.I.R. 1952 S.C. 54, Rel. on]: 1991 Cr.L.J. 278 (Gau.) (D.B.).

6. Illustrative cases—(*a*) Where child witness's evidence was accepted.—Where evidence of a child witness of the tender age of 9 years, who was daughter of the accused and deceased, was trustworthy and consistent and on preliminary examination she had been found to be competent to testify, *held*, there being no reason that she would falsely depose against her own father, her evidence could certainly be relied on: 1984 Raj.L.W. 619 (D.B.).

The mere fact that a witness is of tender age or of old age is hardly sufficient to conclude that he has no testimonial competence. Where a child of ten years was the sole witness to an act of uxoricide committed by her father and her testimony was corroborated by evidence of witnesses who rushed to the place of occurrence on hearing *hue* and *cry* made by child witness and got a brief account of occurrence from the child which was consistent with child witness's testimony in Court, *held*, the testimony of child witness could be relied upon: (1993) 1 An.L.T. (Cr.) 666 (D.B.).

Where a child witness who was daughter of the deceased and the accused-wife and was examined soon after the incident had categorically stated what she had heard from her father who was at the threshold of death and she had also described in detail the role played by both the accused, *i.e.*, her mother and another accused, while causing death of the deceased and there was no material discrepancy therein, *held*, evidence of said witness being clear, cogent and worthy of credence, it could certainly be relied on: 1994 Cr.L.J. 197 (Ori.) (D.B.).

A witness who, by reason of his immature understanding, was not administered oath and who was privileged, by reason of his years, not to make his answers in an intelligible and coherent manner is unsafe to be trusted whole-sole. Where it was found that a child aged 5 years, who happened to witness murder of his mother and an infant brother was a witness of truth and not a witness of imagination and not only did the conduct of the accused corroborate the evidence of the child witness but the very pattern of the crime corroborated that it was the accused who committed it, *held*, accused could be convicted on basis of child witness's evidence. But as child witness answered many vital questions with a nod of head and his statement was recorded 20 days after the incident and accused had already been in jail for last 10 years, sentence of death was altered to imprisonment for life. [(1978) 5 U.P. Cr.C. (All.) 17, Affirm.]: A.I.R. 1981 S.C. 1122: (1981) 2 S.C.C. 569: 1981 Cr.L.J. 746.

Where, it was found that the child witness had developed sufficient understanding, *i.e.*, after witnessing the occurrence, he described it and understood the questions and answers and had given a vivid account of the occurrence and was cross-examined at length by putting to him varied and diverse questions and his answers seemed to have been given on his own, *held*, he himself having been attacked and injured during the course of the occurrence, he was definitely in a position to watch and thereafter narrate the happenings, and when his testimony got corroboration from other evidence, it could certainly be relied: 1990 Cr.L.J. 111 (All.) (D.B.).

Where though all the eye-witnesses were children but as they had truely stated the sequence of events as were seen by them and their testimony was corroborated by other circumstances, *held*, reliance could be placed on their testimony: 1994 Cr.L.R. 247 (Raj.).

Where evidence of the eye-witnesses, who were children in the age group of 6 to 11 years, regarding murder committed during school hours, was consistent in respect of time and place of occurrence and killing by gun-shots, *held*, though they were related to the deceased, their evidence was clearly admissible: 1991 Cr.L.J. (N.O.C.) 23 (Pat.) (D.B.).

Where deceased's younger brother had an occasion to witness the murder of his brother, *held*, simply because the witness was a boy of 14 years it would not be proper to assume that he was likely to be tutored: A.I.R. 1993 S.C. 65: 1992 Cr.L.J. 3703.

Where child witness of 8 years was found by the Court to be a person of maturity and understanding and there was no contradiction with reference to his earlier statement to the Police, *held*, his evidence was acceptable: 1994 Cr.L.J. 432 (Gau.) (D.B.).

Where in a murder case, the sole testimony was of the minor son of one of the deceased, who had described as to how and where the gun-shot injuries were received by the deceased persons and his evidence was corroborated by medical evidence, *held*, in absence of any material infirmity in his evidence, his testimony was clearly admissible. [1976 Cr.L.J. 1031 (S.C.); 1973 Cr.L.J. 159 (S.C.), Rel. on]: 1994 Cr.L.J. (N.O.C.) 407 (P.&H.) (D.B.).

Where version of the incident by a child witness was truthful, *held*, the Court is justified in relying on his evidence: A.I.R. 1979 S.C. 1173: 1979 Cr.L.J. 700: 1979 Cr.L.R. (S.C.) 81: 1979 U.J. (S.C.) 334: (1979) 4 S.C.C. 332: 1979 S.C.C. (Cr.) 968; (1978) 2 M.P.W.N. 144 ; (1979) 1 M.P.W.N. 205; (1981) 1 M.P.W.N. 17.

Child witness aged about 8 or 9 years—Sessions Judge observing that the witness had given his evidence in a straight forward manner—*Held*, in view of the observations of Sessions Judge who had opportunity to see and watch demeanour of witness, his evidence should not be discarded on ground of a danger of his being tutored: 1969 Cr.L.J. 1282 (Del.).

Where testimony of a child witness was found to be natural and straight forward, *held*, in absence of any material showing that he was tutored or influenced by any person, his testimony should be accepted: (1982) 54 Cut.L.T. 527: 1983 Cr.L.J. (N.O.C.) 31. *See* also 1993 Cr.L.J. 772 (Pat.) (D.B.).

In a murder trial the evidence of the child witness aged about 8 years who was an eye-witness to the occurrence was recorded by the trial Court in a narrative form carefully in a clear and cogent manner, *held*, merely because the evidence was not recorded in the form of questions and answers did not impair its value: 1977 Cr.L.J. 1349 (Gau.) (D.B.).

(*b*). Where child witness's evidence was not accepted.—Where there were several contradictions in the statement of the child witness, in a murder case, coupled with the fact that the first information report was not lodged for about four months, though he was said to have told about the occurrence to two other witnesses, *held*, implicit reliance could not be placed on his testimony. [A.I.R. 1946 P.C. 3, Rel. on]: 1983 Raj.L.W. 80; 1983 M.P.W.N. 2. Where name of accused not furnished for 5 or 6 days though known, *held*, it is not safe to rely upon the evidence of such child witness: 1982 M.P.W.N. 392; 1983 Jab.L.J. (Note) 35.

It will be most unsafe to rely on the testimony of a child witness who has made contradictory statements too often in the case: 1992 M.P.L.J. 267 (D.B.).

While a child with an age of 9 to 15 years can often be expected to give out a true version because of his innocence but there is always the danger in accepting the evidence of such a witness that under influence he might have been coached to give out a version by persons who may have influence on him. Hence, for relying on such child witnesses the evidence given by them must stand the test of judicial scrutiny. When there were a number of circumstances which indicated that it will not be quite safe to rely on their evidence, *held*, the Court was justified in rejecting their evidence as untrustworthy even though they were the only eye-witness to the murder of their mother: (1979) 81 Punj.L.R. 265: (1979) 6 Cr.L.T. 108: 1979 Chand. Cr.C. 51: 1979 Cr.L.J. (N.O.C.) 100 (D.B.).

Competence of a child witness is tested on the basis of an old latin maxim *"varitatem dicere a corruption of vior dire"* which means that examination of a witness is a series of questions by the Court usually in the nature of an examination as to his competence to give evidence in some other collateral matter prior to his examination-in-chief. Where a child witness of 3-4 years age was found to be not in a position to understand what is truth and what is falsehood and could understand the questions with difficulty and after repetition, *held*, he could not be said to be a proper witness who could depose correctly or on whose deposition reliance could be placed: 1992 All.L.J. 1182: 1992 Cr.L.J. 3972 (D.B.).

When a child witness of 5 years failed to give proper answers and the manner in which he re-cited the prosecution story gave an impression that he was tutored to give a particular statement and further he could not explain the injuries sustained by accused, *held*, his testimony could not be accepted: 1984 Raj.L.W. 473 (D.B.); (1978) 2 M.P.W.N. 174. Where the child witness was found to be not capable of giving rational replies, and was also found to be tutored by relatives and Police, *held*, no reliance could be placed on such testimony: 1982 M.P.W.N. 506; 1982 M.P.W.N. 499.

Testimony of a child witness cannot be relied upon if at the time of incident he was only 6/7 years of age and examined as witness during trial after about four years: 1987 Rec.Cr.C. 357 (Raj.).

Where there were several infirmities in the evidence of a child witness of six years age, in a murder case and his evidence also appeared to be tutored, *held*, in absence of corroboration from any other independent witness, no reliance could be placed on it. [A.I.R. 1930 Oudh 406; A.I.R. 1977 S.C. 135, Foll.]: 1982 M.P.L.J. 772 (D.B.); (1978) 2 M.P.W.N. 114; 1980 B.B.C.J. 701.

Evidence of a child witness aged only 6 years is to be approached with great caution; where serious infirmities and contradictions were found in his evidence, *held*, it could not be relied on: A.I.R. 1977 S.C. 135: (1977) 1 S.C.C. 707: 1977 Cr.L.J. 167.

Where the prosecution had relied on the testimony of a child eye-witness and oral extra judicial confession of the accused and the circumstances did cast a serious doubt about the child's claim to being an eye-witness, *held*, it also destroyed the veracity of the extra-judicial confession; no case for conviction was made out: A.I.R. 1980 S.C. 1621: (1980) 1 S.C.C. 582: 1979 U.J. (S.C.) 580.

Where a child witness aged about 12 years at the time of incident and who was related to the deceased as his grand-daughter, stated that she was grazing buffalo in a field near the road when she saw that the deceased was run over by a lorry which was proceeding very fast and it did not stop even after hitting the deceased, *held*, it was highly improbable for her to notice the driver or other person inside the cabin especially when she herself admitted that she saw the persons in the lorry only at the time of hitting the deceased, therefore, it was highly improbable for the witness to have witnessed the incident and her evidence was not natural and probable. Hence, no reliance could be placed on her testimony: 1993 Cr.L.J. 2574 (Mad.) (D.B.).

Where in a case of homicide, the young daughter of the victim was the main occular witness but there were lots of infirmities in her testimony which clearly pointed out to the fact of her being tutored, *held*, the conviction of the accused on the sole testimony of that child's witness was not maintainable as she did not appear to be a witness of sterling worth, on whose uncorroborated testimony the conviction could be safely maintained. [1983 Raj.L.W. 80, Rel. on]: 1985 Raj.L.W. 601: (1985) 1 W.L.N. 581: 1985 Cr.L.R.428 (D.B.).

7. Evidence of victim of rape.—(*See* also S. 133, Note 13, *infra*). Unsworn testimony of prosecutrix—Admissibility: 1960 Cr.L.J. 237: A.I.R. 1960 Madh. Pra. 59.

The prosecutrix of a sex offence is not at par with an accomplice; in fact, she is a victim; undoubtedly a competent witness, her evidence must receive the same weight as any victim of physical violence; no where does the Act bar its acceptance unless corroborated in material particulars. What is necessary is that the Court must be alive to the fact that she is interested in the outcome of the trial and if the Court feels satisfied about the reliability of her evidence it is not required to look for corroboration. The High Court's view that it is only in the rarest of rare cases if the Court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary is not correct; the law is otherwise: (1990) 2 Bom.C.R. 630: (1990) 1 Rec.C.R. 411 (S.C.). If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix, it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding, the Court is entitled to bear a conviction on her evidence, unless the same is shown to be infirm and not trustworthy: 1995 Cr.L.J. 1561 (Ori.) (D.B.).

Prosecutrix of rape is a competent witness under S. 118; if her testimony inspires confidence and is trustworthy then there is no need of corroboration: (1992) 1 Crimes 1140 (Del.).

It is well settled that in sexual offences the need of corroboration of prosecutrix is more a rule of prudence and not one of law. If a Judge of facts is convinced that the testimony of a young victim of sexual offence can be relied on and the witness is one of truth the need for corroboration is rendered unnecessary. Thus, where the young child witness was herself a victim of sexual offence, but oath was not administered to her because the trial Judge was of the opinion that she did not understand the sanctity of oath, *held*, that did not in any way create a hurdle in the way of her testimony being accepted as the statement of that child witness as a whole clearly showed that she fully understood the questions which were asked of her and she gave a very natural and truthful version of the incident as it occurred. She was cross-examined at length, for two days, but nothing could be brought out to detract from the weight of her testimony and there did not appear any likelihood of her being tutored. Thus, omission to administer oath to her did not render her testimony inadmissible in evidence: 1989 M.P.L.J. 243.

Where the victim of rape, a girl of tender years, narrated true story of rape committed on her which was corroborated by other evidence, *held*, her statement could certainly be relied on: 1982 M.P.W.N. 149; 1987 Cr.L.R. 91: 1987 Rec.Cr.C. 65 (Raj.).

Where victim of rape, a child of seven years was able to narrate in a consistent manner how she was handled or mishandled on the fateful day and at the end of her cross-examination she was clear enough in telling that she was not deposing at anybody's insistence and that her father had never asked her to depose to the facts in a particular manner or otherwise, *held*, under such circumstances the irregularity committed by Assistant Sessions Judge in omitting to record a certificate about the intellectual capacity of the child or about the awareness of the duty of the child witness to tell the truth before the Court could not affect the admissibility or the weight of the evidence of the child witness: 1994 Cr.L.J. 1752 (Bom.).

Where in a case of sexual assault, prosecutrix was a child of three and a half years and was incapable of understanding the questions posed to her and give rational replies thereto, *held*, she could not be a competent witness: 1982 Raj.L.W. 469; (1978) 2 M.P.W.N. 43.

8. Lunatic witness.—Where a witness is declared incapable of giving evidence owing to insanity it is the duty of the Court to record its finding that the witness is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. The fact that the witness had become incompetent to testify and so incapable of giving evidence must be proved strictly: 1954 Cr.L.J. 6: A.I.R. 1953 Madh. Bh. 262.

9. Leper's evidence.—Contents of document—Proof—Evidence of attesting witness—Non-production on the ground that he was leper—Not proper—Leper held could be examined on commission: A.I.R. 1963 Ori. 29.

10. Accused as witness.—The taking of oath or making of an affirmation being an indispensable pre-requisite for any person giving evidence in a Court of a law as a witness, in India excepting under special laws like S. 7 of the Prevention of Corruption Act or in proceedings under S. 107, Cr.P.Code or maintenance proceedings under the Code of Criminal Procedure, the accused is not a competent witness: 1955 Cr.L.J. 452: A.I.R. 1955 Mad. 100. [*See* S. 342-A, Cr.P.Code].

When two persons though accused of complicity in the same offence are tried separately, each is a competent witness at the trial of the other though the case could be different if they are tried together: I.L.R. 45 Cal. 720: (1917-18) 22 Cal.W.N. 405.

Withdrawal of pardon granted to a person—Competency as witness against other accused—Refusal of prosecution to examine—No bar to his examination at fresh trial necessitated by retirement of Sessions Judge: 1961 Raj.L.W. 188: (1961) 2 Cr.L.J. 798: A.I.R. 1961 Raj. 274.

11. Accomplice's evidence.—(*See* also Notes under S. 133, *infra*). Accomplice evidence: 8 P.R. 1904 (Cr.). Evidence of witness illegally pardoned by Police: I.L.R. 16 Bom. 661: Rat. 776. *See also* I.L.R. 19 Bom. 363.

Accomplice evidence—Taking accomplice evidence outside S. 337, Cr.P. Code by using S. 494 or otherwise—Power to tender self-confessed criminal as witness instead of trying him as accused—No violation of Arts. 14 and 20 of the Constitution: 1968 Cr.L.J. 1124: A.I.R. 1968 S.C. 38.

Where a person, who acted as a carrier in a conspiracy to smuggle gold in India, admitted her role in the statements made to the Customs officials investigating the case under the Sea Customs Act but, instead of being included in the array of accused and sent up for trial, was examined as a witness against her former associates. *Held* that, there could be no doubt, that she was a competent witness. Being self-confessed criminal, her evidence was accomplice evidence and, if subjected to scrutiny and the usual checks for corroboration must be held to be received with due caution. No pardon could be tendered to such a witness because the pertinent provisions of Cr.P.Code did not apply. Nor could she be prevented from making a disclosure, if she was so minded. The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. She was protected by S. 123 (proviso) of the Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence. As the person is tendered as a witness, the bar of S. 5, Oaths Act, does not apply because the person is not an accused person in a criminal proceeding. The exclusionary clause in S. 5 is to be interpreted as a whole and "criminal proceedings" means a criminal inquiry or a trial before a Court and the "accused" means a person actually arranged that is, put on a trial. The investigation was by Customs Officers under the Sea Customs Act and not by the Police under Chapter XIV of the Cr.P. Code. Therefore, no question of the application of Ss. 169 and 170, arose. The competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case. S. 5 of the Oaths Act and S. 342 of the Code of Criminal Procedure do not stand in the way of such a procedure. It is, however, necessary to say that where S. 337 or S. 338 of the Cr.P. Code apply, it is always proper to invoke those sections and follow the procedure there laid down. Where those sections do not apply there is the procedure of withdrawal of the case against an accomplice: (1968) 2 S.C.R. 624: A.I.R. 1968 S.C. 938.

12. Credibility of witness—General.—In assessing the credibility of witnesses the test is two-fold. The first is generally about the veracity of the witnesses, *viz.*, whether he has got such regard for truths that generally speaking the Court can accept his statement, subject of course to correction for the vagaries of memory and observation and separable exaggeration and super-additions which do not go to the root of the matter. The second is, specifically whether in regard to each accused he had an opportunity to make the correct observation and a motive to speak the truth. But when the witness does not come up to the mark in his general regard for truth then even if he makes a plausible and consistent allegation in regard to an individual accused, the Court should look for extra guarantee that this is not vitiated by his general indifference to truth: A.I.R. 1955 Vindh. Pra. 36: 1955 Cr.L.J. 1000.

In determining on the credit due to the witnesses regard must be had to the following considerations, namely, their integrity, their ability, their number and consistency with each other the conformity of their testimony with the experience, the conformity of their testimony with collateral circumstances: A.I.R. 1955 All. 328: 1955 Cr.L.J. 892.

Credibility of witness—It is open to Court to look into surrounding circumstances: (1964) 66 Bom.L.R. 486: A.I.R. 1965 S.C. 354.

Appreciation of evidence—Evidence of witness—Credibility: (1967) 12 Law Rep. 92 (Mys.), *see* 1968 Cr.L.J. 270 (Raj.).

The maxim *falsus in uno falsus in omnibus* is not applicable in India; thus, a witness cannot be branded liar and his evidence discarded on the sole ground that a part of his testimony is not reliable; besides, as held in, A.I.R. 1951 S.C. 120 and A.I.R. 1983 S.C. 114 primacy must be attached to the trial Court's opinion on credibility of a witness; the appellate Court must be very slow in discarding in appeal the evidence of any witness found reliable and accepted by the trial Court: A.I.R. 1987 Madh. Pra. 244: 1987 Jab.L.J. 462: 1987 M.P.L.J. 719.

Credibility of witness—Consideration—Community of witness—Relevancy: A.I.R. 1958 Madh. Pra. 407.

Credibility of witness—Absence of inherent vice—Adverse presumption on any matter cannot be drawn in absence of opportunity to explain it: A.I.R. 1970 Cal. 38: (1969-70) 74 Cal.W.N. 168 (D.B.).

There may be a little difference or distinction or variation in the version of different witnesses before the Court as to timings or sequences. But such witnesses are not unreliable on that ground as it is unrealistic to expect a witness to be human tape recorder since power of observation differs from person to person. On the other hand, when the witness sing the song of accusation in chorus tallying every point of the occurrence as to place, time and manner, the evidence of such witnesses may be considered as unnatural or tutored or regimented and may not inspire confidence in the mind of the Courts: 1991 Cal.Cr.L.R. 61.

Test of competency is that witness should be able to understand questions put to him: 102 I.C. 349: 8 Pat.L.T. 594: A.I.R. 1927 Pat. 406; A.I.R. 1928 Lah. 903; A.I.R. 1930 Sind 120 (understanding is the sole test of competency). As to competency to testify, *see* also I.L.R. 23 All. 90; I.L.R. 11 All. 180.

Testimony of witnesses not wholly reliable—Necessity of corroboration: (1961) 63 Punj.L.R. 629.

Evidence of husband to disprove access on the question of legitimacy of child born during wedlock. *See* I.L.R. 38 Mad. 466: 25 M.L.J. 594.

Adoption—Oral evidence—Reliability of witness has to be tested only by surrounding circumstances: A.I.R. 1968 Mys. 309.

A plaintiff can examine any witness he so likes—The witness may be a stranger, may be a man of his own party or party himself or may be a defendant or his man. Therefore, if a plaintiff wants to examine a defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that the said defendant has neither appeared in the suit nor upon appearance filed written statement nor prayer for filing written statement has been rejected: A.I.R. 1993 Pat. 122: (1993-2) 41 B.L.J.R. 1445: (1993) 2 Pat.L.J.R. 1: 1993 B.B.C.J. 317 (D.B.).

Defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses: A.I.R. 1981 S.C. 911: 1981 All.W.C. 297: 1981 All.Cr.R. 165: 1981 All.L.J. 228: (1981) 2 S.C.C. 166: 1981 Cr.L.J. 618.

Unless there is something shown against the witness, his evidence should not be discarded merely because he is related to the party when he is a man who *prima facie* must be regarded as respectable and reliable: 145 I.C. 330: A.I.R. 1933 Rang. 162. Ordinarily, a close relative could be the last person to screen the real culprit and falsely implicate an innocent person, and hence the mere fact of relationship far from being the foundation for criticism of the evidence is often a sure guarantee of truth; but no sweeping generalisation can be made: A.I.R. 1955 All. 328: 1955 Cr.L.J. 892.

Where evidence of a witness was straight forward and the Court was satisfied that their evidence was natural and worthy of credit, *held*, merely because they were related to the party, would not be sufficient to discard their testimony: (1985) 60 Cut.L.T. 269; (1982) 53 Cut.L.T. 470 (D.B.); (1984) 57 Cut.L.T. 81 (D.B.).

The evidence of a witness is not to be rejected merely on the ground of his relationship with the deceased, but such evidence is to be scrutinised with care. [A.I.R. 1976 S.C. 216; A.I.R. 1982 S.C. 1076, Foll.]: (1984) 58 Cut.L.T. 211.

Evidence of uncles of prosecutrix—There can be no presumption against veracity of a relative when there is no suggestion that they had any ill-will or enmity against accused: 1983 Cr.L.J. (N.O.C.) 194 (P.&H.).

Where eye-witnesses, being neighbours, testified that they had, on hearing the shouts of the prosecutrix, reached the place of occurrence and rescued her from the accused who was raping her, and they were neither actuated by malice nor were there any strong reason to disbelieve them, it is not possible to ignore their testimony; more so when their testimony found corroboration in medical evidence. [(1988) 1 Raj.L.W. 278, Reversed]: A.I.R. 1992 S.C. 2004: (1992) 3 S.C.C. 615.

Enmity of prosecution witness with accused or distant relationship of two prosecution witnesses (great grandsons of two brothers) are not reasons to disbelieve their testimony: 1953 Raj.L.W. 165. Where one part of a witness's evidence is disbelieved, Judges of fact have the right to act on the rest of his testimony. But it will be so only if the Judge regards the rest of the testimony as reliable. But where out of ten statements made by a

witness, nine are decidedly false, there is little guarantee that the tenth statement is true: 1957 M.P.L.J. 852: A.I.R. 1958 Madh. Pra. 13.

Interested party or relation—Testimony of cannot be fully reliable: 1965 Raj.L.W. 168.

Murder charge — Proof — Eye-witnesses close by related to victim—Not incompetent witnesses—Their evidence cannot be disregarded but must be closely scrutinised: (1968) 1 An.W.R. 178.

The evidence of an interested or partisan witness whose relationship with the accused is inimical cannot be discarded on that ground alone, but should be scrutinised with care and caution before acceptance. If the Court will feel that before acceptance of such evidence there should be corroboration from independent sources, it should not hesitate to insist upon the same. Where there was enmity between the two parties and the evidence of the appellant was not corroborated by independent, natural and neighbouring witnesses, *held*, evidence of the appellant could not be accepted: 1988 Cr.L.J. 1887 (Ori.).

Relationship of a witness is no ground for not acting on his testimony if it is otherwise reliable in the sense that the witness was otherwise a competent witness who could be expected to be near about the place of occurrence and could have seen what happened: I.L.R. (1962) Cut. 303.

Witness—Credibility—Relationship of witness—Relevancy: 1959 Ker.L.T. 1014.

The label "interested witnesses" is frequently used to throw cloud on the evidence. The probation that when eye-witnesses to the occurrence were interested persons, there should be corroboration to their evidence by independent evidence cannot be of universal application. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him, falsely: 1993 Cr.L.J. 378 (Ori.) (D.B.).

The term "interested" postulates that the person concerned must have some direct interest in seeing that the accused is somehow or other convicted either because he had some grudge against the accused or for some other reason: (1982) 53 Cut.L.T. 470 (D.B.).

Where accused who was alleged to have committed murder of the deceased admitted the presence of ocular witnesses at the scene and there was no animosity between the witnesses and the accused but the High Court not only discarded the testimony of ocular witnesses but also rejected dying declarations giving importance to some trivial and insignificant contradictions between the evidence of witnesses and dying declaration, *held*, the High Court was not justified in acquitting the accused and a conviction could safely be recorded by placing reliance on the dying declarations alone: A.I.R. 1994 S.C. 475: 1994 Cr.L.J. 145.

Where evidence of a witness was attacked on the ground that she was deceased's sister and, thus, her evidence should be discarded outrightly, *held*, her evidence could not be rejected on that ground alone: 1989 Cr.L.J. 420 (Ori.) (D.B.).

The evidence of a partisan witness is not to be discarded as such; in a faction ridden locality, the prosecution may not find independent witnesses. But when the interested eye-witnesses did not belong to the locality and other persons, including nearby shopkeepers, belonging to the locality, independent and disinterested, were not examined, it would certainly cast serious reflection on the trial's fairness: 1985 Cr.L.J. 580. *See* also S. 3, Note 52 for Relations/interested/partisan/inimical witness.

In the case of witnesses in a criminal case who are rustics, their behavioural, pattern and perceptive habits have to be judged as such. Too sophisticated approaches familiar in Courts based on unreal assumptions about human conduct cannot obviously be applied to those given to lethargic ways of villages. When scanning the evidence of various witnesses, the Court has to inform itself that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony, provided there is the impress of truth and conformity to probability in the substantial fabric of the testimony given: 1973 Cr.L.J. 1763 (Bom.) (D.B.).

A person while going on the way may have occasion to see an occurrence which takes place. Different persons react differently when they witness an occurrence and

119. Dumb witnesses.—A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

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merely because a person does not intervene when he sees an assault, his evidence is not to be discarded: (1984) 57 Cut.L.T. 168.

The evidence of pedestrian and passer-by passing along the nearby street at the time of occurrence cannot be brushed aside or viewed with suspicion on the ground that they are mere chance witness. To discard such evidence on the ground that they are chance witnesses is to abandon good sense and to take too shallow a view of the evidence: 1991 Cal.Cr.L.R. 61. *See* also S. 3, Note 55 "Chance witness".

In the case of a legitimate trap, the officers taking part in the trap as well as the witnesses to the trap would in no sense be accomplices and their evidence would not require under the law to be corroborated as a condition precedent for conviction though the usual rule of prudence would require the evidence to be scrutinised carefully before being accepted and before an order of conviction is passed: (1983) 56 Cut.L.T. 372. *See* also S. 3, Note 54 "Trap witness".

Police Officers as witnesses: 6 C.P.L.R. (Cr.) 1: 1957 Cr.L.J. 237 (Raj.).

Where the only witnesses supporting the prosecution case were the Police witnesses and the story as put forth by the prosecution was most improbable, unnatural and unbelievable and it was more or less like a drama staged by the Police to involve the accused in case by describing them as dacoits, *held*, evidence of the Police witnesses could not be believed: 1988 Cr.L.J. 785 (Del.).

Prohibition Sub-Inspectors cannot be called interested witnesses merely because they are carrying out the provisions of the Act and therefore, their evidence should not be disbelieved merely on that ground: (1955) 1 M.L.J. 54. *See* also S. 3, Note 60.

Section 119—Notes.

See 5 O.C. 246. S. 119 also applies to the case of a witness who has taken a religious vow of silence and gives his evidence in writing to questions put to him. It is not the practice of the Courts to force any man to act contrary to his religious convictions so long as his acts are legal, and thus, if a witness's religion forbids him to speak, the Court will not compel him to speak and he must be deemed "unable to speak" within the meaning of S. 119. The evidence of such a witness given and taken in writing in open Court is properly taken and is not inadmissible: I.L.R. 20 Pat. 898: 23 Pat.L.T. 332: A.I.R. 1942 Pat. 183.

When a witness is so deaf, and dumb that it is impossible to make him understand the question put to him, in cross-examination, he cannot be a competent witness and his evidence ought to be struck out and a conviction based solely on his evidence ought to be quashed: 14 I.C. 655: 1912 M.W.N. 100. *See* also 1979 Ker.L.T. 123.

The Court was not justified in examining a deaf and dumb witness without assistance of expert or person familiar with his mode of conveying ideas of others in day-to-day life: 1982 Cr.L.J. 94 (Ker.) (D.B.).

Where the trial Court did not record the signs made by a victim of murderous assault, who lost his power to speak, in answer to several questions put to him but only recorded the interpretation, *held*, it was not a correct compliance with S. 119; case remanded: 1980 Cur.Civ.Cas. 27 (P.&H.).

Where an eye-witness could not be examined as he had become dumb and could not speak, *held*, no adverse inference could be drawn against the prosecution for not examining him: 1995 Cr.L.J. 2027 (Raj.) (D.B.).

Where evidence of two employees cited as prosecution witnesses against the Company was sought to be shut out as violative of Art. 20(3) of the Constitution of India as it would amount to self-incrimination on the part of the Company, *held*, a body corporate, since it cannot take or make oath or affirmation, a necessity for witnesses other than children nor can it be deemed a dumb witness under S. 119 because of its incapacity to see or hear or perceive by sense nor can a person summoned to produce documents can become a witness under S. 139, is not contemplated as a person under Art. 20(3) of the Constitution; the Company employees cannot be equated with the Company; there is no bar against their examination as prosecution witnesses: 1991 Cr.L.J. 828 (Cal.) (D.B.).

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120. Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.—In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

121. Judges and Magistrates.—No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations

(*a*) *A*, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate. *B* cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(*b*) *A* is accused before the Court of Session of having given false evidence before *B*, a Magistrate. *B* cannot be asked what *A* said, except upon the special order of the superior Court.

(*c*) *A* is accused before the Court of Session of attempting to murder a Police Officer whilst on his trial before *B*, a Sessions Judge. *B* may be examined as to what occurred.

Section 120—Notes.

Where the husband in divorce proceedings relied on non-access, his evidence was held admissible under Ss. 118 and 120: I.L.R. 38 Mad. 466: 25 M.L.J. 594.

Proof of non-access—Spouses are competent to give evidence: A.I.R. 1969 Mad. 235.

Proof of non-access—Evidence of parents of child. *See* A.I.R. 1953 Nag. 374: I.L.R. (1954) Nag. 204, cited under S. 112, *supra*. A child born 11 months after the marital intercourse between its parents had ceased, is illegitimate: I.L.R. 38 Mad. 466. A person against whom are launched proceedings for order for maintenance under S. 488, Cr.P. Code, is competent witness on his own behalf in such proceedings: I.L.R. 18 All. 107. *See* also I.L.R 16 Cal. 781; 17 C.P.L.R. 127; 19 P.R. (Cr.) 1903.

Application for divorce on ground of impotency—Evidence and proof required: A.I.R. 1957 Mad. 243.

Suit for specific performance of contract—Want of notice—Burden initially lies on subsequent purchaser—Burden is light and mere denial is sufficient to discharge burden—Both parties giving evidence—Question is one of appreciation of evidence—Husband of subsequent purchaser deposing about wife's want of knowledge about agreement—This portion not challenged in cross-examination—Initial burden, held discharged—Importance to her avoidance of witness-box not attached: 1968 B.L.J.R. 28.

Finding of fact—When not binding in second appeal—Material evidence—Due consideration of, must appear in judgment—Plaintiff's evidence ignored—Evidence of other witness misread—Finding held not binding: 1964 Raj.L.W. 7.

Interested evidence—Meaning of: A.I.R. 1967 Cal. 390.

Section 121—Notes.

As to the principle of the section, *see* I.L.R. 3 All. 573; I.L.R. 3 Mad. 271; 2 Weir 777: 6 M.H.C.R. App. 42; 12 Cr.L.J. 277: 10 I.C. 917; I.L.R. 20 Cal. 857.

Questions mentioned in Ss. 121, 124 and 125 are not barred. The witness has simply a privilege of refusing to answer them and a Magistrate may warn the witness of his privilege. But he cannot disallow such question: 10 I.C. 917: 12 Cr.L.J. 277. As to whether a Judge can be witness in a case tried by himself, *see* 4 B.L.R. (Cr.) 15: 13 W.R. (Cr.) 60; 20 W.R. (Cr.) 76; I.L.R. 2 Cal. 405; I.L.R. 23 Cal. 328; I.L.R. 24 Cal. 167; I.L.R. 19 Mad. 263; 10 B.H.C.R. 75; 5 Cal.W.N. 864; 4 Cal.W.N. 604; 7 W.R. 190.

The slightest attempt to get to the materials of his decision, to get back to his mind and to examine him as to why and how he

122. Communications during marriage.—No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative-in-interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

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arrived at a particular decision should be immediately and ruthlessly excluded as undesirable: A.I.R. 1925 All. 203.

Indeed, it will be very embarrassing and, in many cases, objectionable if every quasi-judicial authority or Tribunal were put to the necessity of getting into the witness-box and testify as to what weighed in his mind in reaching his verdict. When an arbitrator has given an award, if grounds justifying his being called as a witness are affirmatively made out, the Court may exercise its power, otherwise not. If arbitrators are summoned mindlessly whenever applications for setting aside the award are enquired into, there will be few to undertake the job. The same principle holds good even if the prayer is for modification or for remission of the award. The short point is that the Court must realise that its process should be used sparingly and after careful deliberation, if the arbitrator should be brought into the witness-box. In no case can he be summoned merely to show how he arrived at the conclusions he did. Of course, if a party has a case of *mala fides* and makes out *prima facie* that it is not a frivolous charge or has other reasonably relevant matters to be brought out, the Court may, in given circumstances, exercise its power to summon even an arbitrator, because nobody is beyond the reach of truth or trial by Court: A.I.R. 1977 S.C. 2445: (1978) 91 Mad.L.W. (S.N.) 24.

Section 122—Notes.

See I.L.R. 22 Mad. 1; (1933) 35 Bom.L.R. 174: A.I.R. 1933 Bom. 153; A.I.R. 1953 All. 97. *See* also 1985 Cr.L.R. 324: (1985) 2 W.L.N. 592 (Raj.).

The protective provision under S. 122, Evidence Act, is based on the wholesome principle of preserving domestic peace and conjugal confidence between the spouse during coverture. The exceptions also are based on common sense: A.I.R. 1951 Cal. 140: I.L.R. (1952) 1 Cal. 239.

S. 122 inhibits disclosure of marital confidence and it cannot be contravened by spouse through medium of a third person—Absence of words "to the Court" in S. 122 which appear in S. 129 signify that S. 122 is of general application and anything done contrary thereto should not be heard or accepted in evidence in Court of law—Accused's wife handing over to her father letters sent to her by accused—Father complaining that certain words in those letters were defamatory—*Held*, letters could not be proved in Court either by wife herself directly or through her father in whose hands she had voluntarily placed them. *Held* further that, in view of difference in statutes concerned, English precedents were of no assistance: I.L.R. (1967) 1 Ker. 145: 1967 M.L.J. (Cr.) 184: A.I.R. 1967 Ker. 228.

The prohibition enacted by this section rests in no technicality that can be waived at will, but is founded on a principle of high import, which no Court is entitled to relax: (1914) 23 I.C. 511; A.I.R. 1914 Lah. 380; A.I.R. 1923 Lah. 40: 81 I.C. 271.

If the marriage was subsisting at the time when the impugned communications were made by one spouse to another, the bar prescribed by S. 122 will operate. The bar to the admissibility in evidence of communications made during marriage attaches at the time when the communication is made, and its admissibility will be adjudged in the light of the status at that date and not the status at the date when evidence is sought to be given in Court. [A.I.R. 1967 Ker. 228, Reversed]: A.I.R. 1970 S.C. 1876: 1970 Cr.L.J. 1651: (1969) 2 S.C.R. 692.

There is a prohibition against the disclosure of any communication between spouses made during the subsistence of marriage unless the person who made it or his representative-in-interest consents to the same. The bar is not only against a spouse being compelled to disclose the same but also extends to cases where the spouse may be inclined or willing to disclose the same. In the latter case,

the disclosure can be permitted if the other spouse who made the same, agrees to the disclosure. The consent has to be positive and not that it may be imported from mere waiver. There are, of course, exceptions when the spouses are themselves parties arrayed against each other in suits or there are proceedings in which one married person is prosecuted for any crime committed against the other.

The prohibition under S. 122 is based on the ground that the admission of such testimony is likely to disturb the peace of the family and weaken the feeling to mutual confidence. It rests on no technicality that can be waived at will but is found on a principle of high import which no Court is entitled to relax. It is further not confined to cases where communication is of strictly confidential character. In fact, it extends to all communications of whatever nature, which pass between the husband and the wife unless the spouse making the communications consents to the disclosure.

It is also now well settled that if the marriage was subsisting at the time when the communications were made, the bar prescribed by S. 122 will operate even after the wife has obtained decree for nullity of her marriage. The bar to the admissibility in evidence of the communications made during marriage attaches at the time when the communication was made, and its admissibility will be adjudged in the light of the status at that date and not the status at the date when evidence is sought to be given in the Court.

The prohibition being absolute, unless the disclosure was consented to by the accused, the non-raising of any objection by the accused when that evidence was being recorded would not make the same relevant or admissible. The waiver does not come in. The evidence has to be excluded from consideration unless the accused consents to its disclosure or retention on record: (1985) 1 Rec.C.R. 345: 1985 Cr.L.J. 622: (1984) 2 Crimes 668 (Del.).

Communications between the husband and wife during coverture is privileged and its disclosure cannot be enforced. This protective provision is based on the wholesome principle of preserving domestic peace and conjugal confidence between the spouses. But, as observed in Queen v. Donaghue, (1899) I.L.R. 22 Mad. 1 the communication between a husband and his wife is not protected if it can be proved without their assistance, for, in these communications there is no question of any compulsion or permission to the wife or the husband to disclose it. The section protects the individuals and not the communication of it. Thus, marital communications could be proved by the evidence of the over-hearers, even though the wife herself could not have been called to testify to them: A.I.R. 1971 Mad. 194: (1971) 2 M.L.J. 53: 1971 Cr.L.J. 615 (D.B.). S. 122 only prevents disclosure of a communication between husband and wife by one of them without other's consent, but such communication is not totally inadmissible; it can be proved by such other means as are available: A.I.R. 1981 Andh. Pra. 58: (1980) 2 An.L.T. 412: (1981) 1 An.W.R. 212: 1981 Hindu L.R. 537.

S. 122 of the Evidence Act only prevents disclosure in giving evidence in Court of the communication made by the husband to the wife. If wife appears in the witness box to give evidence about the communications made to her by her husband, *prima facie* the communications may not be permitted to be deposed to or disclosed unless husband consents. That does not, however, mean that no other evidence which is not barred under S. 122 of the Evidence Act or other provisions of the Act can be given. [(1962) 3 All E.R. 256, Rel. on]: A.I.R. 1970 S.C. 1876: (1969) 2 S.C.R. 692: 1970 Cr.L.J. 1651.

Where accused husband wrote certain letters to his wife containing defamatory imputations concerning the complainant and in a suit for defamation by the complainant, the husband contended that uttering of a libel by a husband to his wife was not publication and, hence, could not support a charge for defamation, *held*, the doctrine of the common law of England that a communication by one spouse to another of a matter defamatory of another person does not amount to publication had no application in India, and S. 122 of the Indian Evidence Act did not prohibit proof in the Court by the complainant of the letters written by the accused husband to his wife. [A.I.R. 1967 Ker. 228, Reversed]: A.I.R. 1970 S.C. 1876: (1969) 2 S.C.R. 692: 1970 Cr.L.J. 1651.

The restriction in S. 122 is not one that can be waived or that a Court can relax, so that disclosure by a widow of certain communications made to her by her husband immediately before his death cannot only be not

123. Evidence as to affairs of State.—No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

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compelled but should not be permitted at all: 23 I.C. 511: I.L.R. 40 Cal. 891.

Under S. 122, the consent to the evidence being given cannot be implied. It is incumbent upon the Court to ask a party against whom the evidence is to be given whether he or she would consent to the evidence being given and not to admit it unless such consent is given : 38 Cr.L.J. 1089: A.I.R. 1937 Rang. 347; 27 P.R. (Cr.) 1913: 19 I.C. 1004.

Ss. 122 and 123—*See* 45 Mad.L.W. 470: A.I.R. 1937 Mad. 492: (1937) 1 M.L.J. 613.

In a matrimonial dispute the State is also an interested party and is more interested in reconciliation than in divorce. It is with that overriding consideration that in certain circumstances intermediaries and conciliators are persons to whose evidence privilege attaches, one fundamental reason being that if privilege did not attach, those whom they sought to reconcile would tend not to be frank with them and that in itself would be an impediment to reconciliation. In this respect there is no distinction between position of an intermediary if he had been asked by the husband to go to the wife, or his position if he went to the husband and was accepted by him as a conciliator before going on to the wife. In both these cases, privilege attaches to the talk between him and the husband and wife and he cannot be called to depose as to the statement made to him by one of the parties: (1955) 1 All E.R. 590.

Where, in a murder case, the evidence of a female who was found to be the mistress of the accused and not a legally wedded wife, *held*, her evidence against the accused could be relied upon as S. 122 did not apply in such cases: 1994 Cr.L.J. 3071: (1994) 4 S.C.C. 478: 1994 S.C.C. (Cr.) 1252: (1994) 2 Crimes 1: (1994) 2 An.L.T. (Cr.) 429.

No statement of an incriminating nature made by the accused as to her guilt under S. 302 to her husband could be received in evidence. [10 P.R. (Cr.) 1914, Foll.]: A.I.R. 1923 Lah. 40. *See* also 27 I.C. 664: 34 P.R. 1914 (Cr.); 14 Cr.L.J. 273: 19 I.C. 705.

Where there was nothing to show that the husband, who was an accused in a murder case had even consented to the disclosure of the communication allegedly made by him to his wife, *held*, the trial Court should not have permitted the wife to disclose the communications she received from the accused; such communications under the law may be of any nature and need not necessarily be confessions. [A.I.R. 1954 S.C. 704, Rel. on]: 1995 Cr.L.J. 88 (All.) (D.B.).

A woman's confession to her husband is inadmissible in view of S. 122. An offence against a person in the section does not include an offence against a son though it may cause grief to the father: 10 P.R. (Cr.) 1914: 25 I.C. 525.

Communication by an arbitrator to his wife shortly before his death that he accepted bribe from a party can be permitted to be disclosed only if S. 122 is fulfilled: A.I.R. 1930 Lah. 218(2).

On a trial for breach of trust by a public servant, a letter of the accused to his wife found by the Police was held admissible against him in evidence: I.L.R. 22 Mad. 1. The statements of the accused to his wife that he would give her jewels and he had gone to the house of the deceased to get them are inadmissible under S. 122. But the wife's statement that the accused was seen in the early hours, while it was dark, coming down the roof of his house, that he went to the bhusa kothri and came out again and had a bath and put on the dhoti again, is not inadmissible under S. 122 as it has reference to acts and conduct of the accused and not to any communication made by him to his wife: 1954 Cr.L.J. 1755: A.I.R. 1954 S.C. 704.

Section 123—Synopsis.

1. Scope, object and applicability.

2. "Unpublished official records"—Claim of privilege—Power of Court.

3. "Affairs of State".

4. Relative scope of this section and section 124.

5. Privileged documents — Duty of officer of Government.

6. Manner in which privilege may be claimed.

7. "Head of the Department concerned".

8. Privileged documents—What are and what are not.

9. Refreshing memory from privileged document.

10. Secondary evidence—Knowledge of witness based on privileged document—Admissibility.

11. Industrial Tribunal bound by the provisions of this section.

12. Stage at which privilege may be claimed.

13. Revision against order allowing or disallowing privilege.

14. Miscellaneous.

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1. Scope, object and applicability.—As a result of S. 123, a document which is material and relevant is allowed to be withheld from the Court and that undoubtedly constitutes a very serious departure from the ordinary rules of evidence. The principle on which this departure is justified is the principle of the overriding and paramount character of public interest. A valid claim for privilege made under S. 123 proceeds on the basis of the theory that the production of the document in question would cause injury to public interest. Care has, however, to be taken to see that interests other than the interest of the public do not masquerade in the garb of public interest. Subject to this reservation the maxim *salus populi est superma lex,* which means that regard for public welfare is the highest law, is the basis of the provisions contained in S. 123: (1961) 2 S.C.R. 371: A.I.R. 1961 S.C. 493.

According to the law in the United States of America it is within the power of a Court to overrule the claim of privilege on the ground that the disclosure is essential for determination of the defence of the accused and where Government insists on claiming privilege the Court can, if it so deems fit, acquit the accused. The law in this country is contained in Ss. 123, 124 and 162 of the Indian Evidence Act and it does not even suggest that an accused is entitled to acquittal when privilege has been claimed with respect to unpublished official records relating to any affairs of State: (1961) 63 Punj.L.R. 794: A.I.R. 1961 Punj. 215: (1961) 1 Cr.L.J. 710.

In deciding whether a document is privileged or not it is not of importance whether the party claiming production can avail himself of inferences under S. 114; what is of importance is whether the claim of privilege in the circumstances should be allowed or not: (1979-80) 84 Cal.W.N. 751.

There is nothing sacrosanct about the immunity to documents for belonging to a certain class; class immunity is not absolute or inviolate in all circumstances; it is not a rule of law to be mechanically applied in all cases; the principle of immunity is founded on the principle that it would be contrary to public interest to disclose such documents as it would impair the proper functioning of the public service: A.I.R. 1982 S.C. 149.

Claim of privilege sustained—Effect on admissibility of documents withheld as privileged: (1970) 1 M.L.J. 300: I.L.R. (1970) 2 Mad. 289.

A person summoned to produce a document must bring it to the Court; it is only then that he may object to its production or admissibility under S. 162; such an objection comprehends all claims of privilege under Ch. XI of Part III of the Act and not merely under S. 123: A.I.R. 1979 Cal. 114.

S. 123 relates to the competency of the witness to depose to the matters referred therein. On the other hand, S. 162 regulates the examination of such witness who are required to produce such documents. But even here S. 162 carves out an exception in favour of the documents which refer to matters of State, which are no other than relating to "affairs of State" as mentioned in S. 123: 1986 Rev.L.R. 193.

The foundation of law behind Ss. 123 and 162 is the same as in England; it is the injury to the public interest which is the reason for exclusion from disclosure of documents whose contents, if disclosed, would injure the public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that the Courts should have the fullest possible access to all relevant materials; when public interest outweighs the latter, the evidence cannot be admitted; the Court will *proprio motu* exclude evidence the production whereof is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. But confidentiality is not a head of privilege but a consideration to bear in mind.

It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents are of the class which demands protection. Such documents are cabinet papers, Foreign Office dispatches, papers regarding security of the State and high level inter-departmental minutes. [A.I.R. 1974 All. 324, Reversed]: A.I.R. 1975 S.C. 865: (1975) 4 S.C.C. 428.

It is needless to emphasise that the Court's extraordinary powers under Art. 226 of the Constitution are indeed "very high and transcendent"; the writ should run and reach injustice wherever it is found which is possible only when the records called for by the Court are made available to the Court. Thus, where documents pertain to defence, diplomatic relations, foreign affairs, cabinet minutes, advice tendered by the Council of Ministers to the Governor under Art. 163(3) of the Constitution, secret service, intelligence or policy making decisions and the like matters, *held*, the concerned Secretary to the Government or the Head of the Department or the Minister can file an affidavit stating the nature of the affairs of the State and expressing his opinion that it will not be in, or will be injurious to, the interest of the State or the services or the public interest to produce them. The Court will then decide whether the privilege be allowed or declined: A.I.R. 1971 Andh. Pra 196: (1970) 2 An.W.R. 323 (D.B.).

It cannot be held that the Crown's ordinary right of withholding disclosure of documents is altogether displaced wherever fraud is alleged or *prima facie* proved: (1958) 1 W.L.R. 1300.

It is well settled that the privilege cannot be waived: A.I.R. 1988 S.C. 782.

Where the State is not a party, the following rules govern the question of production of records, claim of privilege, etc.—(*1*) All documents called for must be produced. (*2*) In case of State documents, the privilege should be claimed by the witness who is summoned to produce them. (*3*) When objection is taken, the Court cannot inspect the document but can take other evidence to determine its nature. (*4*) Ordinarily, it is enough if the Head of the Department certifies that it refers to an affair of State. (*5*) The Court need not accept it as final but may require further evidence. (*6*) If the Court decides that it is not privileged, the document should be tendered in evidence. (*7*) If the Court considers it a State document, it cannot be admitted in evidence unless with the permission of the Head of the Department: I.L.R. (1940) Nag. 280: A.I.R. 1938 Nag. 358.

A non-disclosure of matters involving the secrets of State of Military or International affairs, is a well recognised and a genuine ground for claiming testimonial exemption. Secrecy is legitimately invoked for acts of pending international negotiations or military directions against foreign enemies. The law of evidence considers the rules of privileged testimonial exclusion under four categories, political, judicial, professional and social. The first species of privilege is political, relating to secrets of State such as State papers and communications between Government and its officers and other matters of public policy. S. 123 protects from judicial scrutiny "evidence derived from unpublished official records relating to any affairs of State" except with the permission of the officers at the Head of the Department concerned. Such a privilege is a narrow one and has to be exercised most sparingly. Departmental enquiry papers are not unpublished documents relating to affairs of the State. Consequently, where the probity of the conduct of a public servant is a matter in issue the State cannot screen his conduct from the purview of the Court on the ground that it is an affair of the State and therefore, sacrosanct and consequently needs to be insulated from the reach of the Court as evidence: (1968) 70 Punj.L.R. 65: I.L.R. (1968) 2 Punj. 171: A.I.R. 1968 Punj. 255.

Application under S. 94, Cr.P.Code for calling for certain document from concerned Department—Even the documents forming part of unpublished official record and relating to any affairs of State can be given in evidence if Head of Department concerned grants permission for it: (1965) 2 Cr.L.J. 415: A.I.R. 1965 Tripura 33.

The privilege in respect of official and State documents from production in Court is a narrow one, most sparingly to be exercised. Scope of privilege pointed out: A.I.R. 1931 P.C. 254: (1930-31) 35 Cal.W.N. 1121: 61 M.L.J. 943. *See* also A.I.R. 1944 Sind 145.

Scope and object of Ss. 123, 124 and 125. *See* (1973) 1 An.W.R. 31. Power of writ Court to call for documents and look into same and

disclosure of contents to parties. *See* (1972) 1 Mys.L.J. 339. Claim of privilege without placing documents before the Court for inspection. *See* (1972) 74 Bom.L.R. 550.

The Public Service Commission is an independent entity under the State Constitution and cannot be said to be the Government or a Department of the Government so as to entitle it to claim privileges under Ss. 123 and 124: 1971 Kash.L.J. 350 (D.B.).

Production of documents—Proceedings before Commission under J. and K. Commission of Inquiry Act (XXXII of 1962)—Commission has unfettered powers in asking for production of documents—Privileges under the section cannot be claimed unless S. 5(2) of J. & K. Act is made applicable: 1965 Kash.L.J. 160: (1965) 2 Cr.L.J. 212: A.I.R. 1965 J.&K. 75.

2. "Unpublished official records" — Claim of privilege — Power of Court.—*See* A.I.R. 1953 Trav.-Co. 363 (F.B.).

Only unpublished official records could be withheld on ground of privilege relating to affairs of State: 1969 All.Cr.R. 322: 1969 All.W.R. (H.C.) 494.

Unpublished records of affairs of State may include (*1*) documents that pass between two States; (*2*) documents between the State and its own subject; (*3*) documents between the State and subject of another State; (*4*) documents between subjects of more than one State; and (*5*) documents that pass between Heads of Departments or between Ministers of a State: 1954 Cr.L.J. 602: A.I.R. 1954 Bhopal 9. *See* also I.L.R. (1955) Hyd. 256: A.I.R. 1955 Hyd. 61.

An advice from his Advisor to the Governor during the President's rule is equivalent to a Minister's advice to the Governor under Art. 163(3) of the Constitution of India; it is protected from the purview of the Court; it is hit by the bar contained in Ss. 123 and 124; merely because it had been published in newspapers does not make them anytheless privileged: (1989-2) 96 Punj.L.R. 304: (1989) 2 Rec.C.R. 287.

The Blue Book contains the rules and instructions for the Prime Minister's protection when on tour or travel; even if a paragraph or two thereof have been disclosed, it cannot be said that it is a published document; publication of some innocent part of the book would not render the entire book to be a published document; case remanded. [A.I.R 1974 All. 324, Reversed]: A.I.R. 1975 S.C. 865 (1975) 4 S.C.C. 428.

The statement of a person recorded under S. 164 of the Code of Criminal Procedure in the course of investigations cannot be deemed to be an unpublished official record and is not subject to the bars of Ss. 123 to 125: (1985) 2 Bom.C.R. 469.

Where the letters sought to be produced had already been placed on record of another suit, *held*, they ceased to be unpublished official records or documents within the meaning of S. 123 and, therefore, no privilege could be claimed in respect of those documents: I.L.R. (1974) 2 Del. 15.

Where privilege was claimed against production of a file concerning the grant of a mining lease on the ground that it contained letters written by the Departmental Head to his subordinate officers and *vice versa* and between that Department and other Departments, *held*, they were unpublished official records and secrets of the State entitled to the privilege. [A.I.R. 1961 S.C. 493, Rel. on]: A.I.R. 1975 Madh. Pra. 196: 1975 M.P.L.J. 801 (D.B.).

Where it is not the suitor who takes out subpoena for production of documents but the Court under Art. 226 of the Constitution calls for official Government records for scrutiny and perusal by it, *held*, it does not amount to giving evidence derived from unpublished records relating to affairs of State; ordinarily, no occasion arises in writ proceedings to record evidence unless the Court in the interest of justice summons somebody to give evidence; it is the Court's constitutional right to direct production of records where a citizen seeks *certiorari*; but even if S. 123 is attracted as writ proceedings are also judicial proceedings, there is no such thing as absolute privilege to every State document; records "relating to affairs of State" do not take in every unpublished document concerning the business of State; only such records are protected whose disclosure would be injurious to the public interest: A.I.R. 1971 Andh. Pra. 196: (1970) 2 An.W.R. 323 (D.B.).

The question whether the record in question is "an unpublished official record relating to any affair to the State" must be decided first before S. 123, Evidence Act can be availed of by the Head of the Department

concerned. That question cannot be decided by the Head of the Department himself. It is the Court which must decide it: 1958 All.L.J. 588: A.I.R. 1959 All. 543.

The well settled practice is that the objection to the production of summoned documents is raised by an affidavit affirmed by the Head of the Department though the Court may also require a Minister to affirm an affidavit in the course of enquiry to determine whether the document should be withheld from disclosure. If the Court is satisfied that the document should be protected in public interest from production, the matter ends there. But if it is not so satisfied, it may inspect the document. However, in case no affidavit is filed or a defective affidavit is filed, the Court may call for an affidavit or a better affidavit, if the Court thinks that the affidavit is not clear in regard to the objection. [A.I.R. 1974 All. 324, Reversed]: A.I.R. 1975 S.C. 865: (1975) 4 S.C.C. 428.

When privilege is claimed in respect of certain documents, the Court has the power to inspect them to decide whether they are privileged or not: (1979-80) 84 Cal.W.N. 751.

If privilege is claimed under S. 123 of the Evidence Act in respect of a document as an unpublished official record relating to an affair of State, it is for the Court to decide the validity of that claim under the first paragraph of S. 162. The second paragraph of S. 162, no doubt disentitles the Court from inspecting the document in question, but the Court can decide by taking other evidence whether the document is of the nature or kind mentioned in S. 123. Heads of Departments are not expected to act capriciously and ordinarily the Court will accept their statement. If necessary, the Court may call for affidavits from them. If, however, the Court finds that an over-zealous Officer is capriciously putting forward a claim of privilege, the Court will decide as best as it can, by the means available to it, whether the claim is well founded. In many cases the very nature of the documents may be enough to show that it cannot be an unpublished official record relating to any affairs of State: I.L.R. (1944) 1 Cal. 410: A.I.R. 1943 Cal. 539; 1975 Pat.L.J.R. 40: 1974 B.L.J.R. 796: 1974 B.B.C.J. 993.

The principles with regard to the privilege under S. 124 are that a person who is summoned to produce the document should bring it into Court even if there is any objection to its production or to its being admitted in evidence under S. 123 or S. 124. The Court will decide on the validity of the objection and he is not entitled to withhold the evidence if the objection is overruled. In enquiring into the validity of the objection, the Court will, of course, bear in mind that it should not exercise its powers, in such a way as to occasion the mischief, which the law providing for the objection is designed to guard against. If it is a claim or privilege under S.124, the Court may inspect the document in its discretion. If the Court comes to the conclusion that the communication in question was made to a public officer in official confidence, it will have to uphold the privilege claimed under S. 124 and leave the public officer concerned to decide whether or not to disclose the communication. The final decision of both the Departmental Head who had been summoned to produce the document as well as the Presiding Judge, should be governed by only one consideration, namely, whether the disclosure would result in any injury being caused to the public interest as the section gives effect to the principle that public interest must be paramount and private interest must give way when there is conflict between public and private interest. *Held*, that the valuation statement given by the Revenue Inspector on the basis of which the award was passed could not be said to be a communication made in official confidence. The document was not produced before the Court below and without seeing the document it will not be possible to decide whether the whole or any portion of the document will be privileged under S. 124: 1963 Ker.L.T. 107: I.L.R. (1963) 1 Ker. 346: A.I.R. 1964 Ker. 274.

When privilege is claimed, concerning the official notings, etc., the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to affairs of State it should leave it to the Head of the Department to decide whether he should permit its production or not. Where the privilege claimed in case falls within the latter category, it is for the Head of the Department of the State to decide whether disclosure will injure the public interest. It is not for the

Court in such a situation to assess whether it will injure the public interest if disclosure is made. Case-law discussed: 1970 Serv.L.R. 223: 1970 Lab.I.C. 593 (Del.).

Though under Ss. 123 and 162 of the Evidence Act, the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question, that matter being left for the authority concerned to decide, the Court is competent to hold a preliminary enquiry and determine the validity of the objection to its prosecution and that necessarily involves an enquiry into the question as to whether the document relates to affairs of State under S. 123. In view of the fact that S. 123 confers wide powers on the Head of the Department, the Heads of Department should act with scrupulous care in exercising their right under S. 123 and should never claim privilege only, or even mainly on the ground that the disclosure of the document in question may defeat the defence raised by the State. Considerations which are relevant in claiming privilege on the ground that the affairs of State may be prejudiced by disclosure must always be distinguished from considerations of expediency which may persuade the Head of the Department to raise a plea of privilege on the ground that if the document is produced, the document will defeat the defence made by the State: A.I.R. 1964 S.C. 1658.

Under S. 123 read with S. 162 where privilege is claimed in respect of a document by a Head of a Department on the ground that it relates to affairs of State and objection is raised by him for its production in Court, it is for the Court to determine the validity of the objection. The Court may require him to give an affidavit or make a statement on oath and may put any question to him for satisfying itself that the privilege has been validly claimed. The Court is, however, not entitled to inspect the document nor put such questions to the Head of the Department or any other witness as would directly or indirectly reveal its contents. Once the Court comes to the conclusion that the document relates to affairs of State the decision of the Head of the Department to give or withhold permission to its production must be accepted as final. On this point the Court cannot question the discretion of the Head of the Department: A.I.R. 1950 East Punj. 228: (1950) 52 Punj.L.R. 153 (F.B.).

When privilege is claimed in respect of a document on the ground of public interest, *held*, the Court is entitled, indeed bound, to insist upon its production and inspection with a view to determine whether it relates to the affairs of the State and whether the disclosure of its contents would be prejudicial to public interest; while so doing, the Court would give due weight to the opinion of the executive on the point—which is, however, not conclusive—but it would strike a balance between the requirements of public which demands on the one hand that evidence should be held back and that, on the other, it should have all relevant material before it to do justice to the case; it is only when the former outweighs the latter that the Court would grant privilege: A.I.R. 1977 N.O.C. 243: I.L.R. (1976) 2 Del. 667.

Where an objection is raised regarding the document being a privileged one under S. 123 of the Evidence Act, the Court has no jurisdiction to inspect the document first and then to determine the question as to whether the document is privileged one or not. The proper course in such matters is to first hold an enquiry and then determine the character, class or the nature of the document concerned and if the Court finds that the document belongs to the noxious class, it may stay its hands and refer the document to the Head of Department and leave it to its discretion to produce the document. If, however, the Court finds that the document is not privileged and does not relate to the affairs to the State, it can direct the document to be tendered in evidence and overrule the objection on that score. Under S. 162, Cr.P.Code a Court has got ample powers to direct a witness to produce a document and once orders for the production of a document are passed, the witness concerned has to bring the document in Court and produce the same subject to objections of the other side. The objections will be considered by the Court and if the objection relates to one under S. 123 of the Evidence Act, then the Court cannot inspect document before determining the question as to whether the document is privileged or not. Thus, it is manifest that this stage will arise only after the document is brought before the Court as directed by the Judge. While determining the question as to the nature of the document, the Court must be mindful of the fact that the privilege which is claimed by the State or by the Head of

Department should not be utilised to override the considerations other than those of public interest under the mere garb of affairs of State: (1963) 1 Cr.L.J. 356: A.I.R. 1963 J.&K. 20.

The statute does not say that the evidence of the Head of the Department shall be conclusive proof. As the decision on the validity of the claim is that of the Court, it is to be based on the entire evidence available on the question. The affidavit of the Head of the Department is only a piece of such evidence: (1957) 1 An.W.R. 106: I.L.R. (1957) Andh. Pra. 174: A.I.R. 1957 Andh. Pra. 486.

When an objection is raised under S. 123, it is for the Court to decide whether a particular document is, as claimed, an unpublished record relating to any affairs of State, *i.e.*, whether it is a document in respect of which privilege can properly be claimed; but once the Court has decided that the document is one in respect of which privilege may be claimed, the question whether the document should be produced or not is one entirely in the discretion of the Head of the Department concerned, and the Court has no power to inspect the document to determine the question of its admissibility, the Court is not entitled to inspect the document for the purpose of deciding whether it is a privileged document within the meaning of the objection taken in that behalf based on the provisions of S. 123: (1950) 52 Bom.L.R. 231: A.I.R. 1950 Bom. 230.

S. 162, though it gives power to the Court to inspect a document or to take other evidence to enable it to determine its admissibility, precludes the Court from inspecting any document which refers to matters of State under this section. The validity of an objection to the production of a document has to be determined by the Court, and the only limitation on the power of the Court, is that in cases of documents where privilege is claimed under S. 123, the Court may not look at those documents but must determine the validity of the claims of privilege on materials other than the document themselves. But a difficulty arises as to how a Court is to determine whether a document refers to affairs of State as contemplated by S. 123, if the Court is not to look at the document at all and therefore, it must be left to a Minister or a person at the Head of the Department concerned, to look at the document, to consider it, and to decide for himself whether the document falls in the category of documen of State referred to in S. 123. If having consi ered the document, he tells the Court that th document is one relating to affairs of Sta and that its disclosure will be injurious public safety the Court ordinarily will acce this statement, if made on oath. The stat ment must, however, not be of a vague or i definite character. The Court may, in proper case not be satisfied with the oath the deponent and he may be asked to subm himself to cross-examination at the hands the party claiming the disclosure of doc ments. But the Court treats the objection conclusive provided it is validly and pro erly taken and, is based on materials whi the Court considers adequate. The ultima adjudication is always by the Court thoug under the peculiar circumstances of the cas the Court accepts the view of the responsib Officer as conclusive proof provided th necessary conditions are satisfied: (1951) Bom.L.R. 229: A.I.R. 1951 Bom. 72.

It is obligatory for a person who has bee summoned to produce a document in h possession or control, to bring it into Cou even if there is any objection to its produ tion or to its being admitted in evidence under S. 123 or 124 of the Evidence Act. Th Court will decide on the validity of the obje tion and he is not entitled to withhold th evidence if the objection is overruled. Th Court will, of course, bear in mind that should not exercise its powers in such a wa as to occasion the mischief which the la providing for the objection is designed guard against. If the objection is a claim privilege under S. 123, the Court has power to inspect the document, but ma only take other evidence for the purpose deciding on the objection. If it is a claim privilege under S. 124, the Court may inspe the document in its discretion. The criteri for the Head of the Department and the Pu lic Officer is whether or not the disclosu would cause injury to public interest. B they are the sole Judges of the matter and t Court cannot interfere with their discretio once it upholds their claim of privilege eith under S. 123 or 124 of the Evidence Act: I.L. (1957) Andh. Pra. 174: (1957) 1 An.W.R. 1 A.I.R. 1957 Andh. Pra. 486.

It is open to the Court to decide wheth the document is or is not a record relating any affairs of State. For this purpose t

Court may take evidence if it requires, and if it is satisfied on that evidence that it is a record of that character, then the Court will refrain under S. 162, from inspecting the document; but if it is not so satisfied, then it is open to the Court to call for further evidence, and if still not satisfied to inspect the document itself: 30 Pat.L.T. 327.

Two points arise for consideration under Ss. 123 and 124, *viz.* whether the document from which the information is to be given is on a matter relating to affairs of the State and whether the disclosure would be against public interest. It is for the Court to decide if the documents relate to the affairs of the State while it is for the Head of the Department concerned to decide if the disclosure would be against public interest. Ordinarily, a document is bound to be produced in the Court unless it relates to the affairs of the State and even if the latter it must be produced for inspection of the Court and the Court may obtain other evidence, if it relates to the affairs of the State. It is the supreme duty of the Court to protect the privilege when it exists, but in order to determine the validity of the objection, the Court has power to inspect the document in appropriate cases: 1954 Cr.L.J. 602: A.I.R. 1954 Bhopal 9.

O. 11, R. 19(2) of the Code of Civil Procedure must be read as subject to S. 162; thus, where a witness summoned to produce certain documents claims privilege by submitting an affidavit, the Court must determine upon the material before it whether the documents were in fact of the class which related to the affairs of the State in the light of A.I.R. 1961 S.C. 493: A.I.R. 1975 Madh. Pra. 196: 1975 M.P.L.J. 801 (D.B.).

Where documents summoned relate to the security of the State, national defence, foreign relations, cabinet decisions and high national policies and privilege is sought, the Court would treat the executive's opinion as conclusive; the decision be best left to be made by the executive for the Court is not the proper place to adjudicate upon such matters. However, on other confidential documents such as confidential reports, etc., about the Government servants, the Court may decide whether privilege should be allowed or not: A.I.R. 1977 N.O.C. 243: I.L.R. (1976) 2 Del. 667.

Inspection of documents—Power of Court—Privilege claimed not under S. 124 but under S. 123—Court cannot inspect such documents: 1968 Cur.L.J. 990 (Punj.)

Where privilege was claimed in respect of a document produced in the sealed cover, *held*, the request could not be rejected merely on the ground that a copy thereof had been produced by the opposite party which had rendered the document no longer confidential; the Court has to inspect the document and decide the objection itself whether or not the claim for the privilege is just, proper or *bona fide*: A.I.R. 1971 Pat. 264.

It is now well settled that the Court is not bound by the Minister's or the Head of the Department's affidavit; it retains the power to balance the injury to the State or the public service against the risk of injustice before reaching its decision. The final decision as to the objection raised under S. 123 would always be with the Court by reason of S. 162: A.I.R. 1982 S.C. 149.

It is well settled that privilege cannot be claimed on apprehension that the document sought to be produced would defeat the State's defence; where privilege is claimed, the Court has to determine the character or class of the document summoned; and if it finds that the document does not relate to the affairs of the State, it should refuse to accord privilege and direct its production: A.I.R. 1979 Cal. 114.

Claim in affidavit that documents asked to be produced were unpublished official records relating to affairs of State—Court is bound to consider objectively whether material before it justified inference that questioned documents related to affairs of State—If documents relate to questions of public policy they can be said to relate to affairs of State—But averments that file contained several letters written by Head of Department to his subordinates and *vice versa* or that they were secrets of State do not constitute material from which it can be inferred that documents referred to affairs of State—Privilege of documents should be claimed generally by Minister or Secretary of concerned Department and if there are series of documents in file it should appear from affidavit that they were individually read and considered: 1967 All.L.J. 469: A.I.R. 1968 All. 42.

The Court is not merely competent, but is also bound to hold an enquiry to determine the validity of the objections to production of document and this necessarily involves the

enquiry into the questions whether the evidence relates to an affair of State under S. 123 or not. If the Court comes to the conclusion that the document relates to an affair of State, the Court should leave it to the Head of the Department to decide whether he should permit its production or not.

Officers deputed to transcribe in shorthand the speeches of persons at public meetings, under departmental instructions, should not generally be permitted through the procedure prescribed under statute, to object to the production of the transcript as relating to affairs of State. Every such transcript does not relate to or embody matters connected with affairs of State. The mere fact that the record was made by the Police Officer, and confidentially forwarded to his superior, will not render the document privileged under S. 123 read with S. 162 of the Evidence Act. The documents have to be produced for inspection by the Court, and that disclosure will be ordered, if the Court is satisfied that there is no prejudice to public interest, or, the possibility of such prejudice: 1968 Mad.L.W.(Cr.) 211: A.I.R. 1969 Mad. 378.

Where a Public Officer declines to produce a certain document, claiming privilege under Ss. 123 and 124, it is for the Court to satisfy itself that the documents relate to any State affair or that their production will be detrimental to public interests and it is not for the Public Officer to decide whether the documents are privileged. The privilege regarding production of documents is a narrow one and the mere fact that their production is likely to prejudice the Crown's case is no reason for their non-production: 161 I.C. 668: A.I.R. 1936 Nag. 25.

Order for production of document—Discretion of Court—Exercise of—Court cannot override provisions of Ss. 123 and 124, Evidence Act—Power of Court is not limited by S. 126, Evidence Act—But ordinarily order for production should not conflict with privilege conferred under S. 126: (1962) 3 Guj.L.R. 833: (1962) 2 Cr.L.J. 610: A.I.R. 1962 Guj. 290.

Reading Ss. 123 and 162 together, the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in respect of which privilege is claimed under S. 123. The Court is competent and indeed is bound to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the questions as to whether the evidence relates to an affair of State under S. 123 or not. In holding an enquiry into the validity of the objection under S. 123, the Court cannot permit any evidence about the contents of the document. [I.L.R. 48 Cal. 304; I.L.R. (1945) Lah. 219, Overruled]: Per Majority in [A.I.R. 1961 S.C. 493].

For the purpose of S. 123 the Court cannot be invited to discuss the question if a particular document falls within the description of "an unpublished official record". The decision of the Public Officer concerned is final on that question: 8 Mys.L.J. 474.

The question whether a certain document shall be given in evidence or withheld, in a case where objection is taken to its production, must be decided by the Public Officer concerned and not by the Judge: 119 I.C. 718: A.I.R. 1930 Mad. 342. *See* also I.L.R. 14 Luck. 351: A.I.R. 1939 Oudh 65.

The Zaildari book and an application by the Zaildar to the Collector praying for the deletion of certain remarks therein, are not in their very nature unpublished official records and no privilege in respect of these documents can, therefore, be claimed under S. 123. The Head of a Department may be the final Judge as to whether a certain document does or does not relate to matters of State but he cannot be the final Judge as to whether the document has been published or not and whether it is official or not: (1946) 48 Punj. L.R. 41: A.I.R. 1946 Lah. 459.

Power of Court and power of Departmental Head—Decision as to whether claim of privilege in respect of document well founded or not—Ultimate decision must always rest with Court and not with Head of Department to which that register belongs—Power of Court is restricted only if it comes to opinion that particular document relates to affairs of State: 1969 All.Cr.R. 322: 1969 All.W.R. (H.C.) 494.

Defendant State claiming privilege—Court looking at such papers and acting on them—Procedure unwarranted: 1968 Lab. I.C. 302 (All.).

Election petition—Evidence sought to be given derived from unpublished official records relating to affairs of State—Court has jurisdiction to determine whether those

documents relate to affairs of State: (1967) 2 An.W.R. 401: 1967 Cr.L.J. 691: A.I.R. 1967 Andh. Pra. 155.

When a Government Order simply refers to a report from the Chief Engineer to the Secretary, Government, P.W.D. and does not mention its contents and it is not possible to know from the Government Order what the contents of the report are, the mere mention of the report in the Government Order does not amount to the report having been published, inasmuch as the extent to which it is published is not the contents but only that it is a letter and when what is sought to be let in as evidence is not the letter number, but its contents, the contents of the report remain an unpublished record within the meaning of S. 123. The mere fact that the letter is relevant or that it is an important piece of evidence or that it has some bearing on the Government coming to a conclusion in respect of a particular matter, cannot be a ground for deciding the question of allowing or refusing privilege in respect of the document, and if the Government is entitled to privilege on grounds mentioned in Ss. 123, 124, the privilege cannot be refused: (1964) 2 An.L.T. 251.

A Magistrate who came across a document during trial of a criminal case consulted the first Magistrate and declined to allow the document to be produced on ground that it was a document of State. *Held*, his action was correct: 22 Nag.L.R. 34: A.I.R. 1926 Nag. 304.

3. "Affairs of State".—The expression "affairs of State" in S. 123, is a very wide one. Every communication proceeding from one Officer of the State to another Officer of the State is not necessarily one relating to the affairs of State. Only such documents which relate to the affairs of the State the disclosure of which would be detrimental to the public interest would come within the category of unpublished official records relating to the affairs of the State, entitled to protection under S. 123: (1950) 52 Bom.L.R. 231: A.I.R. 1950 Bom. 230.

Per Majority (*Gajendregadkar, J., Sinha, C.J.* and *Wanchoo, J.*): As the Legislature has advisedly refrained from defining the expression "affairs of State" it would be inexpedient for judicial decisions to attempt to put the said expression into a straitjacket of a definition judicially evolved. The question must be determined in each case on the relevant facts and circumstances adduced before the Court.

Per *Subba Rao, J.*—Subject to the overriding power of the Court to disallow the claim of privilege in exceptional cases, the following provide working rules of guidance for the Courts in the matter of deciding the question of privilege in regard to unpublished documents pertaining to matters of State: (*a*) "records relating to affairs of State" mean documents of State whose production would endanger the public interest; (*b*) documents pertaining to public security, defence and foreign relations are documents relating to affairs of State; (*c*) unpublished documents relating to trading, commercial or contractual activities of the State are not, ordinarily to be considered as documents relating to affairs of State; but in special circumstances they may partake of that character; (*d*) in case of documents mentioned in (*c*) *supra*, it is a question of fact in each case whether they relate to affairs of State or not in the sense that if they are disclosed public interest would suffer: (1961) 2 M.L.J. (S.C.) 203: (1961) 2 S.C.R. 371: A.I.R. 1961 S.C. 493.

The expression "affairs of State" used in S. 123 is used in the narrower sense in comparison with its use in Art. 309 of the Constitution of India; it is, thus, of no use for interpreting Art. 309 wherein the expression takes within its sweep all the affairs and activities of the State in modern times: A.I.R. 1971 Pat. 273: 1970 Pat.L.J.R. 212: 1970 B.L.J.R. 631 (D.B.).

The expression "affairs of State" as used in S. 123 of the Evidence Act refers to matter of a public nature in which the State is concerned and the disclosure of which will be prejudicial to the public interest or injurious to national defence, or detrimental to good diplomatic relations: (1950) 52 Punj.L.R. 153: A.I.R. 1950 East Punj. 228 (F.B.).

The term "affairs of State" contained in S. 123 is a general one but it cannot include all that is contained in the record. Where an open enquiry is made, statement recorded during the open enquiry cannot be deemed to be confidential and similarly, any application or complaint made by a person cannot be held to relate to the "affairs of State": 1964 All.L.J. 950: (1965) 2 Cr.L.J. 452: A.I.R. 1965 All. 494.

As the Legislature has refrained from defining the expression "the affairs of the State" occurring in S. 123, it is inexpedient to define this expression. It means matters of a public

nature, with which the State is concerned, or the disclosure of which will be prejudicial to the public service, when the State is a party to the litigation and documents relate to commercial or contractual activities of the State, privilege can be claimed in respect of such documents, but privilege should not be claimed unadvisedly, lightly or capriciously. Thus, where the affidavit was submitted by the State claiming privilege in respect of certain unpublished official records, *held*, the lower Court had committed an error in adjudicating on the merits of the claim of privilege made by the State. [A.I.R. 1975 S.C. 865, Rel. on]: A.I.R. 1978 Pat. 76.

The words "affairs of State" are not confined only to matters which will be prejudicial to the public interest or injurious to national defence or detrimental to good diplomatic relations. It may cover the case of documents in respect of which the practice of keeping them secret is necessary for the proper functioning of the public service. When a report is made regarding the activities of an individual with a view to enable the State to take action against him under the Preventive Detention Act, such a report does not only relate to the affairs of the individual, but it also relates to the affairs of the individual, so far as they affect the affairs of the State: I.L.R. (1961) 13 Assam 472: 1960 Cr.L.J. 1551: A.I.R. 1960 Assam 210.

When a privilege is claimed with regard to certain documents, the Court without inspecting the documents will determine the validity of objection under S. 123, particularly with regard to the character of the document whether it relates to the "affairs of the State". The Court under S. 162 of the Evidence Act will not inspect the document although it is brought to Court in order to determine whether it relates to the affairs of State. It will, however, have power to determine the point by entertaining collateral evidence or evidence *aliunde*. [A.I.R. 1961 S.C. 493; A.I.R. 1934 P.C. 254, Rel. on]: A.I.R. 1970 Assam 131 (D.B.).

A Cabinet decision certainly relates to the affairs of the State; it affects the Cabinet's integrity in laying down and executing public polices; privilege can certainly be claimed for its non-production in the Court: A.I.R. 1979 Cal. 114.

Resolutions passed by or other deliberations held at the Council of Ministers or advice finally tendered to the Governor pursuant thereto are privileged communications; they are exempt from production in Courts, irrespective of the Evidence Act. However, it lies in the sole discretion of the Governor to produce the proceedings of the Council of Ministers without objection or claiming privilege; there is no constitutional bar under Art. 163(3) of the Constitution against such production in or perusal by the Court. [A.I.R. 1961 S.C. 493; A.I.R. 1980 S.C. 383, Foll.]: A.I.R. 1995 Raj. 69.

Where the President's satisfaction for issuing a proclamation under Art. 356 of the Constitution is based on a report from the Governor of a State and "otherwise", that is, other information received from other sources, *held*, the Cabinet cannot claim privilege in respect of such other information: A.I.R. 1993 Madh. Pra. 214 (F.B.).

Art. 74(2) of the Constitution merely bars an enquiry into the question whether any, and if so, what advice was tendered by the Cabinet to the President; it does not bar the Court from calling upon the Union of India to disclose the material on which the President felt satisfied; such material is no part of the Cabinet's advice, even if the President had seen, or was shown, it. However, Art. 74(2) of the Constitution and S. 123 of the Evidence Act cover different fields; therefore, while defending the Presidential action, the Minister or the concerned official may claim privilege under S. 123 which the Court will decide as per the provisions of the section. [A.I.R. 1977 S.C. 1361, Dissent. from]: A.I.R. 1994 S.C. 1918.

Per Majority *Gajendragadkar, J., Sinha C.J.* and *Wanchoo, J., Kapoor, J.*, concurring).— Documents which embody the minutes of the meetings of the Council of Ministers and indicate the advice which the Council ultimately gave to the Rajpramkuh, and the document embodying the advice tendered by the Public Service Commission to the Council of Ministers, are protected under S. 123, and if the Head of the Department does not give permission for their production, the Court cannot compel the State to produce them. The advice given by the Cabinet to the Rajpramukh or the Governor is expressly saved by Art. 163(3) of the Constitution. The report received by the Council of Ministers from the Public Service Commission carries on its face, the character of a

document the disclosure of which would lead to injury to public interest. It falls in that class of document which on ground of public interest must, as a class, be withheld from production. [A.I.R. 1960 Punj. 407, Reversed].

Per *Subba Rao, J.*—The claim of privilege in regard to the documents embodying the minutes recorded in the course of Cabinet discussions must be sustained, but the claim of privilege in regard to the report of the Public Service Commission must be rejected: A.I.R. 1961 S.C. 493.

Even though previously "affairs of State" meant matters of political or administrative character, the present connotation of the expression would comprehend commercial activities, undertaken in pursuit of the State's welfare activities; privilege could, therefore, be extended to such documents as are related to such commercial activities: (1979-80) 84 Cal.W.N. 751.

The document which embodies the minutes of the discussion between private party and State Minister and which indicates the advice given by the Minister is certainly protected under S. 123 of the Evidence Act. In a suit against the State if such a document is not produced and protection under S. 123, Evidence Act, is claimed, the Court cannot compel the State to produce it. At the time when the Evidence Act was enacted the words "affairs of the State" might have had a narrow conception. "Affairs of the State" then might have related to the matters of political or administrative character relating, for instance, to the national defence, public peace, security and good neighbourly relations. But on account of the changed conception of the functions of the State, the State in pursuit of its welfare activities which were in the past treated as purely commercial matters, is apt to claim, the privilege relating to the affairs of the State in accordance with S. 123 of the Evidence Act. [A.I.R. 1961 S.C. 493, Rel. on]: I.L.R. (1969) 19 Raj. 461: A.I.R. 1970 Raj. 118 (D.B.).

One Hari Ram filed a complaint under Ss. 167/217-218, Penal Code, against Sub-Inspector and Head Constable of a Police Station, alleging that they had made interpolations in the surveillance register of the Police station by adding the name of the complainant without any orders from any competent authority and against the statute and the Police Rules. The complainant applied for summoning the register to the Court. The State claimed privilege under S. 123, Evidence Act and the Home Secretary filed an affidavit averring that the register was an unpublished official record relating to the affairs of the State and that its disclosure would be prejudicial to the public interests. The affidavit further stated that there was absolute necessity to keep the register as secret for the proper functioning of the Police Department and its disclosure would frustrate the purpose of secret surveillance of bad characters and criminals. *Held*, that Rr. 23.4 (1), 23.31 and 27.24(2) of the Punjab Police Rules treated the contents of surveillance register as strictly confidential and since the said register being a document necessarily pertaining to public security or public peace and security would fall within the ambit of the term "affairs of State". This test being satisfied the Courts of law ought not to hold an enquiry into the possible injury to public interest which might result from the disclosure of the document relating to the affairs of the State. This was a matter entirely for the authority concerned and the Head of the Department concerned to decide. In fact such a person would be the sole judge to determine whether the disclosure thereof was or was not in public interest. The privilege was also claimed by the proper authority and in the manner prescribed by law and hence the privilege should be upheld: I.L.R. (1969) 2 Punj. 338.

All the documents relating to deployment of armed forces are unpublished official records and, in the very nature of things, are confidential and secret papers. Except officers dealing with law and order, none has naturally access to such documents. Whenever, it is found necessary by the State to maintain law and order in a particular locality, the armed forces can be deployed at the discretion of the authorities responsible for maintenance of law and order. Therefore, it can be said with no fear of contradiction that all such papers relate to the affairs of the State. Where allegations of arson were made against unnamed armed constables of a Batalian and records of names of constables deputed and the number of guns and ammunition they carried were called for, *held*, unpublished official records relating to the affairs of the State which by their very nature were confidential and secret, could not be

permitted to be produced in Court to be exposed to the public view and even if documents containing the list of names of the armed forces deployed were produced in Court, it would not serve any useful purpose because, none of the forces could possibly be made accused for having committed arson and an accusing finger could not be pointed out to any one. [A.I.R. 1982 S.C. 149, Rel. on]: 1988 Cr.L.J. 1570 (Ori.).

"Affairs of State"—Meaning of—State activities of a welfare State like India are fast expanding after independence—Administrative instructions and guidance notes secretly given to various Departments of Government can claim status of being documents relating to affairs of State. [A.I.R. 1961 S.C. 493; A.I.R. 1934 P.C. 254, Rel. on]: A.I.R. 1970 Assam 131 (D.B.).

Where the appointment of the Chief Secretary of the State Government was impugned on the ground that R. 3(2-A) of the Indian Administrative Service (Pay) Rules, 1954 was not complied with, *held*, if documentary evidence in the nature of unpublished official records exist dealing with the selection of the Chief Secretary, that cannot be said to be evidence relating to "affairs of the State"; no privilege could be claimed in respect thereof. However, the Cabinet's advice to the Government for the appointment of the incumbent cannot be looked into by the Court under Art. 163 (3) of the Constitution of India and is, therefore, privileged. [A.I.R. 1961 S.C. 493; A.I.R. 1964 S.C. 1658, Rel. on]: A.I.R. 1972 Pat. 93: 1971 Pat.L.J.R. 471: 1971 B.L.J.R. 918 (F.B.).

Affidavit—Privilege—Allegation that a person was recommended to the post of a Judge of High Court but the recommendation was turned down on ground that he had no judicial experience—Allegations not denied in counter-affidavit but privilege claimed on ground that it related to affairs of State—*Held* that there was no duty on Government to claim privilege in case of this kind—They had duty to speak truth. Affidavits are not excepted from scope of this rule: I.L.R. (1961) Mad. 553: A.I.R. 1961 Mad. 450.

It is not possible to see how in cases dealing with non-appointment of an Additional High Court Judge for a further term or the transfer of a High Court Judge the disclosure of correspondence exchanged between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notings made by them could at all be said to be injurious to public interest. [A.I.R. 1961 S.C. 493, Overruled]: A.I.R. 1982 S.C. 149.

Character rolls and confidential reports are maintained for the purpose of providing an appraisal of the merit of State servants by their superiors from time to time. They are in the nature of confidential communications from one official to another and are meant to serve as part of the material designed to maintain the efficiency of the public service. The disclosure of the contents of such documents would certainly affect materially the freedom and candour of expression of opinion of those officers whose duty it is to make entries therein. The carrying on of the public administration in a proper manner cannot but be regarded as an "affair of State" and, therefore, documents which are maintained for the purpose of so carrying on the administration would relate to "affairs of State". Therefore, the character rolls and confidential reports are the documents, evidence derived from which cannot be given as per S. 123. [A.I.R. 1961 S.C. 493, Appl.; 1968 Cur.L.J. 990 (Punj.); A.I.R. 1969 Del. 246, Rel. on; A.I.R. 1950 East Punj. 228 (F.B.); A.I.R. 1967 Punj. 387; A.I.R. 1968 Punj. 255 held not good law in view of A.I.R. 1961 S.C. 493]: A.I.R. 1975 P.&H. 11.

Letter written by Superintending Engineer to contractor held did not relate to affairs of State—No privilege to be claimed: 31 Cut.L.T. 412: I.L.R. (1965) Cut. 269.

Where a relation of an accused being tried in the Sessions Court lodged a complaint with the Deputy Inspector General of Police that the local Police was colluding with the complainant party and under his instructions witnesses were examined and report was submitted to him, *held*, neither the complaint nor the statements recorded nor the report submitted related to the affairs of the State nor were they communications made in confidence to a Public Officer; Ss. 123 and 124 were not attracted: 1982 Cr.L.J. 393 (Andh. Pra.).

4. Relative scope of this section and section 124.—S. 123 of the Evidence Act gives effect to the principle that public interests must be paramount and private interests must give way when there is a conflict

between public interests and private interests. The privilege under the section only applies to unpublished official records, relating to any affairs of State and before privilege can be claimed there must be an adjudication that the documents in respect of which privilege is claimed are official records relating to affairs of State. The principle is that it is not all records, relating to the affairs of State that are privileged, but only those the disclosure of which would result in an injury being caused to public interests. S. 124 is really supplementary to S. 123: A.I.R. 1951 Bom. 72: (1951) 53 Bom.L.R. 229.

The objections under Ss. 123 and 124 cannot be treated as on at par with each other, without discriminating the one from the other. The considerations which should weigh with the Court in deciding objections under S. 123, ought not to be mixed up with those which should weigh in deciding objection under S. 124. A question arising under S. 123 has therefore, to be considered only with reference to S. 123 divorced from the considerations which may be germane to or relevant under S. 124: (1950) 52 Bom.L.R. 231: A.I.R. 1950 Bom. 230.

The word "unpublished" in S. 123 and the disclosure contemplated in S. 124, relate primarily to the person against whom privilege is claimed under those sections, and if he has been permitted lawfully to see those papers, and also to take copies of the same it will be futile for the authorities to claim privilege under either of those sections. S. 123 by its own terms is limited to unpublished official records and therefore, the privilege can hardly be asserted in relation to documents the contents of which have already been published. The principles dealing with publication applicable to the law of libel do not apply for the construction of S. 123. *Prima facie* the two differ because in actions for libel it is injury to the reputation of a person, caused by wide dissemination of libellous matter that is involved. But the privilege under S. 123 is claimed against a particular litigant in a case, and if the papers concerned have already been shown to him by the Officer-in-charge of the papers and if in respect of some of the papers, certified copies have also been granted to him, it cannot be said that the document still retained its unpublished character: 29 Cut.L.T. 179: I.L.R. (1963) Cut. 213: A.I.R. 1963 Ori. 111.

S. 123 of the Evidence Act relates to the evidence as to the affairs of the State, whereas S. 124 pertains to the disclosure of communications made to a Public Officer in official confidence. Although both the sections resemble each other in a number of points, the communication which is made to a Public Officer and which may relate to the affairs of the State would be covered by S. 123 of the Evidence Act. But if the communication is made in official confidence, wherein affairs of the State are not involved, but public interest would otherwise suffer by disclosure under S. 124, the Court can inspect the documents in question and determine the claim of privilege. Thus, returns submitted to Income-tax Officer and statements made to him cannot be said to be made in official confidence within the meaning of S. 124, Evidence Act. [(1909) I.L.R. 32 Mad. 62; (1899) I.L.R. 26 Cal. 281; (1950) 52 Cr.L.J. 161; (1953) 2 All E.R. 149, Foll.]: 1972 Cr.L.J. 1496: 1972 Raj.L.W. 433: 1972 W.L.N. 279.

Reports made by one Public Officer to another in the discharge of his official duties would come both within the ambit of S. 123 and within the scope of S. 124. Apart from such class of documents claiming the status of documents relating to public affairs within the meaning of S. 123 they can also be treated as privileged documents if and when the Public Officer to whom they are sent in official confidence considers that the public interests would suffer by their disclosure if they relate to matters relating not to public policy. The foundation of the claim of privilege under S. 123 is that the document from which evidence is sought to be derived is from any "unpublished official record relating to any affairs of state". Under S. 124, the occasion for claiming privilege arises only when the evidence sought to be given is a communication made to a Public Officer in "official confidence".

In both Ss. 123 and 124, the Court is the Judge as to whether the documents in respect of which privilege is claimed is a State document or whether the communication was made in official confidence. If a document comes within S. 123, the Court cannot inspect it though it can take other evidence to determine the character attributed to the document. If the document falls within S. 124, the Court can inspect it to determine the claim of privilege. But as regards the

question whether a disclosure will or will not be prejudicial to public interest the Head of the Department concerned in S. 123 or the Officer concerned in S. 124 is the Judge. The opinion of the Officer concerned is conclusive only when he claims privilege on the ground that the public interests would suffer and not when it is claimed on any other ground: 1962 M.L.J. (Cr.) 280: (1962) 1 An.W.R. 256: (1962) 2 Cr.L.J. 649.

Document falling within S. 124—Court must inspect the documents and determine whether the communications have been made in official confidence and whether the public interest will suffer by the disclosure of the contents of the documents within the meaning of S. 124—Only where the document comes within S. 123, the Court cannot inspect it, but can take other evidence to determine the character attributed to the document: A.I.R. 1964 Pat. 444.

S. 162 deals with the production of documents in answer to summons and it is obligatory on a witness so summoned, to produce the documents called for by the Court, he has no right to determine whether the documents shall be produced. When producing them, it is for him to claim privilege, if the documents are privileged, and it is the duty of the Court to determine whether the documents shall be admitted and exhibited. Ss. 162 and 123 protect the discovery of documents relating to matters of State. There is a difference between a private witness called upon to produce documents and a public officer summoned to produce a public record. S. 124 is more particular and lays down the rule of public policy and the limits within which the production can be withheld, in other words, the character and quality of the privilege. The condition precedent to or the test of privilege under S. 124 is that communication was made to the public officer in official confidence. The question is primarily to be decided by the Court before whom the privilege is claimed. It should be claimed at the earliest opportunity, and it is futile to claim the privilege at a late stage when there has already been a disclosure of the document given in charge of the Court: (1939) 41 Bom.L.R. 391: A.I.R. 1939 Bom. 237. *See* also I.L.R. (1940) Nag. 280: A.I.R. 1938 Nag. 358.

Ss. 123 and 125 cannot be understood as mutually exclusive. They do overlap. The difference between the two is that while S. 123 applies only to evidence derived from unpublished official records relating to any affair of the State, S. 124 applies to all communications made in official confidence, whether such communications are in writing or not and whether they relate to any affairs of State or not. Against S. 123 leaves the discretion of divulging the contents of State documents to the Head of the Department, whereas S. 124 leaves the discretion of disclosing communications made in official confidence to the Public Officer to whom the communication was made, whether or not he is the Head of the Department. Even if a subordinate public officer does not claim any privilege in respect of a document falling under S. 123, such evidence cannot be admitted. But under S. 124 a Public Officer may waive the privilege in his own discretion without any reference to his Head of the Department. A document marked confidential is not by itself the basis of a successful claim of privilege under S. 124. It must be further shown that the public interest would suffer by the disclosure of that document: A.I.R. 1961 J.&K. 20.

A privilege can be claimed for unpublished official records under S. 123 or official correspondence under S. 124; when privilege is claimed under S. 123, the Court has to hold a preliminary enquiry to ascertain whether or not the document relates to affairs of the State for which purpose the Court should direct the parties to file their affidavits, desirably of the Head of the Department or, may be, even of a Minister, disclosing why the document relates to the affairs of the State. On the Court being satisfied on the point, the document is excluded; otherwise it may itself inspect the document and decide whether to accord or withhold privilege; if the document is partially inoccuous, it may be produced in evidence after sealing other parts of the document. However, for the purposes of S. 124 the objection need not be raised by the Head of the Department; it may well be raised by the Public Officer; the objector must contend that the communication was made in official confidence which is to be determined by the Court, not by the Public Officer. But the Court must decided whether the documents falls within the ambit of S. 123 or S. 124: A.I.R. 1978 N.O.C. 253: 1978 Rajdhani L.R. 345.

5. Privileged documents — Duty of officer of Government.—The Head of the

Department must in the first place examine the document and consider whether privilege should or should not be claimed in respect of the document. He may then appear in person, before the Court to raise the objection or he may direct one of his subordinates to do so on his behalf with a certificate signed by him and stating that he has examined the document. But where the latter course is followed, the Head of the Department will not be absolved from the obligation of appearing in person and satisfying the Court that the objection taken by him is valid. The Court may require him to give an affidavit or make a statement on oath and may put any further question to him for satisfying itself that the privilege has been validly claimed. But the Court is not entitled to inspect the document, nor put such questions to the Head of the Department or any other witness, either directly or indirectly to reveal its contents: 1959 B.L.J.R. 658: A.I.R. 1960 Pat. 192.

It is clearly essential in the public interest that responsible Government Department should be entitled to claim privilege for documents, the disclosure of which would be against the public interest, and it is clearly right that the decision of the responsible Minister on the question whether privilege should be insisted on or not in respect of any particular document should be final. But in the interests of justice—particularly in a case which concerns a claim of one of subjects against a Government Department—document within the ambit of privilege should be most carefully scrutinised, and the person entrusted with that task should in regard to each document, ask himself whether it is relevant to the plaintiff's case, whether the plaintiff's case will be hampered or impeded if it is not made available and, if so, whether the probability of any harm being done to the public interest by disclosing it is sufficient to outweigh those other considerations. Further in a case where there is a large number of relevant documents within the ambit of privilege which may or may not become of real materiality to the case as it develops, there should be some one on the spot readily available—whether Counsel or Solicitor on the Government side or an official from the Department concerned—invested with authority to consider questions of privilege which may arise in the course of the case, and in his discretion to waive the claim of privilege. That, of course, would not apply to documents which from the outset appear to be such that they should on no account be disclosed for reasons of public interest. But in the case of ordinary documents, the disclosure of which could not, apparently, do any harm to anybody, it should be possible for the question to be disposed of in the course of the trial of an action without the delay imposed by reference back to the Minister: (1933) 2 All E.R. 149.

The Minister is in no way concerned as such with the issues between the parties or the relative importance in an action of the material sought to be disclosed. The Minister should no doubt accept and recognize, that the proper administration of justice may be impeded or may be unattainable if any document or any evidence which the Court would allow to be seen by the parties or which the Court allow to be put or given in evidence is withheld. Nevertheless his sole concern is whether the interests of the State in the sphere for which he is the responsible official would be so affected that the Crown should without documents or evidence from the parties and the Court: (1958) 1 W.L.R. 1300.

The Government should not claim privilege as a routine in every case and thus unnecessarily invite suspicion when, on the other hand, disclosure will be to its benefit. This tendency of secretiveness in matters which concern large numbers of employees is hardly consistent with the open and democratic society that our Constitution is committed to build: I.L.R. (1972) 1 Del. 446 (D.B.).

A privilege under S. 123, Evidence Act, should be rarely claimed, and should only be claimed, after the responsible Minister or the Head of the Department has fully satisfied himself that the document whose disclosure is being resisted is really a document relating to the affairs of the State and whose disclosure will result in injury to public interests. The scales are always weighed against the subject who fights against Government, the Government should be loath to throw against him more weight in the scales by refusing disclosure of documents which are relevant to the issue in the suit. Government should always bear in mind that it is incumbent upon it to see that there is a fair trial between itself and the subject who is fighting the Government; it should also bear in mind

that the loyalty of its officers to the cause of Government should not prevail to the extent of injustice being done to the subject. Even if disclosure of a document may result in the subject succeeding or in getting heavy damages or compensation against the Government there is no reason why a material document should not be disclosed. The only loyalty which the section contemplates and which must undoubtedly prevail over private interests is the loyalty to the State in the sense that public interest must prevail over private interest and the disclosure of a particular document, will damnify public interest: (1951) 53 Bom.L.R. 229: A.I.R. 1951 Bom. 72, followed in 1957 Cr.L.J. 134.

The decision taken at the level of the Ministry or by the authorised Secretary at the Secretariat level though expressed in the name of the President is not immuned from judicial scrutiny and is to be produced and inspected by the Court. If public interest immunity under S. 123 of Evidence Act is claimed, the Court would first consider it in camera and decide the issue. The immunity must not be claimed on administrative routine and it must be for valid, relevant and strong grounds or reasons stated in the affidavit filed in that behalf: A.I.R. 1993 S.C. 1769: (1993) 4 S.C.C. 120.

Under S. 123 when a Government official desires to claim privilege, it is desirable, even if it is not essential, that he should put in a statement stating that he has considered the documents carefully and had come to the conclusion that they cannot be produced without injury to the public interests: 1946 Nag.L.J. 205: I.L.R. (1946) Nag. 385: A.I.R. 1946 Nag. 256. An objection validly taken that it would be injurious to the public interest to produce a document is conclusive. But the mere fact that the Head of the Department does not wish the document to be produced is not an adequate justification for objection to its production. Production should only be withheld when the public interest would otherwise be damnified, as where disclosure would be injurious to national defence or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service: (1950) 52 Bom.L.R. 231: A.I.R. 1950 Bom. 230.

It is true that the Head of a Department has an absolute privilege on the point, it is for him to decide whether the matter is one in which privilege should be claimed or should not be claimed, but it would be good to follow the practice of the English law, namely, that some indication should be given to the Court as to why privilege is claimed or what affairs of State are involved in the matter. Without such indication, there is always a danger that the Court may draw an adverse inference from the non-production of the document: (1940) 42 Punj.L.R. 484: A.I.R. 1940 Lah. 217.

The fact that in the first instance, the Government had sent some documents for the inspection of the Court, to satisfy itself on its claim to privilege does not preclude the Government from subsequently claiming privilege against Court's inspection regarding the same documents, if they still remain unopened along with other documents of the same nature: (1959) 1 L.L.J. 539: (1958-59) 15 F.J.R. 297 (Punj.).

The fact that privilege claimed by the State if upheld would defeat a person's interest and would cause great hardship to him, is hardly a ground for denying a valid claim of privilege made by the State. It is settled law that where private interest and public will clash with each other, private interest must make way for the latter. There is no magic incantation or a formula which must necessarily be repeated in the filing of the affidavits for claiming the privilege under Ss. 123 and 162 of the Evidence Act. When it has been expressly averred that the Officer concerned has very carefully considered the document in issue and also given detailed reasons for his conclusion that the disclosure thereof would be against public interest, the mere absence of the word "read" or words *"bona fide"* would in no way detract from the validity of such an affidavit: I.L.R. (1969) 2 Punj. 338.

Reports made by one Public Officer to another in the discharge of his official duties and notes not minutes made by respective officers of the Government on relevant files come within the ambit of S. 123 and within the scope of S. 124 and are privileged documents. These documents come within the scope of documents which must be treated as confidential in the interests of efficient administration of public affairs and for the proper functioning of public services. Apart from such class of documents claiming the status of documents relating to public affairs within the meaning of S. 123, they can also be

treated as privileged documents, if and when the Public Officer to whom they are sent in official confidence, considers that the public interests would suffer by their disclosure, if they relate to matters of public policy. It is a matter for the Head of the Department to consider and decide whether the disclosure of the documents would lead to injury to the public interests and where the Head of the Department files an affidavit averring that the disclosure of the documents would lead to injury to the public interests and it is also his case that because public interests would suffer by the disclosure of the documents, they have the status of documents relating to public affairs, and it is no part of the jurisdiction of the Court to decide whether the disclosure of the given documents would lead to injury to public interest. The jurisdiction of the Court is confined to the narrow limits provided by the second clause of S. 162, *viz.*, it is open to him to take evidence to decide the character of the documents but it cannot inspect and peruse the documents: (1964) 2 An.L.T. 251.

The oath of office of secrecy adumbrated in Art. 75(4) and Schedule III of the Constitution does not absolve the Minister from filing affidavit, either stating the reasons in support of the public interest immunity to produce the State documents or as to how the matter was dealt with or for their production when discovery order *nisi* or rule *nisi* was issued on the other hand, it is his due discharge of the duty as a Minister to obey rule *nisi* or discovery order *nisi* and act in aid of the Court: A.I.R. 1993 S.C. 1769: (1993) 4 S.C.C. 120.

Claim of privilege under S. 123—When can be allowed—Claim must strictly fall within four corners of provisions of law because admission of such claim deprives the subject of evidence on matters directly in issue—Copy of document in respect of which privilege claimed by defendant filed by plaintiff—Court cannot without deciding claim of privilege, by calling upon defendant to admit or deny same, have its contents proved indirectly—Privilege claimed in respect of document which contained order of termination of plaintiff on ground that disclosure would affect freedom and candour of expression and endanger proper functioning of public service—*Held*, as Government servant was entitled to show that order in substance amounted to punishment, claim could not be allowed as document was not shown to be noxious: A.I.R. 1967 Punj. 387.

Government employee challenging reversion from officiating post—Consideration by authorities of employer's witness—Employee seeking production of connected files —Permissibility—Non-disclosure of such documents necessary for proper functioning of public service—Their disclosure will affect freedom of public servant and his expression—Injury to public interest will hence result—Production therefore not ordered—(Delhi Administration Subordinate, Ministerial/Executive Service Rules, 1967, Rr. 3 and 5—Constitution of India, Art. 311): 1969 Lab.I.C. 974: A.I.R. 1969 Del. 246.

Privilege cannot be claimed unless production would be injurious to public interest or unless keeping of documents secret is necessary for functioning of public service: 1972 Mah.L.J. 618: (1972) 74 Bom.L.R. 320.

When there was no claim or contention that disclosure would be prejudicial to public interest or to national security, *held*, the bare plea that the letters in question are "confidential letters" is of no avail: (1992-1) 33 Guj.L.R. 310.

6. Manner in which privilege may be claimed.—There is nothing in O. 11, R. 19, C.P. Code which requires a party to file an affidavit to support the claim of privilege. Judicial decisions however, emphasise that affidavits should be filed when privilege is claimed. The Provincial Government where it is a party has to decide whether it should claim privilege in respect to documents of which inspection or production is sought. It may take the advice of the Head of the Department but the objection has to be raised in the Court by the Provincial Government which is a party to the suit and not by the Head of the Department which is not a party. The Provincial Government in such a case can authorise any of its Officers to swear an affidavit on its behalf. The authority and discretion of the Provincial Government to select one of its Officers to conduct proceedings and act on its behalf in Court cannot be questioned. It is only where the Provincial Government is not a party that the contention may be raised that the privilege should be claimed by the Head of the Department concerned: I.L.R. (1950) Nag. 690.

The difference between S. 94(5), Cr.P. Code, and O. 11, R. 19(2) of the C.P. Code, is

that the provisions in the C.P. Code, does not say anything about Ss. 123, 124 and 162, Evidence Act. The prohibition with regard to the inspection of a State document arises out of the privilege of the State, it is not a procedural matter with which alone sub-R. (2) of R. 19 of O. 11, C.P. Code deals. The matter of State privilege is a matter of constitutional law and is dealt with specifically under Ss. 123 and 162, Evidence Act. S. 4, C.P. Code, lays down that nothing in the Code would affect any special or local law in force. Ss. 123 and 162, Evidence Act, being a special law, the general provision of law contained in sub-R. (2) of R. 19 of O. 11, C.P.Code, cannot abrogate the special law: 1957 Cr.L.J. 134; 1959 B.L.J.R. 658: A.I.R. 1960 Pat. 192.

The claim of privilege of document under S. 123, Evidence Act should generally be made by the Minister-in-charge who is the Political Head of the Department concerned and the affidavit made in that behalf should show that each document in respect of which the claim is made has been carefully read and considered, and the person making the affidavit is *bona fide* satisfied that its disclosure would lead to public injury. *Held*, that in the present case the claim of privilege could be rejected on the preliminary ground that the document signed by the Home Minister and claiming privilege did not satisfy the requirements of affidavit for making such claim: 1965 M.L.J. (Cr.) 107: A.I.R. 1964 S.C. 1658.

Per Majority (*Gajendragadkar, J., Sinha, C.J.* and *Wanchoo, J.*) —The effect of the document on the ultimate course of litigation or its impact on the Head of the Department or the Minister in charge of the Department, or even the Government in power, has no relevance in making a claim for privilege under S. 123. The sole and the only test which should determine the decision of the Head of the Department is injury to public interest and nothing else. The privilege should be claimed generally by the Minister in charge who is the Political Head of the Department concerned; if not the Secretary of the Department who is the Departmental head should make the claim; and the claim should always be made in the form of an affidavit. The affidavit should show that each document in question has been carefully read and considered, and the person making the affidavit is satisfied that its disclosure would lead to public injury. If there are a series of documents included in a file it should appear from the affidavit that each one of the documents, whose disclosure is objected to, has been duly considered by the authority concerned. The affidavit should also indicate briefly within permissible limits the reasons why it is apprehended that their disclosure would lead to injury to public interest. If the affidavit produced in support of the claim for privilege is found to be unsatisfactory a further affidavit may be called, and in a proper case the person making the affidavit whether he is a Minister or the Secretary should be summoned to face cross-examination on the relevant points.

Per *Subba Rao, J.*—The said claim shall be made by an affidavit filed by the Minister in charge of the Department concerned describing the nature of the document in general and broadly the category of public interest its non-disclosure purports to serve. In exceptional circumstances, when it has reason to believe that there is more than what meets the eye, it can examine the Minister and take other evidence to decide the question of privilege under no circumstances can a Court inspect the document of which privilege is claimed: (1961) 2 S.C.R. 371: (1961) 2 M.L.J. (S.C.) 203: A.I.R. 1961 S.C. 493. *See* also (1993) 1 Hindu L.R. 321 (Cal.) (D.B.); 1972 Raj.L.W. 433: 1972 W.L.N. 279: 1972 Cr.L.J 1495.

Affidavit claiming privilege under S. 123 should be by the Head of the Department. Where the suit is against the Union of India as representing North Eastern Railway, the Head of the Personnel Department of the North Eastern Railway is not the Head of the Department of Government.

The affidavit should be by the Railway Minister, being the Political Head of the Department of the Secretary to the Ministry of Railways who is the highest officer and the Head of the Department. It is one of them who can claim this privilege under S. 123 if he so thinks fit. He can call for the papers from the Officer of the Railway Administration concerned and, after examining the papers himself, he has first to decide as to whether the papers called for relate to any affairs of the State; if so, whether their production could cause public injury or impair public interest. It is only when he comes to this conclusion that he can withhold the permission for, or refuse, production of the

document in Court. For the grave purpose of S. 123 all those officers mentioned in Annexure 1 as Heads of Departments mentioned in Appendix XXXVIII of the Indian Railway Establishment Code, Vol. II, prepared in pursuance of Rule 2202(9) of the Railway Supplementary Rules, cannot be taken to be the Heads of the Railway Department which is the Department of the Government of India as envisaged in S. 123: 1963 B.L.J.R. 138: A.I.R. 1963 Pat. 129.

Government claiming privilege in respect of document—Procedure—Duty of Court: I.L.R. (1961) 13 Assam 472: 1960 Cr.L.J. 1551: A.I.R. 1960 Assam 210.

7. "Head of the Department concerned".—Privilege can be claimed in respect of unpublished official records relating to any affairs of State under S. 123 of the Evidence Act only by the "Head of the Department concerned". The Secretary to the Provincial Government is the Head of the Department concerned and under S. 123 it is either the Minister or the Provincial Head of the Department who has the right to grant or withdraw permission to the production of the documents relating to the affairs of State. The Director of Industries may be called the Head of the Department for other purposes but for purposes of S. 123 of the Evidence Act it is the Secretary of the Department or the Minister in charge of the concerned Department who can file an affidavit giving or withholding the permission contemplated in this Act and therefore, the Director of Industries is not entitled to claim privilege respecting letters in the land acquisition file kept and maintained by him: 1963 Cur.L.J. 130 (Punj.).

For the purpose of claiming privilege under S. 123, the expression "Head of Department" has two distinct meanings. It may be limited to Heads of the various Departments, of the Secretariat, namely, the Secretaries of the Departments, or else it may also include Heads of Departments of attached offices either under the Union Government or under the State Government. The privilege should be claimed generally by the Minister in charge who is the political Head of the Department concerned, if not, the Secretary of the Department who is the Departmental Head. The reason for thus limiting the expression to the highest officials in the State is that privilege under S. 123, is only claimed in respect of "affairs of State" and it is ordinarily expected that neither the Minister concerned nor the Secretary of the Department would lightly make such a claim whereas the Heads of Departments of subordinates offices may not be fully alive to their responsibility in this matter, and interests other than public interest may masquerade in the garb of public interest and take undue advantage of the provisions of S. 123: A.I.R. 1963 Ori. 111: 29 Cut.L.T. 179: I.L.R. (1963) Cut. 213.

The expression "Head of the Department" in S. 123 must be confined to the Minister who is the Political Head of the Department and, in special circumstances, the Secretary of the Department and none else. In the context of Rules framed under Art. 166 of the Constitution, Inspector-General of Police cannot be the Head of the Department for purposes of S. 123: (1975) 41 Cut.L.T. 363: (1973) 1 Cut.W.R. 661.

Under S. 123 of the Evidence Act, the officer at the Head of the Department concerned is the authority to decide whether to permit or to withhold the evidence. The question as to who is the Head of the Department depends on the particular facts. The English decisions according to which the privilege has to be claimed in the form of an affidavit either by the Minister or the Secretary of State in charge of the Department are on the other hand based on common law in the absence of any statutory provisions similar to S. 123 of the Indian Evidence Act. They proceed on the principle that the best evidence which the Court could safely accept without question should be adduced: That under Act VI of 1932, the State Government has revisional power over the Registrar of Co-operative Societies does not mean that Registrar is not the highest executive authority in the State for the Department. The State Government is necessarily the highest executive authority in a State and S. 123 of the Evidence Act does not mention the State Government as the authority to give or withhold permission. It mentions only the Head of the Department concerned and the Government may designate any Officer as the Head of the Department for the purpose: A.I.R. 1957 Andh. Pra. 486: (1957) 1 An.W.R. 106: I.L.R. (1957) Andh. Pra. 174.

Ordinarily, the Head of the Department will mean the officer who is in control of the Department and in whose custody records of that Department remain. It will usually be

the Secretary to the Provincial Government in Provincial Departments or the Secretary to the Government of India in the Departments of the Government of India. In England, it is the political head or the Minister who has been held to be the Head of the Department, but under the Evidence Act it is either the Minister or the permanent Head of Department who has the right to grant or withhold permission to the production of a document relating to affairs of State: (1950) 52 Punj.L.R. 153: A.I.R. 1950 East Punj. 228 (F.B.).

The use of the word "concerned" in relation to the Head of the Department shows that the affidavit must contain a sworn statement by the Head of the Department in whose custody the documents happen to be at the time when discovery and production is claimed. The principle and the foundation on which S. 123 rests is concern for the public interest. If an affidavit is made by the Head of the Department that he does not wish to produce certain documents as they constitute unpublished official records relating to affairs of State, he is deposing by implication that the production of those documents will be prejudicial to public interest. The words "Head of the Departments concerned" are not only applicable to the Ministers in the case of Provincial Governments and to the Members of the Viceroy's Executive Council so far as the Central Government is concerned. Therefore, the affidavits by the Chief Secretary of the Provincial Government or Home Secretary of the Central Government are good: A.I.R. 1944 Lah. 209. *See* also I.L.R. (1944) Kar. 175: A.I.R. 1944 Sind 145.

The Secretary to the Government in charge of the Department to which the document in respect of which privilege is sought belongs is an Officer at the Head of the Department within the meaning of S. 123 and, hence, to insist on an affidavit from the Minister in charge of that Department is wrong: (1954) 2 M.L.J. 236: A.I.R. 1954 Mad. 926.

Government documents required to be produced under O. 13, R. 10, C.P. Code—Secretary to Government who is Head of Department concerned is competent authority to claim privilege under Ss. 123, 124: (1964) 2 An.L.T. 251.

The claim of privilege under S. 123 has to be put forward by the Head of the Department concerned and not by the subordinate of such head: 30 Pat.L.T. 327. Summons to produce document served on Collector—Collector claiming privilege by means of an affidavit through his personal assistant in direct charge of records—Privilege held claimed by Collector and not by personal assistant—*Held*, no defect: (1953) 66 Mad.L.W. 927: A.I.R. 1954 Mad. 278.

The National Savings Commissioner is not the Secretary of the Finance Department and his claim of privilege under S. 123 must therefore fail. In the case of a Collector, the claim is still weaker because he is not a Head of Department even for the purpose of the Orissa Service Code: 29 Cut.L.T. 179: I.L.R. (1963) Cut. 213: A.I.R. 1963 Ori. 111.

The Chief Personnel Officer, N.E. Railway is not given the status of a Head of Department for the purpose of claiming the privilege under S. 123 of the Evidence Act even if it was possible to confer such a status on a person, who is not in fact Head of Department by any notification of the Government or of the Railway Administration: 1965 M.L.J. (Cr.) 762: A.I.R. 1964 S.C. 1118.

8. Privileged documents — What are and what are not.—Statements in departmental enquiry into the conduct of Police Officers are not privileged under Ss. 123, 124 or 125, and can be called for when those witnesses are subsequently examined in a criminal Court on a charge against the Police Officers for taking illegal gratification: (1911-12) 16 Cal.W.N. 431: 13 Cr.L.J. 445. Where letters addressed by the Head of a Department reach the addressee, those letters would not be unpublished documents within the meaning of S. 123, and the Court would be entitled to see the documents and decide under S. 162 as to their admissibility: A.I.R. 1933 Lah. 157: 143 I.C. 685.

In a suit by an employee challenging the order of dismissal, papers containing noting by the various Officers and the communication made in official confidence from one Officer to another can be validly withheld by the Department claiming them to be privileged under S. 123 on the ground that their disclosure would not be in public interest and would materially affect the freedom and candour of expression of opinion in the determination and execution of public policies: 1968 Cur.L.J. 990 (Punj.).

As the notings and the comments of the officials are an essential part of the enquiry proceedings culminating in the order of removal of the employee from service, the

same cannot be treated as privileged proceedings relating to the affairs of the State and in any manner prejudicial to the public interest. Removal of an employee after enquiry and collecting the relevant material cannot be said to be related to public policy as such. [A.I.R. 1961 S.C. 493, Disting.]: 1978 Rev.L.R. 483.

There are two categories of documents which can be said to relate to affairs of the State. Documents whose contents, if disclosed, would affect national defence or public security or good neighbourly relations of the country belong to one category. The other category comprises of such documents, disclosure of whose contents would not affect the national defence, public security or good neighbourly relations, but would materially affect the freedom and candour of expression of opinion in the determination and execution of public policies. This second category would include notes and minutes made by respective officers on the relevant files, opinion expressed or reports made and gist of official decisions reached in course of determination of the said questions of policy. Privilege in regard to this second category of documents can be claimed in the interest of efficient administration of public affairs. The said category of documents may claim the status of documents relating to public affairs, if their disclosure would cause possible injury to public interest or impair the proper functioning of the public service: (1975) 41 Cut.L.T. 363: (1973) 1 Cut.W.R. 661. [In appeal against the said judgment, the Supreme Court in A.I.R. 1977 S.C. 2201, *held* that as the High Court rejected the State's claim of privilege in regard to departmental notings contained in official files, for the reason that the affidavits filed on behalf of the Government did not adequately bring out the involvement of public interest consequent upon the disclosure of the notings, the judgment of the High Court has to be confined to the particular facts of the case and cannot be used as a precedent in other cases for calling upon the Government to produce confidential notings in official files, if the disclosure thereof is calculated to impair public interest.]

In the matter of departmental enquiries conducted against Government employees no privilege could be claimed by the State in respect of notings or opinions expressed on the file during such proceedings. In case the documents regarding which privilege is claimed related to departmental proceedings, *i.e.*, proceedings contemplated under the service rules, obviously the privilege could not be claimed. However, with respect to other matters for which service rules do not contemplate, the State would be within its rights to claim privilege in respect of office notings or opinions expressed by officers or the officials on such matters. Thus, where a dismissed Government employee, wanted production of his representations made to the Chief Minister, in respect of which privilege was claimed on the ground that office notings or opinions were expressed on such representations by the Government officials, *held*, those representations could not be called proceedings under the rules such as departmental proceedings, the State could legitimately claim privilege with respect to office notings or opinions expressed on such representations. [A.I.R. 1961 S.C. 493; A.I.R. 1968 Punj. 255; (1977) 1 S.L.R. 565; 1978 Rev.L.R. 483; A.I.R. 1982 S.C. 149, Rel. on]: (1990-2) 98 Punj.L.R. 475: (1990) 2 Rev.L.R. 289.

Where privilege was claimed in respect of annual confidential reports and minutes of Departmental Promotion Committees, *held*, the claim of privilege, cannot be upheld: 1983 Lab.I.C. 469 (D.B.).

Where petitioners alleged that Governor's order dispensing with domestic enquiry on ground that it was in interest of security of State was passed without application of mind to relevant records, *held*, it was necessary for exercise of powers of High Court under Art. 226 to look into records to determine whether Governor had applied his mind to same—Hence, privilege under S. 123 could not be claimed. [(1972) 1 Mys.L.J. 339 (Karn.), Rel. on]: (1981) 2 Karn.L.J. 489: (1982) 1 Serv.L.J. 213: 1982 Lab.I.C. 430 (Karn.) (D.B.).

Claim by Government in respect of documents relating to compulsory retirement of employee — Competency. *See* (1972) 74 Bom. L.R. 320: 1972 Mah.L.J. 618.

Record evidencing interference by Government with pending judicial proceedings—If privileged departmental enquiry papers are not unpublished documents relating to affairs of State. *See* 161 I.C. 668: A.I.R. 1936 Nag. 25.

Officers of the Government are often times confronted with orders of Courts, impossible of immediate compliance for various reasons. On such occasions they will necessarily have to note in the files, the reasons why the orders cannot be complied with and also indicate that the Courts would not have passed those orders if full facts were placed before them. The expression of opinion by the officers in the internal files are for the use of the Department and not for outside exposure or for publicity. To find the officers guilty for expressing their independent opinion, even against orders of Courts in deserving cases, would cause impediments in the smooth working and functioning of the Government. These internal notings, in fact, are privileged documents, notings made by the officers in the files cannot be made the basis of contempt action against each such officer who makes the notings. [1986 Pat.L.J.R. (H.C.) 319, Reversed]: A.I.R. 1987 S.C. 1554: 1987 Cr.L.J. 1860: (1987) 3 S.C.C. 34.

The Magistrate is bound to call for them under S. 162 and to allow the accused to cross-examine the witnesses under S. 155 on the statements made whether they are in favour of the accused or against them. S. 163 entitles the prosecution to make use of them if they turn out to be not in favour of the defence: 13 Cr.L.J. 445: (1911-12) 16 Cal.W.N. 431.

Observation by High Court on report of Enquiry Officer against conduct of judicial officer, forwarded to Governor, are privileged: I.L.R. (1965) Bom. 317: A.I.R. 1965 Bom. 156.

Where documents summoned to be produced in the Court are part of the preparation of documents leading to the advice tendered to the President of India, *held*, they are privileged documents under Art. 74(2) of the Constitution; the Supreme Court is precluded from directing that they be produced in the Court; Cabinet papers are protected from disclosure not by reason of their contents but because of the class to which they belong; and Cabinet papers also include the papers brought into existence for the purpose of preparing submission to the Cabinet: A.I.R. 1988 S.C. 782.

Where privilege claimed against production in Court of a summoned document was supported by the affidavit of the Secretary to the Government of India in the concerned Ministry which gave a gist of the intelligence reports against an Air India Pilot, quoted the numbers of the files comprising reports of his Ministry as well as the Ministry of Home Affairs as also of the Intelligence Bureau, *held*, the Court found no reason to look into the documents and allowed the privilege not because the affidavit was of a high officer but because he seemed to be aware of the seriousness of the case: A.I.R. 1988 Bom. 416: (1988) 3 Bom.C.R. 292.

Any communication made between Chief Minister and Governor of the State concerning land acquisition proceedings is a privileged communication: A.I.R. 1995 Raj. 69.

Communications between Ministers of State: 5 Bom.L.R. 30: I.L.R. 27 Bom. 189; I.L.R. 32 Mad. 62: 19 M.L.J. 263.

Where in case of preventive detention, privilege was claimed, *held*, the claim of privilege can hardly prevail over the constitutional mandate of disclosure under Art. 22 (5) of the Constitution: 1981 Bom.C.R. 551: 1981 Cr.L.R. 445: 1982 Cr.L.J. 53 (D.B.).

The reports of the inspection of various banks by the Reserve Bank and the correspondence between the various banks and the Reserve Bank regarding their affairs are documents which relate to affairs of State and the claim for privilege in respect of these documents is justified: (1959) 1 L.L.J. 539.

As to production of State records to which protection of this section does not extend, *see* 2 Weir 781. Secretary to the Board of Education, West Bengal held had no power to claim privilege in respect of the reviewer's report submitted to the Board: 1954 Cr.L.J. 624: A.I.R. 1954 Cal. 216.

Reports by auditors from the Accountant General's Office—Prosecution of Government Officer for criminal breach of trust—Accountant General should not claim privilege and refuse to produce original reports. *See* 1958 B.L.J.R. 6: A.I.R. 1958 Pat. 166.

Statements made to and recorded by a Forest Range Officer in the course of an investigation into an offence under the Madras Forest Act do not relate to any affairs of State nor can they be said to be communications made in official confidence the disclosure of which would be injurious to public interests. No privilege can be claimed in respect of such statements under Ss. 123 and 124: A.I.R. 1937 Mad. 492: (1937) 1 M.L.J. 613.

The reports made by officers of the C.I.D. Special Branch who cover public election meetings comprising, *inter alia*, the mental notes made by them and the chart of such

meetings, the places they were held at and the names of the speakers prepared and furnished by the Police could not said to be privileged documents: A.I.R. 1975 S.C. 308: (1975) 3 S.C.C. 646.

The accidents register kept by a medical practitioner is not a privileged document, and a Magistrate cannot therefore, refuse to cause production of the same: (1937) 50 Mad.L.W. 796: A.I.R. 1940 Mad. 240. The diary of a foot constable who was shadowing the movements of a suspect could not possibly become an affair of State within the accepted meaning of the words: (1940) 42 Punj.L.R. 484: A.I.R. 1940 Lah. 217. An entry in a posting register kept by the Customs Department, showing the section to which officers are posted, is not a State document for which privilege can be claimed under S. 123 or S. 162: 45 I.C. 284: 19 Cr.L.J. 524.

S. 124 of the Evidence Act can be applied only when the communication is made to a public officer in official confidence. On a complaint against a Sub-Inspector of Police made to a District Superintendent of Police the latter directed the Circle Inspector of Police to make an investigation and during the course of investigation statements were recorded from various persons, but ultimately no action was taken. On a subsequent private complaint being filed, the accused applied for calling of the statements recorded by the Circle Inspector for the purpose of contradicting the witnesses. On a claim of privilege by the District Superintendent, *held*, the statements in question cannot be considered to be statements made in official confidence. The accused is entitled to use those statements to contradict the prosecution witnesses: A.I.R. 1951 Mad. 864(1): I.L.R. (1952) Mad. 170: (1951) 1 M.L.J. 526.

The record kept at the Police Station about the activities of a particular person and the reports about him made by the Sub-Inspector to the Inspector from time to time or even by the Inspector to the Superintendent of Police cannot be regarded as privileged under Ss. 123 and 124: A.I.R. 1945 Lah. 293: 47 Cr.L.J. 277.

Case diary — Privilege — Bar under S. 162—Statement of witnesses recorded during investigation of crime can be used in civil litigation as previous statements: 1964 All.L.J. 950: (1965) 2 Cr.L.J. 452: A.I.R. 1965 All. 494.

Where a Police report about the antecedents and character of a Government employee (petitioner), whose services were terminated by the State basing their conclusion on the report, is produced by the Government in Court, without prejudice to the claim of privilege under Ss. 123 and 124, Evidence Act, the Court would be competent to refuse the petitioner access to the report on the ground that it would react to the detriment of public interest. Perusal of the report by the Court without giving such an opportunity to the petitioner does not involve any violation of the principles of the natural justice. In this case, the Court, however, did not look into the confidential file, as the petitioner was not agreeable to that course: 1964 Ker.L.J. 162: I.L.R. (1964) 1 Ker. 374: A.I.R. 1965 Ker. 63.

A statement made by a subordinate officer to his superior regarding the apprehension of an accused person within the hearing of various other people is a relevant fact and is admissible under S. 124: 45 I.C. 284: (1917-18) 22 Cal.W.N. 451.

A petition sent against a person to the Excise Commissioner and a report thereon, in so far as it contains the statements made by witnesses to the Investigating Officer, do not come within the purview of S. 123 at all and therefore, there can be no claim for privilege in respect thereof: I.L.R. (1944) 1 Cal. 410: (1942-43) 47 Cal.W.N. 928: A.I.R. 1943 Cal. 539.

A Police witness in proceedings under Ch. VIII, Cr. P. Code cannot claim privilege when asked about a statement made or given to him by one of the witnesses. If such a statement was given in the course of an investigation, the plea of privilege might be based on S. 124 of the Evidence Act, as S. 125 refers to information given before the initiation of proceedings and S. 123 cannot apply. Such a plea of privilege cannot be allowed, for a statement by a person who afterwards gives evidence as to the facts in that statement cannot be said to have been a statement made in official confidence, nor can a Police Officer be heard to say that the public interest will suffer if the accused are allowed their right of cross-examination: I.L.R. (1942) Kar. 252: A.I.R. 1942 Sind 122.

Income-tax Officer may in a proper case claim privilege under Ss. 123 and 124: 1960 Ker.L.J. 1191: I.L.R. (1960) Ker. 1292: A.I.R. 1961 Ker. 32.

After the repeal of S. 137 of the Income-Tax Act, 1962, there is no longer any impediment left in the way of a Court to summon the production of documents filed by an assessee before the Income-tax Authorities after 1-4-1964, relating to assessment proceedings after 1964-65, onwards and the finality attached to the Commissioner's order under S. 138(1) of that Act has no relevance to the exercise of power by a Court to summon the production of documents in a case pending before the Court. [1974 Tax. L.R. 703 (Del.) (F.B.), Partly reversed]: A.I.R. 1992 S.C. 990: (1992) 2 S.C.C. 13: (1992) 1 Hindu L.R. 283; (1992) 2 Hindu L.R. 157 (P.&H.).

Privileged document—Conciliator's report regarding his findings on an industrial dispute not a privileged document or a confidential document—Party to dispute entitled to a copy of the report: A.I.R. 1967 Bom. 174.

Documents annexed to petition already in Court—Claim of privilege under S. 123 by respondent after service of rule *nisi*—Court may adopt judicial blindness to these documents and proceed in accordance with law—But if petitioner does not take any step to direct respondent to produce originals before Court, no question of taking collateral evidence to determine validity of objection arises—Court is justified in excluding these documents from consideration in arriving at its decision in case on merits. [A.I.R. 1961 S.C. 493; A.I.R. 1934 P.C. 254, Rel. on]: A.I.R. 1970 Assam 131 (D.B.).

Fire breaking out in Railway truck at wayside station resulting in loss of goods—Departmental enquiry by Railway Administration with a view to litigation which might arise out of accident—Enquiry report is privileged document: A.I.R. 1960 Pat. 489: 1960 B.L.J.R. 669.

Where in a suit for damages for breach of the terms of a licence which conferred the right on the plaintiff to fish for and take away chank shells from the sea off the coasts, inter-departmental communications and reports sent by the Assistant Directors of Fisheries to the Deputy Director showing the price for computing the damages were sought to be used as evidence, *held*, they could not be excluded from consideration as no question of public importance or public interest was involved in the reports: (1979) 92 Mad.L.W. 29 [Reversed on another point in (1986) 99 Mad.L.W. 777.]

Where in a suit to restrain the State of Madras from diverting water flowing into the plaintiff's tank by construction of a dam at the instance of the State of Travancore, an official file from the State of Madras was summoned but the trial Court had granted privilege, *held*, in revision on inspection of the file, that the part containing correspondence between the two Government was entitled to the privilege but not the part containing the statements recorded and reports made by subordinate officials in regard to the riparian rights of the ryots; the last part directed to be produced in the Court. [A.I.R. 1961 S.C. 493, Rel. on]: A.I.R. 1971 Mad. 468: (1971) 84 Mad.L.W. 455.

Trial for offence of theft and conspiracy by Court-Martial—Reports of Security Officer and C.B.I. not allowed to be inspected by accused nor produced on record under the cover of privilege under Ss. 123 and 124—Reports containing conclusions of officers—They could not be classed as evidence of previous statements—Accused could not be said to have suffered in their defence. *See* 1983 Cr.L.J. (N.O.C.) 109 (Del.).

Where the State is a party to a litigation and the documents which the State is called upon to produce in that litigation relate to commercial or contractual activities of the State and if it is the considered view of the officer concerned that the disclosure of certain document is likely to damnify public interest then and then alone he is entitled to claim privilege in respect of them: A.I.R. 1961 J.&K. 20.

Where in a suit for recovery of moneys for construction of a minor irrigation work, the State justified deductions and altogether denied its liability and on letters written by and to the departmental officers, the State claimed privilege by an affidavit of the Secretary of the Department which merely expressed the apprehension that their disclosure would hurt and be prejudicial to the public interest but without disclosing the reasons underlying his apprehension, *held*, no privilege could be allowed on such an affidavit, the affidavit should have indicated briefly and within permissible limits, the reason for the apprehension, even more so when the documents *prima facie* are of commercial character and pertain to the State's commercial activities; the State, despite

being allowed one and a half years time, did not produce the documents for the High Court inspection. [A.I.R. 1961 S.C. 493; A.I.R. 1964 S.C. 1658; A.I.R. 1975 S.C. 865, Rel. on]: A.I.R. 1979 Raj. 221: 1979 Raj.L.W. 366.

Where in a suit for recovery of the balance price of the chrome ore supplied to a public authority under instruction from the State, the plaintiff summoned in evidence an official file pertaining to meeting attended by all the three parties where certain decisions regarding the price was taken and the State claimed privilege under S. 123, *held*, as the file summoned on the face of it relates to a commercial transaction and not to the affairs of the State, no privilege can be granted; the State was directed to produce the same and they were to be kept in the Court in a sealed cover and were to be proved in evidence subject to the objections of relevance and admissibility. [A.I.R. 1961 S.C. 493; A.I.R. 1975 Madh. Pra. 196; A.I.R. 1951 Bom. 72; A.I.R. 1982 S.C. 149, Rel. on]: A.I.R. 1986 Ori. 199: (1986) 61 Cut.L.T. 270.

9. Refreshing memory from privileged document.—Before any witness can be allowed to refresh his memory from any document in respect of which a plea of privilege under S. 123 is put forward it is essential that the plea of privilege should be determined. The Judge must, therefore, decide the question whether the document in question is protected from disclosure under S. 123, before he allows any witness to refresh his memory from such document. The decision of the question should not be postponed until after the witness has been allowed to refresh his memory: 30 Pat.L.T. 327.

10. Secondary evidence—Knowledge of witness based on privileged document—Admissibility.—The evidence of a witness deposing to a particular fact is inadmissible in evidence if his knowledge about that fact is based upon a confidential register which is not open to inspection by Court as being unpublished privileged Government records and not upon personal knowledge and experience only: (1958) 1 Cal.L.J. 46: A.I.R. 1958 Cal. 440.

11. Industrial Tribunal bound by the provisions of this section.—Industrial Tribunal is bound by the relevant provisions of the Evidence Act in a matter of admitting documents regarding which privilege is claimed in consequence of the provisions of S. 11(3)(*b*) of the Industrial Disputes Act: (1959) 1 L.L.J. 539: (1958-59) 15 F.J.R. 297 (Punj.).

12. Stage at which privilege may be claimed.—Claim of privilege at stage of inspection of documents—Permissibility: (1961) 2 M.L.J. (S.C.) 203: A.I.R. 1961 S.C. 493.

Claiming privilege for production of document on the final order for its production is not vitiated by *mala fides* merely because no privilege was claimed when it was directed to be produced at an earlier occasion: A.I.R. 1971 Pat. 264.

Where certain documents annexed to a petition were described in the counter-affidavit of the respondent-Railway Authority as general secret and confidential instructions having no bearing on the case and the petitioner neither took steps to call for their originals nor explained how he came by those documents, it cannot be said that the Railway Authority had waived any claim to privilege in respect of those documents under S. 123, and it is entitled to raise the objection under S. 123 at the hearing particularly when the documents are introduced by the petitioner not in accordance with law. [A.I.R. 1961 S.C. 493; A.I.R. 1934 P.C. 254, Rel. on]: A.I.R. 1970 Assam 131 (D.B.).

Suit for damages against State—Interrogatories—State not answering on ground of confidential nature of information—Subsequent claiming of privilege—Procedure: I.L.R. (1956) 1 Cal. 370.

13. Revision against order allowing or disallowing privilege.—An order allowing or disallowing privilege under S. 123 in criminal proceedings is an interlocutory order and does not finally determine the proceedings; such an order is, therefore, not amenable to revision. [(1965) 1 Cr.L.J. 94 (S.C.), Rel. on; 1978 Cr.L.J. 165 (S.C.), Disting.]: A.I.R. 1980 N.O.C. 72: 1980 Cr.L.J. 292: 1980 Kash.L.J. 1 (F.B.).

14. Miscellaneous.—Communication made to one public officer forwarded by him to another public officer—Affidavit by latter in support of claim of privilege is sufficient: (1963) 5 Ori.J.D. 10: 29 Cut.L.T. 179: I.L.R. (1963) Cut. 213: A.I.R. 1963 Ori. 111.

Government claiming want of knowledge of proceedings under S. 46 of U.P. Zamindari Abolition and Land Reforms Act—Other party claiming knowledge on part of Government of such proceedings and applying for discovery and inspection of certain documents in support of his allegations—Government claiming privilege—*Held*, Compensation Officer will be required to decide in the light of decisions in A.I.R. 1961 S.C. 493 and A.I.R. 1964 S.C. 1658, whether claim of privilege raised by State Government should be

124. Official communications.—No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

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sustained or not—That must be done after appropriate affidavits by Heads of Departments concerned were filed and claim of privilege was properly examined: (1966) 1 S.C.A. 556: A.I.R. 1966 S.C. 1164.

Where in the bofors kick back case, the High Court quashed the First Information Report after looking into the documents produced before it by the Government as secret documents for Court's perusal, *held*, those documents from their very nature could have never been in possession of any third party much less with the accused and in such a case, the High Court was not at all justified in making use of those documents for its findings especially in a case of this nature where there are serious and outrageous allegations: A.I.R. 1993 S.C. 1082: 1993 (Supp.) 4 S.C.C. 260: 1993 S.C.C. (Cr.) 1171: 1993 Cr.L.J. 859.

Where in a writ petition by way of public interest litigation the arrest and prosecution of the Inspector General of Police, Southern Zone, Kerala was prayed for on the ground that as per newspaper reports he was involved in the I.S.R.O. espionage case and documents and video cassettes collected by the Central Bureau of Investigation were sought to be summoned and privilege in respect thereof was claimed by an affidavit of the Special Secretary, Union Ministry of Home Affairs claiming that the records are connected with and had a bearing on the national security and friendly relations with foreign countries whereupon the High Court summoned and perused the documents and the cassettes, *held*, the documents and cassettes had no bearing on the national security; privilege not allowed but the High Court nevertheless declined to allow the writ on the ground that the High Court could not interfere till the investigations have been concluded: 1995 Cr.L.J. 1976 (Ker.) (D.B.).

Accused has no right to free or certified copies of statements made during investigation of different offences: 1967 Cr.L.J. 1552: A.I.R. 1967 Ori. 189.

When privilege was claimed in respect of two letters of the Superintendent of Police to the Deputy Inspector General of Police, Enforcement, summoned as evidence to claim damages for wrongful detention by the State Government under the Defence of India Rules, 1962 by affidavits of the Home Secretary and the Chief Minister and the Court directed the Chief Minister to appear in the Court for examination and the Court at the instance of the State directed the trial Court to consider affidavit of the Home Secretary, if any clarification is needed and call for further clarifications by affidavit from him and if still necessary, from the Chief Minister: (1979-80) 84 Cal.W.N. 751.

Where an employee of a public limited Company whose Directors were being prosecuted for indulging in black marketing and whose statement was recorded during investigation and who provided certain material which was taken into custody, copies where of were submitted along with the police report under S. 173 of the Code of Criminal Procedure contended on being summoned as a prosecution witness that he was a mere informant, not a witness, and his secrecy should not be exposed and relied upon under S. 123, *held*, the contention was misconceived; S. 123 was not attracted: (1985) 2 Bom.C.R. 469.

Where a foreign candidate was denied admission in the medical course even when he had secured higher marks than another student who was admitted but not impleaded in the writ petition and there were also other candidates getting even higher marks but not admitted, *held*, though no relief in the circumstances could be granted, it is high time for the Central Government to frame guidelines for admission of foreign student even if the current scheme contemplates admission on merit or recommendation; the Government may not claim privilege in such matters under Ss. 123 and 124 by filing affidavits. [A.I.R. 1982 S.C. 149; A.I.R. 1961 S.C. 493, Rel. on]: A.I.R. 1994 Mad. 204.

Section 124—Synopsis.

[*See* also Notes under S. 123.]

1. Scope and applicability.
2. Relative scope of section 123 and section 124.
3. Privileged official communication.
4. Public officer.
5. Public interest.
6. Duty of officer claiming privilege.
7. Powers and duties of Court.
8. Failure to claim privilege—Effect.
9. Miscellaneous.

S. 124 must be construed liberally so that its ambit comprehends every communication made to a public officer in official confidence; the section speaks of communications made to a public officer; it does not indicate as to who should be the communicator; he can be any one, whether a private citizen or another public officer: (1973) 1 An.W.R. 31: (1972) 2 An.L.T. 202: 1973 M.L.J. (Cr.) 52: 1973 Cr.L.J. 931(D.B.).

The heart of the matter under S. 124 whether the disclosure of the communication made in official confidence would amount to betrayal of the person who made the communication under a *bona fide* and honest impression that neither the source nor the contents of the communication would be published; the object of the section is to enable the public officer to discharge duties in the interest of the general public; if he is unable to keep it from the public view, informants would stop coming to him to give him voluntary information in confidence: (1973) 1 An.W.R. 31: (1972) 2 An.L.T. 202: 1973 M.L.J. (Cr.) 52 : 1973 Cr.L.J. 931 (D.B.).

Privilege claimed in respect of certain document—Contention that only Receiver of document is debarred from producing it and S. 124 does not prevent producing that document from sender—Contention, *held*, could not be accepted because that would completely put at naught provisions of S. 124: 1967 Cur.L.J. 488.

State cannot claim privilege against probity of conduct of public servant in issue to screen his conduct from judicial scrutiny: 1968 Lab.I.C. 804: A.I.R. 1968 Punj. 255. In a proper case an Income-tax Officer can claim a privilege: A.I.R. 1961 Ker. 32. *See* also A.I.R. 1971 Andh. Pra. 196: (1970) An.W.R. 323; 1972 Raj.L.W. 433: 1972 Cr.L.J. 1496 [Privilege can be claimed by the Minister or his secretary in the form of an affidavit.]

Citizen has a right to know about the activities of the State, the instrumentalities, the departments and the agencies of the State. The privilege of secrecy which existed in the old times, does not survive now to a great extent. The State can impose and should impose the reasonable restrictions in the matter like fundamental rights where it affects the national security and any other allied matter affecting the nation's integrity. But this right is limited and particularly in the matter of sanitation and other allied matter every citizen has a right to know how the State is functioning and why the State is withholding such information in such matters: A.I.R. 1988 Raj. 2.

A privilege extends only in a communication upon the subject with respect to which the privilege extends and the privilege can be claimed in exercise of the right or safe guard of the interests which creates the privilege: 1970 Cr.L.J. 1266: A.I.R. 1970 S.C. 1372: (1970) 1 S.C.C. 590.

Ss. 123, 124, 162 have to be read together while deciding the question of privilege relating to evidence of unpublished official records relating to any affairs of the State or confidential communications to Public Officers. While issuing rule *nisi* there is no question of any witnesses being summoned to produce a document which is in his power and any objection being taken at the time when it is produced by the witness. The question of examining witness in a writ proceeding as in the case of civil action does not arise. All that the Court does when it issues the rule *nisi* is to call for the records and not any witness to give any evidence as the contents of the unpublished official records. The privilege, claimed under S. 123 is based on public policy as being detrimental to public interest or service. Even in a civil action as distinguished from an action under Art. 226 the questions that usually arise are whether the documents in respect of which privilege is claimed is really a document relating to the "affairs of State" and whether the disclosure of its contents would jeopardise the public interest. In other words the interests of the State prevails over the interest of an individual if by producing the documents in respect of which privilege is claimed, it would cause injury to the interest of the State or its services.

Care has, however, to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provisions of S. 123.

The foundation for the privilege is injury to public interest. The expression "affairs of State" is of very wide amplitude and it will cover every business activity of the State so as to take in even day-to-day routine administration as also highly confidential matters pertaining to Defence, Foreign Affairs, Cabinet minutes or what advice was tendered by

the Minister to the Governor specified in, Art. 163(3) secret services and the like. Therefore, the activities of a democratic welfare State extend to so many fields and all such activities can be brought within the broad meaning of the compendious expression "affairs of State". It only shows that any document relating to any affairs of State cannot partake the character of a privileged document, the disclosure of which would not be without possible injury to the public interest.

The extraordinary powers under Art. 226 of the Constitution are indeed "very high and transcendent" and the writ should run so as to reach injustice wherever it is found and that can be achieved only when the records called for are submitted to the Court for its scrutiny and perusal.

A judicial check or review far from affecting the interests of the public service, would protect them against arbitrary or illegal actions of or interference by the Ministers or other superiors.

Having regard to the extraordinary jurisdiction conferred on the High Court under Art. 266 of the Constitution, no general blanket protection can be given to the State and it is for the High Court to ultimately decide notwithstanding the objection raised by an officer or a Minister claiming privilege, the nature and class of the documents and the decision of the Court shall prevail: (1970) 2 An.W.R. 323: A.I.R. 1971 Andh. Pra. 196 (D.B.).

It is not proper for an authority claiming privilege to claim privilege without considering particular papers and then coming to a decision whether privilege should or should not be claimed: I.L.R. 14 Luck. 351: A.I.R. 1939 Oudh 65. S. 124 is designed to prevent the knowledge of official papers beyond that circle which would obtain knowledge of them in confidence whether the confidence was express or implied. As the object is to prevent the disclosure of things not known outside that circle which is in confidence, the section has no application when once there has been a disclosure to what may be called a member of the public to whom the contents of such papers has not been made known in confidence: I.L.R. 14 Luck. 351: 1938 O.W.N. 1354.

A party to an action who had made a communication to the Government or to a Head of the Department of the Government is entitled to ask for its production. The Government or the Head of the Department has no right to claim any privilege in respect of such a document: A.I.R. 1961 J.&K. 20.

Where in a criminal trial, the Court summoned the statements of private persons recorded by the Customs Authorities, undoubtedly officers of the Revenue and certainly not Police Authorities, *held*, no privilege in respect of the summoned documents could be claimed; such information as a class is not entitled to immunity under S. 124: 1989 Cr.L.J. (N.O.C.) 28 (Mad.).

It is indeed detrimental to the interests of a democratic welfare State to disclose or divulge the names of spies, decoys or informers as well as the contents of the document or information which are confidential in nature. Very many citizens would refrain from giving any information relating to offences against the State to the concerned public officers for fear or dislike of being mixed up in enquiries, if such information is required to be published or produced in a Court of law. The fear of reprisals on the part of the criminals sought to be looked is also a valid ground to withhold the contents of such information. [(1962) 1 An.W.R. 256 at 259, Expl.; A.I.R. 1954 Mad. 278; 1967 Cr.L.J. 1232; A.I.R. 1970 Raj. 118, Rel. on]: (1973) 1 An.W.R. 31: (1972) 2 An.L.T. 202: 1973 M.L.J. (Cr.) 52: 1972 Cr.L.J. 931 (D.B.).

Whether a document was made in official confidence or whether public interest would suffer by its disclosure are questions of fact: (1983) 1 Ren.C.R. 389 (Del.).

Appointment of some officers or their discharge on ordinary grounds of ineptitude or corruption cannot be said to involve matters relating to determination and execution of public policy. Therefore, mere expression of opinion of various hierarchy of officers on the file as to the suitability or unsuitability of a particular candidate for a post and the results obtained by such candidate in any examination held for appointment to that post, are normally not matters which would affect the efficient administration of public affairs: (1975) 41 Cut.L.T. 363: (1973) 1 Cut.W.R. 661.

The statement of a person recorded under S. 164 of the Code of Criminal Procedure in the course of investigations cannot be deemed to be an unpublished official record and is not subject to the bars of Ss. 123 to 125: (1985) 2 Bom.C.R. 469.

Production of State documents—Claim for privilege—Difference between provisions under C.P.Code and Evidence Act: 1957 Cr.L.J. 134 (Madh. Pra.).

For the application of S. 124, Evidence Act, the first question which has to be decided is whether the communication which is to be disclosed was one made to the officer in public confidence.

Where the previous statements of the witnesses were made in the proceedings under S. 7, Police Act, in the presence of the complainants, and in the subsequent case against the complainants themselves, those statements were required for contradicting those very witnesses. *Held*, that it was neither the communication made in official confidence nor was it one affecting the public interest. S. 124, therefore, was not applicable: 1959 Cr.L.J. 1035: A.I.R. 1959 All. 543.

Provisions of section apply to and govern trial of an election petition: 1967 Cr.L.J. 691: A.I.R. 1967 Andh. Pra. 155.

Communications made in official confidence—Section is intended to protect not only communications by one public officer to another but also communications by private person to public officer: (1966) 2 M.L.J. 529: 1966 M.L.J. (Cr.) 861: 1967 Cr.L.J. 1232: 1966 Mad.L.W. (Cr.) 168.

Right to claim privilege—Available only to public servants and not to private parties: 1968 M.L.J. (Cr.) 632: (1968) 2 M.L.J. 393: 23 S.T.C. 255.

A co-operative society, not having been created by statute, is not a statutory body; thus, it is not entitled to claim privilege under S. 124: 1984 M.L.J. (Cr.) 127.

Defence is not entitled to make fishing enquiry into papers and records of prosecuting agency when they have no definite allegation to make: 1968 Cr.L.J. 1584: A.I.R. 1968 Bom. 400.

Official communications—Privilege claimed by State Government in respect of—Procedure: A.I.R. 1963 All. 415.

Where the plaintiff wanted certain documents to be summoned and admitted in evidence but the defendant objected to it on the ground that said documents were privileged documents under S. 57 of the Madras General Sales Tax Act, 1959 and therefore, they could not be marked in evidence, *held*, the Court is duty bound to consider whether such documents are prohibited under S. 57(1) of the Act and decide whether they should be admitted or not. Neither the officer can disclose nor the Court can summon and admit in evidence any of the documents that are prohibited by S. 57 of the said Act: (1973) 86 Mad.L.W. 704.

2. Relative scope of section 123 and section 124.—(*See* also S. 123, Note 4, *supra*). A privilege can be claimed for unpublished official records under S. 123 or official correspondence under S. 124; when privilege is claimed under S. 123, the Court has to hold a preliminary enquiry to ascertain whether or not the document relates to affairs of the State for which purpose the Court should direct the parties to file their affidavits, desirably of the Head of the Department or, may be, even of a Minister, disclosing why the document relates to the affairs of the State. On the Court being satisfied on the point, the document is excluded; otherwise it may itself inspect the document and decide whether to accord or withhold privilege; if the document is partially inoccuous, it may be produced in evidence after sealing other parts of the document. However, for the purposes of S. 124 the objection need not be raised by the Head of the Department; it may well be raised by the public officer; the objector must contend that the communication was made in official confidence which is to be determined by the Court, not by the public officer. But the Court must decide whether the documents falls within the ambit of S. 123 or S. 124: A.I.R. 1978 N.O.C. 253: 1978 Rajdhani L.R. 345.

3. Privileged official communication.—Courts have adopted a basic principle for deciding whether a particular document is a communication made in official confidence to a public officer or not, *viz.*, whether the document produced or the statement made was under the process of law or not. If the former is the case it would be difficult to say that a document produced or statement made under the process of law is a communication made in official confidence. If on the other hand, a document is produced or a statement is made in a confidential department enquiry not under process of law but for the gathering of information by the department for guiding them in the future action if any they have got to take, it would be a

case of communication made in official confidence. (Communication held covered by S. 124): (1953) 66 Mad.L.W. 927: A.I.R. 1954 Mad. 278.

Communications made in official confidence by a subordinate officer to his superior officer in the discharge of his official duties must be taken as belonging to the class of documents which the public interest would require to be regarded as privileged: A.I.R. 1961 J.&K. 20.

A distinction has to be drawn between cases: where two citizens engage in civil litigation and want official communications to be disclosed at the time of the trial, and cases, in which the State has entered into a commercial transaction with a private citizen in the course of which the State has made certain communications pertaining to the cases in which it is interested as a defendant or a plaintiff. In the former case, the State not being interested either way, a Government officer is expected to keep before himself only the interests of the public before a privilege is claimed. But in a case in which the State itself is a party, the Court must be satisfied that the mind of a responsible officer of the Government has been applied to the question as to whether the safety of the public interests warrants giving or withholding of the information. The Court must also be convinced that the privilege is not claimed to avoid inconvenient disclosures which may tell against its own side in the litigation or as a matter of mere departmental routine. In order that a Court should arrive at the finding that the communications were made in official confidence whose disclosure would cause public interest to suffer, it has got to be seen whether this disclosure would be injurious to national defence, or to good diplomatic relation, or for the proper functioning of the public service, so as to allow those documents to be kept as secret. The bare fact that the production of the documents might adversely tell upon the fortunes of the litigation would not be sufficient to hold that the documents were made in official confidence and that there disclosure would affect adversely the interests of the State. Communications made by one officer to another in matters which arise out of commercial relations which subsist between the State on the one side and a private citizen on the other cannot be treated as communication made in official confidence: 10 J.&K.L.R. 17: A.I.R. 1954 J.&K. 11. But *see infra*. A communication made by one Secretary to the Government to another Secretary to the Government is a communication in respect of which privilege can be claimed. Such inter-departmental correspondence cannot be compelled to be produced. But any correspondence which passed between an officer of the State and the petitioners must be produced when summoned: 1959 M.L.J. (Cr.) 304: (1959) 1 M.L.J. 288 .

It does not behove the State Government to keep back even any such document, the production of which may possibly not be in its own interest, yet necessary for a just decision of the case. Withholding of documentary evidence for a litigant, professed and held to be a virtuous, can hardly be said to be desirable. Thus, where the respondent instituted a suit for declaration that he was entitled to the salary of the trained Graduate Teacher from June, 1963, as he had acquired the requisite qualification at that time and he referred to a memo issued by the State Government and addressed to the Accountant General, informing him that Graduates, who have passed C.T. examination, would be treated as trained Graduate Teachers entitled to a certain scale of pay but the appellate State failed to produce said document and pleaded it to be a "privileged document," *held*, State could not claim privilege in respect of said document. [A.I.R. 1974 S.C. 130; A.I.R. 1979 S.C. 1144, Rel. on]: A.I.R. 1987 Madh. Pra. 156.

Before any official communication can be clothed with privilege of secrecy in terms of S. 124, it has to be shown that the said communication was made in official confidence and that the concerned officer to whom it is made considers that the public interest would suffer by its disclosure. Thus, where after occurrence of the fatal accident in question, defendant, Oil and Natural Gas Commission, itself appointed a domestic commission of inquiry of competent officers and directed them to go on the spot and find out as to how the accident occurred and to suggest ways and means for avoiding such accidents in future and every aspect of it was made public and inquiry was made on the spot but, subsequently, commission claimed privilege from disclosing inquiry report of the committee, *held*, disclosure of the findings of the inquiry committee in its report was emminently in public interest; there was no

official confidence or secret permeating round the said report. Thus, the report in question could not get benefit of S. 124. [A.I.R. 1939 Bom. 237, Rel. on]: (1986) 6 Guj.L.H. 27: (1985) 26 Guj.L.R. 1315 (D.B.).

An advice from his Advisor to the Governor during the President's rule is equivalent to a Minister's advice to the Governor under Art. 163(3) of the Constitution of India; it is protected from the purview of the Court; it is hit by the bar contained in Ss. 123 and 124; merely because it had been published in newspapers does not make them anytheless privileged: (1989-2) 96 Punj.L.R. 304.

Resolution of Government containing opinions of Government officers whether privileged: (1926) 28 Bom.L.R. 1213: A.I.R. 1926 Bom. 590. Correspondence between President of Municipal Council and Secretary to Government is privileged. Nor could secondary evidence from the President be got: 6 Mys.L.J. 453.

A confidential report submitted as the result of a confidential order of an officer to enable him to take departmental action, is a privileged document falling within the purview of S. 124 of the Evidence Act. Nor is such a document admissible under any section of the Evidence Act: 28 Sind L.R. 274: A.I.R. 1935 Sind 50.

Petition under Art. 226 of the Constitution—Hearing of—Inter-departmental communication—Reference to—Claim of privilege—Not made in proper form by proper authority disclosing reasons—Claim not entertained (Constitution of India, Art. 226): 1968 Lab.I.C. 1055: A.I.R. 1966 Ker. 230.

S. 162 enables Court to inspect document or take other evidence to determine its admissibility—Court inspecting document in question and allowing claim for privilege—*Held*, on perusing the document that it was made in official confidence, was marked secret and contained some material outside of the enquiry and since further enquiry meant further waste of time in an already long-drawn-out trial, the lower Court was right in allowing claim for privilege: 1968 Cr.L.J. 1584: A.I.R. 1968 Bom. 400.

Communications to public officer in official confidence—Cable addresses and cables sent to those addresses are not communications to public officer in official confidence—Court acts wrongly in allowing the claim of privilege from production made by the Telegraph Check Office: 1970 Cr.L.J. 9: A.I.R. 1970 S.C. 45: (1970) 1 S.C.R. 130.

Acknowledgment made in official confidence—Value of. *See* A.I.R. 1958 Raj. 110.

Statements made to a station master of State Railway not made in official confidence is not privileged: A.I.R. 1929 Oudh 543.

Defamation—Complaint made to Police is absolutely privileged: (1968) 81 Mad.L.W. 505: (1969) 1 M.L.J. 338.

Accused has no right to free or certified copies of statements made during investigation of different offences: 1967 Cr.L.J. 1552: A.I.R. 1967 Ori. 189.

Where an enquiry is one under S. 176, Cr.P.Code, copies of depositions of witnesses taken in such an enquiry should be furnished to the accused. The fact that the enquiry under P.S.O. 145 is not a statutory enquiry would not then really affect the question. It cannot, however, be said that every enquiry, under P.S.O. 145 is in respect of an enquiry under S. 176, Cr.P.Code, which relates only to cases of suspicious death. The question whether a party would be entitled to copies of documents in the enquiry under P.S.O. 145, would, therefore, depend on the facts and circumstances of each case. For that purpose the nature of the enquiry under P.S.O. 145 should first be determined and then the statement of every witness considered individually to find out whether they were made in official confidence.

Where a criminal case arising out of an occurrence was started against the accused and the same occurrences also formed the subject of an enquiry under P.S.O. 145, and the enquiry was held in open and witnesses were examined in the presence of others and there was nothing to indicate that any communications were made by any witness in official confidence to the officer conducting the enquiry, *held*, that the question of privilege under S. 124 did not arise and the accused were entitled to copies of statements of witnesses: 1966 Mad.L.W. (Cr.) 168: (1966) 2 M.L.J. 529: 1966 M.L.J. (Cr.) 861: 1966 Cr.L.J. 1232.

Enquiry by C.I.D. Inspector—Statements of witnesses recorded by, during enquiry—If documents relating to affairs of State or communications made to public officer in official confidence—Privilege, if available: 1982 Cr.L.J. 393 (Andh. Pra.).

4. Public officer.—Public officer is an officer with public as opposed to private duties who receives communications made to him in official confidence of such a nature that disclosure in certain cases would injure the public interests. The Court of Wards, for the purposes of S. 124, is to be considered as a Government office and its officers public officers: I.L.R. 14 Luck. 351: A.I.R. 1939 Oudh 65. Whether President of the Municipal Council is a "public officer": 6 Mys.L.J. 453.

Though public officer is not defined under the Act, all officers who in discharge of their regular duties receive communications made to them in official confidence and are expected not to disclose confidential information to others must be held to be "public officers" within the meaning of S. 124: 1973 M.L.J. (Cr.) 52: (1973) 1 An.W.R. 31: 1973 Cr.L.J. 931: (1972) 2 An.L.T. 202.

The term "public officer" as used in the Evidence Act can be assigned to this term in S. 2, C.P.Code. The duties of the Vice-Chancellor of the Punjab University are undoubtedly of a public character as they concern the regulation of educational activities in the Province, and the Vice-Chancellor when performing these public duties is acting as a public officer within the meaning of S. 124 of the Evidence Act: I.L.R. (1946) Lah. 561: A.I.R. 1946 Lah. 220 (D.B.).

The agent of a Railway Company is not a public officer as defined in S. 2(*e*), C.P. Code, although he has power under S. 131 of the Railways Act to arrest certain persons for offences committed on the Railways. He cannot, therefore, object to produce documents in his possession under S. 124: I.L.R. (1939) 2 Cal. 46: A.I.R. 1939 Cal. 286.

Whether station master of State Railway is a public officer: 6 O.W.N. 937: A.I.R. 1929 Oudh 543.

Privileged documents or communications—Privilege can be claimed when communication has been made to a public officer in official confidence and the officer concerned must feel or be satisfied that public interest would suffer if disclosure of communication in question is made. Thus, Divisional Manager of a Bank being neither a public officer nor had the privilege been claimed by him in his official capacity, *held*, disclosure or production of summoned documents could not be said to be likely to injure any public interest: (1991) 1 Rev.L.R. 205.

5. Public interest.—A mere mechanical repetition of the words that the production and disclosure of the document would injure public interest or would be prejudicial to the public interest would not be sufficient. It is for the Court to satisfy that there was a real danger of some injury being caused to the larger public or national interest by the production or disclosure of the documents in question: (1989) 3 An.L.T. 275.

Where in a suit by the contractor for enhanced payment of the contract work, he wanted the State to produce two documents, *i.e.*, (*i*) the estimate prepared by the Superintending Engineer pursuant to the plaintiff's request for enhanced rate, and (*ii*) recommendations of the Chief Engineer to the Government based on his report, *held*, these documents had nothing to do with public interest; they were vital documents for the litigation between the parties; thus, the Government could not claim privilege in respect of these documents: A.I.R. 1971 Ker. 228: 1971 Ker.L.J. 278.

Where in a suit for damages for breach of the terms of a licence which conferred the right on the plaintiff to fish for and take away *chank* shells from the sea off the coasts, interdepartmental communications and reports sent by the Assistant Directors of Fisheries to the Deputy Director showing the price for computing the damages were sought to be used as evidence, *held*, they could not be excluded from consideration as no question of public importance or public interest was involved in the reports: (1979) 92 Mad.L.W. (S.N.) 29 .

Official communication — Privilege — Non-disclosure necessary for proper functioning of public service—Production not ordered: 1969 Lab.I.C. 974: A.I.R. 1969 Del. 246.

Where on the Department seizing certain papers on search, it was agreed to between the assessee and the Income-tax Authorities that agreed assessment would be made on that basis and no penal action would be taken and when penal action was initiated against the assessee despite promise and he sought production of records embodying that agreement and privilege was claimed by the Department, *held*, the assessing authorities have to act judicially and independently;

they cannot act on the advice of outsiders even if higher in rank in the official hierarchy; those communications were against law and their disclosure could have no adverse impact on the public interest: (1974) 95 I.T.R. 523 (All.) (D.B.).

Where the Department acted not only on the basis of an anonymous information, but also on the basis of some more signed letters received by it on the issue and the signatories of those other letters not only gave their names and addresses but some of them even sent reminders to make inquiries about the resultant action taken by the Department on their tips, *held*, the public interest privilege claimed by the Secretary in the Ministry of Finance was to be upheld: 1985 Cr.L.R. (Guj. & Mah.) 309.

Where contraband gold was seized on the basis of information furnished by a private person and recorded by the Assistant Collector, Central Excise and Customs and the Department claimed privilege under Ss. 124 and 125 on the grounds that the information was strictly confidential and its disclosure would injure public interest, *held*, since the Government or the public officer is the sole judge of public policy or public interest, the privilege was rightly allowed: (1973) 1 An.W.R. 31: (1972) 2 An.L.T. 202: 1973 M.L.J. (Cr.) 52: 1973 Cr.L.J. 931 (D.B.).

Where privilege claimed against production in Court of a summoned document was supported by the affidavit of the Secretary to the Government of India in the concerned Ministry gave a gist of the Intelligence reports against an Air India Pilot, quoted the numbers of the files comprising reports of his Ministry as well as the Ministry of Home Affairs as also of the Intelligence Bureau, *held*, the Court found no reason to look into the documents and allowed the privilege not because the affidavit was of a high officer but because he seemed to be aware of the seriousness of the case: A.I.R. 1988 Bom. 416: (1988) 3 Bom.C.R. 292.

6. Duty of officer claiming privilege.— S. 124 confers right on the public officers to claim privilege from disclosure of confidential communications. But before exercising that right, the officer concerned must come to the conclusion that the disclosure of such document would be detrimental to the public interest. He is the sole judge to decide that fact but his decision should not be arbitrary or capricious. He should not claim privilege merely because such disclosure would either advance the case of the adversary or damage his case. The only relevant consideration which should weigh with him is that the disclosure of such document would prejudice the public interest. If he honestly comes to the conclusion that it would adversely prejudice the public interests, he in exercise of the discretion vested in him should claim privilege from disclosing such document. But exercise of such privilege should not be abused. S. 124 should in no event be resorted to as a cloak to shield the truth from the Court: (1967) 69 Bom.L.R. 878: 1968 Mah.L.J. 126: A.I.R. 1968 Bom. 322.

For the purpose of S. 124, communication has to be made to the public officer who considers that the public interest suffers by its disclosure. It is for the Court to decide whether or not a particular document for which privilege is claimed was a communication made to a public officer in official confidence and if the Court decides that it was so made then it has no authority to compel the public officer to produce it, because the public officer himself is the sole judge as to whether its disclosure would or would not be in the public interest. Where the statement contained in a document was not intended to be made public, it must be said that it was made in official confidence. It is not, however, enough for the public officer to merely claim privilege. He must apply his mind to the question whether public interests are likely to suffer by the disclosure of the contents of the document called for; and only if he considers that public interest would suffer by such disclosure that the Court would grant privilege: (1939) 41 Bom.L.R. 391: A.I.R. 1939 Bom. 237.

On an application of a party for the production of documents in the custody of a Governmental Department, summons should be issued to the Head of the Department concerned. He must, therefore, apply his mind to the documents sought to be disclosed and come to his own conclusion whether public interest would or would not suffer by such disclosure. He has then to claim privilege if he chooses to do so by means of a communication, preferably in the form of an affidavit, claiming privilege and sufficiently indicating why he is claiming privilege. It is also desirable, but not indispensable that the records should be sent in a

sealed cover through an officer of the Department claiming privilege. The statement of the Head of the Department would be considered conclusive unless for compelling reasons to the contrary and the privilege will be upheld. In any event, it is the duty of the Court to apply its own mind as to whether the claim is not arbitrary and capricious and if need be it would be open to the Court to look into the document and come to its own conclusion: A.I.R. 1953 Mad. 228: (1952) 2 M.L.J. 375.

Under S. 124, whether the communication in question was made in official confidence is a matter for the Court to decide and whether the public interests would suffer by its disclosure is for the public officer to decide. But the public officer before claiming protection under S. 124 must come to a positive conclusion that by the disclosure of the communication, public interests would suffer. He cannot claim the protection of S. 124 on any other ground. It is also necessary that the privilege in question should be claimed by the official concerned. Where the official concerned has not directly claimed any protection under S. 124 nor was the Court informed that the disclosure of the documents called for would affect public interest no foundation is laid for claiming the privilege in question. Whether a statement is made in official confidence or not is a question of fact. Merely because a communication is made to a public official voluntarily, it cannot be said that it is made in official confidence: A.I.R. 1960 Mys. 186.

Where in a suit for recovery of money for construction of a minor irrigation work, the State justified deductions and altogether denied its liability and on letters written by and to the departmental officers, the State claimed privilege by an affidavit of the Secretary of the Department which merely expressed the apprehension that their disclosure would hurt and be prejudicial to the public interest but without disclosing the reasons underlying his apprehension, *held*, no privilege could be allowed on such an affidavit; the affidavit should have indicated briefly and within permissible limits the reason for the apprehension, even more so when the documents *prima facie* are of commercial character and pertain to the State's commercial activities; the State, despite being allowed one and a half years time, did not produce the documents for the High Court's inspection. [A.I.R. 1961 S.C. 493; A.I.R. 1964 S.C. 1658; A.I.R. 1975 S.C. 865, Rel. on]: A.I.R. 1979 Raj. 221: 1979 Raj.L.W. 366.

7. Powers and duties of Court.—S. 124 leaves it to the Court to consider whether a communication is of the nature covered by the section, *i.e.*, the Court has to decide whether the section can be applied. If it does, the Court has to exclude the document if the public officer concerned considers that the public interests will suffer by disclosure. The Court cannot question his decision on that point. Where the communication or document is a confidential one not intended to be revealed to the public but only to the person to whom it is addressed and to such persons to whom the officer concerned thinks fit to send it, it must be held to be a privileged document: (1943) 56 Mad.L.W. 74: (1943) 1 M.L.J. 154.

Where privilege is claimed under S. 124, the first and essential duty of the Court is to satisfy itself that the communication in question is one made in official confidence. Once the Court comes to the conclusion that the communication in question is one made in official confidence, the Court practically vanishes from the picture and it is for the public officer concerned to decide whether the document should be disclosed or not. The Court had nothing to do with the question as to whether the view expressed by the officer that public interest will suffer by such disclosure is correct or not.

Obiter: —It cannot be urged that no plea of privilege can be claimed when a report (the communication in question) is submitted on the basis of the provisions of the statute or the rules thereunder: 1964 Ker.L.T. 493: I.L.R. (1964) 2 Ker. 83: 1964 Ker.L.J. 762.

Whether a communication was made in official confidence, is a matter subject solely to judicial decision and if once the Court comes to the conclusion that the communication has been made not in official confidence, then the public officer to whom the communication has been made has no other alternative but to produce the documents, irrespective of the fact that in his opinion the interests of the State would suffer by such a disclosure. If, however, the Court comes to the conclusion that the communication was made in official confidence, then it is for the officer alone to whom the communication

has been made to decide as to whether the document should be produced or not. If he elects not to produce it, the Court cannot compel him to produce: 10 J.&K.L.R. 17: A.I.R. 1954 J.&K. 11.

The question whether a communication was made in official confidence is for the Court to decide. But the public officer concerned is the sole judge of whether it should or it should not be disclosed. The Court may adopt any procedure that it considers suitable in the circumstances to satisfy itself whether the document for which the privilege is claimed is a communication made in official confidence. This the Court can do by going through the entire file. It would be better if it is made more explicit by the Court after going through the file that it found that the documents in question were communications made to a public officer in official confidence. Then it would not be necessary for the Court to express its supererogatory opinion whether it agreed or did not agree with the Collector that the communication should not be disclosed because the public officer concerned is the sole judge of whether it should or it should not be disclosed: (1953) 66 Mad.L.W. 927: A.I.R. 1954 Mad. 278.

Where documents summoned relate to the security of the State, national defence, foreign relations, cabinet decisions and high national policies and privilege is sought, the Court would treat the executive's opinion as conclusive; the decision best left to be made by the executive, for the Court is not the proper place to adjudicate upon such matters. However, on other confidential documents such as confidential reports, etc., about the Government servants, the Court may decide whether privilege should be allowed or not: A.I.R. 1977 N.O.C. 243: I.L.R. (1976) 2 Del. 667.

When privilege is claimed in respect of a document on the ground of public interest, *held*, the Court is entitled, indeed bound, to insist upon its production and inspection with a view to determine whether it relates to the affairs of the State and whether the disclosure of its contents would be prejudicial to public interest; while so doing, the Court would give due weight to the opinion of the executive on the point-which is, however, not conclusive. But it would strike a balance between the requirements of public which demands on the one hand that evidence should be held back and that, on the other, it should have all relevant material before it to do justice to the case; it is only when the former outweighs the latter that the Court would grant privilege: A.I.R. 1977 N.O.C. 243: I.L.R. (1976) 2 Del. 667.

Production of State documents—Privilege when can be claimed—Duty of Government Officer—Power of Court: 1957 Cr.L.J 134 (Madh. Bh.).

The Magistrate should not disallow the claim of privilege without perusing the documents themselves. There may be portions of the document which cannot be disclosed without injury to public interest. Public interest should not be allowed to suffer on account of the objectionable conduct of the prosecution before the Magistrate in not bringing the documents before the Court and also in putting forward their claim of privilege piecemeal: 1957 M.L.J. (Cr.) 19: I.L.R. (1957) 1 An.W.R. 106: A.I.R. 1957 Andh. Pra. 486.

8. Failure to claim privilege—Effect.—Where privilege under S. 124 was not claimed in the trial Court in respect of documents summoned, *held*, the High Court declined to interfere under Art. 226 of the Constitution; the correct procedure was to first claim the privilege in the trial Court: 1989 Cr.L.J. (N.O.C.) 28 (Mad.).

9. Miscellaneous.—Where a foreign candidate was denied admission in the medical course even when he had secured higher marks than another student who was admitted but not impleaded in the writ petition and there were also other candidates getting even higher marks but not admitted, *held*, though no relief in the circumstances could be granted, it is high time for the Central Government to frame guidelines for admission of foreign student even if the current scheme contemplates admission on merit or recommendation; the Government may not in future claim privilege in such matters under Ss. 123 and 124 by filing affidavits. [A.I.R. 1982 S.C. 149; A.I.R. 1961 S.C. 493, Rel. on]: A.I.R. 1994 Mad. 204.

Where Board of Revenue relying upon the report of the Deputy Commissioner refused to grant liquor licenses to the respondents though said report was not shown to them, *held*, the Board could not be compelled to disclose the report to respondents as it was

[1][125. **Information as to commission of offences.**—No Magistrate or Police Officer, shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Explanation.—"Revenue Officer", in this section means any officer employed in or about the business of any branch of the public revenue.]

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1. Substituted by Act 3 of 1887, S. 1, for the original S. 125.

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confidential in nature. Further, respondents never made a demand for a copy of the report, and even if such a request was made, the Board would have been fully justified in not furnishing the same. Such a refusal would not amount to denial of natural justice for the obvious reason that the rules of natural justice must necessarily vary with the nature of the right and the attendant circumstances. The grant of liquor licence was not a matter of right but merely in the nature of privilege. [1983 Tax. L.R. (N.O.C.) 114; (1983) 2 Gau.L.R. 78, Reversed]: A.I.R. 1984 S.C. 898: (1984) 2 S.C.C. 488: 1984 U.J. (S.C.) 417.

Trial for offence of theft and conspiracy in Court-martial—Reports of Security Officer and CBI not allowed to be inspected by accused nor produced on record under cover of privilege under Ss. 123 and 124—Effect: 1983 Cr.L.J. (N.O.C.) 109 (Del.).

Section 125—Notes.

Scope of section.—S. 125 entitles a Police Officer to refuse to disclose the source of his information as to the commission of any offence, while public policy demands that no adverse inference be drawn against the prosecution for withholding an informer from the witness-box: 1959 All.L.J. 519: 1959 Cr.L.J. 1274: A.I.R. 1959 All. 727. S. 125 contemplates only the prohibition of the source from whom the Magistrate or the Police Officer got information as to the commission of the offence and not as to the custody of any documents or other material objects, that might have been seized in the course of investigation and that might be tendered in evidence in support of the commission of the offence: (1954) 2 M.L.J. 239: A.I.R. 1954 Mad. 1023. Only source of information to the Police is privileged and thus detail can be elicited: (1987) 3 Crimes 91 (Mad.).

S. 125 rests upon policy and it protects the name of a spy or information not the nature of the information and it has no application to an informant who lays a sworn informant and thereby initiates criminal proceedings. This rule is clearly applicable to gambling cases: 16 Cr.L.J. 447; 8 S.L.R. 309.

The copy of F.I.R. which is statutorily required to be furnished to the accused under S. 173, Cr.P.Code to enable the trial to commence, cannot be treated as a "privileged" document. The material section indeed is S. 125, but scope thereof is clear and narrow. It secures privilege for a "Magistrate or Police Officer" to refuse to "say whence he got any information as to the commission of any offence". The "privilege" contemplated under S. 125 is merely in respect of the source of the information, and not to the content of the information. Besides, the identity of the informant is always disclosed in an F.I.R. under S. 154 (2): 1989 Cr.L.J. 580 (Madh. Pra.) (D.B.).

In criminal prosecutions the witnesses for the Crown are privileged from disclosing the channel through which they received or communicated information. But this privilege cannot be claimed by a detective: I.L.R. 42 Cal. 957: (1914-15) 19 Cal.W.N. 676.

Spy witnesses—Examination of, is neither necessary nor desirable: 1960 B.L.J.R. 511: 1960 Cr.L.J. 1650: A.I.R. 1960 Pat. 582.

Where the accused's demand for permission to peruse the complaint merely to ascertain the name of the informer is denied, the non-production of the complaint is not improper but privileged under S. 125: 37 I.C. 54: 18 Cr.L.J. 70.

Where rewards had been granted by the Customs Authorities to the informants whose recorded statements led the discovery of the offence, *held*, the Customs Authorities could not be compelled to disclose to the trial Court the name of the informants; the information was privileged under S. 125: 1989 Cr.L.J. (N.O.C.) 28 (Mad.).

126. Professional communications.—No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any [1][illegal] purpose;

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [2][pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

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1. Substituted by Act 18 of 1872, S. 10, for "criminal".

2. Inserted by S. 10, *ibid*.

The statement of a person recorded under S. 164 of the Code of Criminal Procedure in the course of investigations cannot be deemed to be an unpublished official record and is not subject to the bars of Ss. 123 to 125: (1985) 2 Bom.C.R. 168 (D.B.).

Section 126—Synopsis.

1. Scope and applicability.
2. Applicability to other professions.
3. Privilege is of client and not of lawyer.
4. "In the course and for the purpose of his employment".
5. "Express consent".
6. Privilege is not absolute.
7. Communication held to be privileged.
8. Communication held to be not privileged.
9. Waiver.
10. Proviso.
11. Miscellaneous.

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1. Scope and applicability.—S. 126, Evidence Act makes all communications between professional advisers like a barrister, attorney, pleader or vakil, and their clients confidential, and it is only when the clients express consent, that such a person may disclose any communication made to him in the course and for the purpose of his employment. The proviso to this section rightly provides, however, that the protection of the section will not extend to any communications made in furtherance of an illegal purpose, or to any fact showing that a crime or fraud has been committed since the commencement of the employment. It is remarkable that the obligation laid down in this section continues even after the employment is ceased: A.I.R. 1954 Raj. 241: I.L.R. (1955) Raj. 70.

On this section, *see* also I.L.R. 3 Bom. 91; I.L.R. 8 Bom. 263; I.L.R. 4 Bom. 576; 4 Bom.L.R. 460.

S. 126 of the Indian Evidence Act is enacted to prevent disclosure by an advocate of any communication made to him for the purpose of his employment as such advocate, by or on behalf of his client, or any advice given by him to his client in the course of such employment. An advocate is also not permitted to state the contents or condition of any documents with which he has become acquainted in the course and for the purpose of his professional employment. The protection against production or disclosure, however, does not extend to any original document which might have come into the possession of the advocate from his client.

If the client is compellable to produce the document, there is no reason either on principle or authority on which the advocate can refuse to produce the document. The document handed over to the advocate by

Illustrations

(*a*) *A*, a client, says to *B*, an attorney—"I have committed forgery, and I wish you to defend me".

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(*b*) *A*, a client, says to *B*, an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue".

This communication, being made in furtherance of criminal purpose, is not protected from disclosure.

(*c*) *A*, being charged with embezzlement, retains *B*, an attorney, to defend him. In the course of the proceedings, *B* observes that an entry has been made in *A*'s account-book, charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

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the client cannot be said to be privileged under S. 126, Evidence Act unless the document contains any communication made to the advocate by the client in the course and for the purpose of his employment as such advocate. Hence, a letter addressed to the client by the State Government which was alleged to be in the brief of the Counsel and of which production was sought in the present case from the advocate of the accused was obviously not a letter in respect of which any privilege could be claimed by the advocate of the accused under S. 126, Evidence Act: (1962) 3 Guj.L.R. 833: (1962) 2 Cr.L.J. 610: A.I.R. 1962 Guj. 290.

S. 126 is not restricted only to oral communications made to the pleader by the client, but extends also to facts observed by the pleader in the course of and for the purpose of his employment and he is not bound to disclose them without the consent of the client: 36 Cr.L.J. 31: A.I.R. 1934 Lah. 269.

Privilege can be claimed only when the advocate or the clients are asked to disclose any professional communication between them. Such a privilege, however, cannot be claimed in respect of a document which has already come in possession of the opposite party and has been filed on record: 1992 Cr.L.J. 319 (All.).

There is no privilege to communications made before the creation of the relationship of pleader and a client. Where two persons have a dispute about a claim made by one of them upon the other and both seek the help of a pleader, and one of them makes a statement to the pleader, the statement so made to the pleader by one of the parties is admissible. The test is whether the communication is made to the witness in his character of legal adviser. Further, in order to attract S. 126 the communications by the party to his pleader must be confidential: I.L.R. 58 Cal. 1379: A.I.R. 1932 Cal. 148.

But the mere presence of friends of clients specially when such friends occupy more or less the same position as he himself does not destroy the privilege: A.I.R. 1933 Sind 47. In an action for damages for personal injuries, copies of the case notes prepared by the hospital in respect of the plaintiff's attendance for treatment at the hospital are privileged where, when they were made, litigation was in active contemplation and they were made by the plaintiff's legal advisers to assist in advising their client in making his claim, though no privilege attaches to the original notes: (1959) 1 W.L.R. 702.

S. 126 is designed to abort the attempt to intrude into privacy of the close preserve of the fund of information conveyed by the client closetted in confidence. All information surrounding the case will be conveyed by the client to the advocate and sifting of relevant material constitutes the nucleus for preparation and make up of the case. S. 126 facilitates the client to pass on full information and material without fear or apprehension of advocate being obligated to divulge the information. In the absence of this privilege the frank disclosure by the client upon discussion will be imperilled. Absolute privilege is conferred save in situations of communications for illegal purpose or in furtherance of fraud or crime. Thus, where an advocate pursuant to the summons issued to him at the instance

of plaintiff appeared and claimed privilege on the ground that he was appearing for the defendants and he would be obligated to divulge privileged communication if he was called upon to adduce evidence, *held*, the advocate should not be called upon to give evidence in view of S. 126: (1984) 2 An.W.R. 138: (1984) 1 An.L.T. 280.

S. 126 prohibits a pleader from disclosing any communication made to him in the course of and for the purpose of his employment as such pleader. Disclosure implies that which was not already made known to others. If the communication by the client to the advocate is put in the form of a notice and that notice is produced in Court, it forms the basis of a complaint for defamation under S. 500, I.P.Code. If what is communicated by the client to the advocate is what is put in the notice then there is already a disclosure; and when such an advocate is called upon to give evidence, he is not disclosing any fact for the first time but is only substantiating what is already disclosed. S. 126, therefore, does not stand in the way of summoning the advocate for this purpose. [1935 Mad.W.N. 460, Rel. on]: (1972) 2 An.W.R. 253: (1972) 2 A.P.L.J. 62: 1972 M.L.J. (Cr.) 652.

The sending of a communication to an advocate on behalf of his client is virtually a communication made to the client himself. As such there is no publication of the imputation concerning the client. [A.I.R. 1934 Bom. 299, Rel. on]: A.I.R. 1988 Ker. 18: 1988 Cr.L.J. 124: 1986 Ker.L.T. 1361: I.L.R. (1987) 1 Ker. 547.

The Court cannot rule out the evidence of a counsel as inadmissible on the ground of the incompetency of the Counsel to be a witness: 15 Cr.L.J. 429: 12 All.L.J. 285.

The practice of employing legal advisers who are well qualified in law has recently grown up; the nature of their duty is to advise their employers on legal questions, rather on all matters pertaining to law and litigation; the same as that of barristers, pleaders, vakils or attorneys except that they do not appear in Courts. There is, thus, no reason why they should not get the same protection as the legal advisers who appear in Courts. The communications made in confidence to them by their employers or *vice versa* are protected under Ss. 126 and 129: A.I.R. 1982 Bom. 6: 1982 Mah.L.J. 798: 1982 Hindu L.R. 93.

A communication in the nature of legal advice from a law officer or law department does not fall under S. 126, it is, however, privileged to a limited extent under S. 129 and cannot be looked into as evidence if the person in receipt of the advice does not tender it as evidence; but where he sues on the basis of legal advice, the Court may compel him to disclose the advice: 1986 All.W.C. 191.

Where the salaried law officer of the Municipal Corporation had prepared a draft reply by the Municipal Commissioner to the State Government's query and neither any legal advice was sought nor given by the law officer but on the contrary the draft letter disclosed facts as they occurred, which contained shocking disclosures as to how the Corporation had been seeking to evict occupants on concocted and false grounds, *held*, the document was not a confidential communication between the client and his legal adviser; it was not entitled to any protection of law either under S. 126 or S. 129. [A.I.R. 1954 J.&K. 11 and (1972) 2 Q.B. 102, Rel. on] A.I.R. 1982 Bom. 6: 1982 Mah.L.J. 798: 1982 Hindu L.R. 93.

Where parties having a common interest engaged common lawyer and discussed matters common to both, *held*, communication could not be said to be privileged between the two persons but was privileged from disclosure at the instance of a third party: (1991) 1 Ker.L.T. 116.

Exemption from disclosure—Lawyer giving notice on behalf of his clients—Court cannot enquire into whether the lawyer had authority to act on behalf of his client—However, lawyer should satisfy himself with regard to his authority: (1979) 5 All.L.R. 302: 1979 All.L.J. 703.

The dictation given by a lawyer to his clerk and transcription made by him of a *per se* libellous matter cannot amount to publication: A.I.R. 1988 Ker. 18: 1988 Cr.L.J. 124: 1986 Ker.L.T. 1361: I.L.R. (1987) 1 Ker. 547; 1974 Cr.L.J. 1435 (Bom.); (1884) 1 Q.B. 842; (1907) 1 K.B. 371.

Issue of commission for examination on interrogatories of Counsel of a deceased party in Pakistan—Evidence sought to be adduced by interrogatories not admissible under Ss. 92 and 126, Evidence Act, and as being opposed to defendant's own pleading—Court acts without jurisdiction: A.I.R. 1963 Punj. 27.

2. Applicability to other professions.— There is no protection afforded by the Evidence Act to a doctor as such. It is his duty to assist the Court in every way possible and to disclose to the Court all the information in his possession relevant to the matter in issue: I.L.R. 55 All. 134: 1933 All.L.J. 14: A.I.R. 1933 All. 56.

Though the Act grants no special privilege to a newspaper or journal, it is undoubtedly true that the disclosure of the newspaper's source of information should not be ordered if it would be injurious to public interest; the media's freedom to investigate and report on matters of public interest is essential to a free society which makes available to the public an information otherwise not available. However, such protection can be extended only if the information or material published is of public importance, as for example, where the information relates to malpractices in a Governmental organisation; even information relating to the private life of a public figure may be of public importance if it has a bearing on his manner of discharging his duties or it reflects on his suitability for the office he occupies. But where impugned article contained comments made by different persons on the lifestyle of a film script writer and his actress wife, *held*, it could not be taken as a matter of public interest; the private life of the script writer and his actress wife may cater to the curiosity of a certain kind of reader but what is interesting to the public is not necessarily of public interest; privilege not allowed: A.I.R. 1987 Bom. 339: 1987 Mah.L.J. 689.

3. Privilege is of client and not of lawyer.—S. 126 has been enacted for the protection of the client and not of lawyer; and it is founded on the impossibility of conducting legal business without the professional assistance and on the necessity in order to render that assistance effectual, of securing full and unreserved intercourse between the two. The privilege is the privilege of the client and not of the legal adviser. The latter is, therefore, bound to claim the privilege unless it is waived by his client expressly under S. 126, or impliedly under S. 128, *e.g.*, by examining the legal adviser as to the privileged communication. A party cannot be compelled to disclose any confidential communication made to his legal adviser unless he offers himself as a witness. The privilege applies to all communications oral or documentary in the course of and for the purpose of the employment as legal adviser and the privilege continues throughout and does not get terminated by the termination of the litigation or the death of the parties. This rule, however, covers only the private and confidential communications between the client and the lawyer and which cannot be disclosed either by means of direct questions or elicited by means of indirect tactics. It does not, however, preclude the lawyer from replying to the opposite party who wants to proceed against him from stating that what all he did was in pursuance of the instructions given to him and not on his own volition. The rule under S. 126, does not require that a lawyer should vicariously make himself responsible for an offence which he never committed and in any event he will not be advancing his cleint's cause by remaining mute since in that case it is a fair inference to draw that what he did was either in violation or in excess of the instructions given to him or that he and the client conspired to defame the complainant and in which event both the lawyer and the client would find themselves in the dock, ranged as co-accused. So looked at from any point of view, the rule under S. 126 of the Evidence Act cannot cover the case of a lawyer acknowledging a notice given to him and replying that what he did was only in pursuance of his instructions and nothing more. The foundation of the rule embodied in S. 126, discussed: 1954 Cr.L.J. 1239: A.I.R. 1954 Mad. 741.

The privilege in respect of professional communication between a client and his advocate is intended only to protect the interest of the client in respect of any action of prosecution for any prior act or offence. The privilege is not intended to cases of commission of any offence. The law presumes that an advocate acts in discharge of his duty in pursuance of the instructions of his client and the protection given under S. 126 of the Evidence Act is restricted by the provisions contained in the section itself. A defamatory imputation about a person in the instructions to an advocate will not be a privileged communication: (1966) 2 M.L.J. 443: A.I.R. 1967 Mad. 395.

4. "In the course and for the purpose of his employment".—S. 126 shows that, the communication by the accused to the lawyer should have been made in the course and for the purpose of his employment as such

barrister, pleader, attorney or *vakil* on behalf of the client. The communication should have been while the relationship of attorney and client subsisted. Thus, where an advocate who was residing just about half a kilometer away from the place of occurrence deposed that on the day of incident the accused came to his house at about 11 P.M. (incident occurred at 10.30 P.M.), and he was not cross-examined, *held*, said piece of evidence did not fall within S. 126. [A.I.R. 1934 Lah. 269, Disting.]: 1994 Cr.L.J. 162 (Ker.) (D.B.).

Employment of a lawyer for drafting a document/deed, *held*, is professional employment: 1980 Jab.L.J. 599.

5. "Express consent".—A failure on the part of a client to claim privilege when he is under cross-examination does not amount to "express consent" given by him to his legal adviser to disclose a communication which is otherwise privileged under the section: A.I.R. 1933 Sind 47: 27 Sind L.R. 72.

6. Privilege is not absolute.—The immunity from disclosure which can be claimed by a client in respect of communication made to his lawyer is not absolute but is limited in its scope by S. 126 of the Evidence Act. The right given to a client under S. 126, Evidence Act, is restricted in its operation to the purpose of defending him or presenting his case and its protection extends no further. It is restricted in its scope by the two provisos contained in the sections itself and the privilege could be claimed only by those clients who have already completed the crime and seek legal advice for defence but it is not open to those who commit subsequent crimes which may be described as future wrong doing. Whether the lawyer exceeded the commission or was a conspirator or was ignorant of the illegal purpose and became a dupe of the client will make no difference and in such a case proviso (1) would apply. *Held*, on facts, that unless the defamatory imputations in the notice could be justified for the purpose of petitioner's civil claim the case would fall under proviso (1) to S. 126, Evidence Act, and not under the general rule of the section. It would not, therefore, be a privileged communication and there would be no bar to the counsel making a disclosure: (1963) 1 Cr.L.J. 38: A.I.R. 1963 All. 33.

The privilege afforded to a legal adviser under S. 126 is of a very limited character. It protects only such communications as are made to the legal adviser in confidence, in the course of and for the purpose of his employment. And if the communication is not made in confidence then communication is in no sense privileged: 27 Sind L.R. 72: A.I.R. 1933 Sind 47.

7. Communication held to be privileged.—Where a person has acted as lawyer to a party he is debarred under S. 126 from disclosing the instructions given to him by his client and hence the client cannot be convicted on the evidence of the lawyer as to the instructions given to him on the strength of which he had put certain defamatory questions to a witness: (1950) 1 M.L.J. 654: A.I.R. 1950 Mad. 537.

If a lawyer puts questions containing imputations to a witness in open Court, no possible question under S. 126 can arise: (1945-46) 50 Cal.W.N. 545: A.I.R. 1945 Cal. 278.

Where a Hindu widow applied through her pleader for a succession certificate to the estate of her husband and the same was granted without the production of the Will, the contents of which had been disclosed to the applicant's pleader and in a later proceeding the pleader was sought to be examined with reference to the Will, *held*, that as the pleader became acquainted with the Will in the course of and for the purpose of his professional employment he was privileged under S. 126. The circumstance that the widow was willing to tender the Will in Court or that its contents had otherwise been made known was entirely immaterial: (1929) 31 Bom.L.R. 1046: A.I.R. 1929 Bom. 414. Opinions given by the Law Secretary who functions as a legal Remembrancer to the State, regarding the plaintiff's claim against the State and which are in the nature of an advice given by the legal adviser to his client are privileged: A.I.R. 1954 J.&K. 11.

Where in a motor accident claim case, the Tribunal directed the Insurance Company to furnish the record relating to compromise to find the stage of compromise, *held*, the Tribunal was not justified in calling for the record as the communication between the Counsel for the Insurance Company and the Insurance Company was a privileged communication: A.I.R. 1982 Del. 486: (1982) 21 Del.L.T. 430.

Where a defence lawyer refused to show his notebook to the Court claiming privilege on the ground that the register in which he

127. Section 126 to apply to interpreters, etc.—The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

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had taken down the notes of the evidence also contained certain instructions given to him by his client which amounted to a privileged communication and could not be looked into by the Court, *held*, the lawyer had rightly claimed privilege under S. 126 of the Evidence Act as the register contained instructions given by the client which being privileged could not be disclosed to the Court. [(1974) 1 Cal.H.C. (N.) 325, Reversed; A.I.R. 1970 Cal. 535 and A.I.R. 1969 Cal. 535, Overruled]: A.I.R. 1981 S.C. 917: 1981 Cr.L.J. 341: (1981) 2 S.C.C. 109: (1981) 2 S.C.R. 661.

8. Communication held to be not privileged.—Communications between a prosecutor in a Crown case and his attorney are not privileged: 27 Sind L.R. 72: A.I.R. 1933 Sind 47.

The privilege under S. 126, Evidence Act is not absolute. When defamatory questions are put by a lawyer to a witness in cross-examination on client's instructions without any reasonable basis for putting them, it cannot be said that said communication is made for the purpose of his employment as lawyer and its disclosure is protected under S. 126 without express consent of the client: 1969 M.L.J. (Cr.) 504: 1970 Cr.L.J. 260: (1969) 1 Mys.L.J. 606: A.I.R. 1970 Mys. 34; 1987 Cr.L.J. 739: (1987) 1 Crimes 27 (Ker.).

9. Waiver.—The privilege embodied in S. 126 is not liable to melt down on the principle of waiver or acquiescence. This can be more understood from S. 128 which says that by giving evidence, a party shall not be deemed to have consented to such disclosure as is mentioned in S. 126. It is only when the party calls such advocate as a witness that the party shall be deemed to have consented to such disclosure, that too only if he questions the witness about it. S. 126 uses strong language in imposing the prohibition. No advocate "shall at any time be permitted" to disclose such communication "unless with his client's express consent". A failure on the part of the client's to claim privilege cannot be stretched to the extent of amounting to "express consent" envisaged in the provision. [A.I.R. 1933 Sind 47, Rel. on]: (1994) 1 Ker.L.J. 696: 1995 Cr.L.J. 61 (D.B.).

Deposing on the same matter by a party does not amount to waiver of the privilege; express consent is necessary for such waiver: 1980 Jab.L.J. 599.

10. Proviso.—There must be definite charge of fraud and something to support the charge before the claim of privilege can be overruled ; and the legal practitioner can then be rightly compelled to answer the question with regard to the condition of the document at the time that it was in his possession: 144 I.C. 175: A.I.R. 1933 Rang. 61 (2).

Where plaintiff approached an advocate and sought advice in respect of a forged promissory note and the advocate found that the four revenue stamps purported to have been singed by the defendant were re-used on the promissory note, which was a blank one, he did not agree with the plaintiff and, in reality, differed from filing the suit on the basis of such a promissory note, *held*, this advice or communication tendered by advocate to the plaintiff was not covered by the protection under S. 126: A.I.R. 1994 Guj. 31.

11. Miscellaneous.—An unsigned and undated letter allegedly written by the accused-advocate to his client, who was a terrorist to remain absconding and which letter did not reach him, *held*, could not be used against said advocate in evidence taking into consideration the fact that he had appeared for the members of the group to which said terrorist belonged before various Courts; said letter could not be taken as an abatement under S. 3(3) of the Terrorist and Disruptive Activities Act, 1987: 1992 Cr.L.J. 2168 (Mad.).

Section 127—Notes.

Protection to interpreters is of peculiar importance in India as there are so many races speaking different languages: I.L.R. 26 Cal. 53: 2 Cal.W.N. 649.

The dictation given by a lawyer to his clerk and transcription made by him of a *per se* libellous matter cannot amount to publication: A.I.R. 1988 Ker. 18: 1988 Cr.L.J. 124: 1986 Ker.L.T. 1361: I.L.R. (1987) 1 Ker. 547; 1974 Cr.L.J. 1435 (Bom.); (1884) 1 Q.B. 842; (1907) 1 K.B. 371.

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128. Privilege not waived by volunteering evidence.—If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such barrister, [1][pleader], attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

129. Confidential communications with legal advisers.—No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

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1. Inserted by Act 18 of 1872, S. 10.

Section 128—Note.

The privilege embodied in S. 126 is not liable to melt down on the principle of waiver or acquiescence. This can be more understood from S. 128 which says that by giving evidence, a party shall not be deemed to have consented to such disclosure as is mentioned in S. 126. It is only when the party calls such advocate as a witness that the party shall be deemed to have consented to such disclosure, that too only if he questions the witness about it. S. 126 uses strong language in imposing the prohibition. No advocate "shall at any time be permitted" to disclose such communication "unless with his client's express consent". A failure on the part of the client to claim privilege cannot be stretched to the extent of amounting to "express consent" envisaged in the provision. [A.I.R. 1933 Sind 47, Rel. on]: (1994) 1 Ker.L.J. 696: 1995 Cr.L.J. 61 (D.B.).

Section 129—Notes.

See I.L.R. 4 Bom. 576; I.L.R. 2 Bom. 453; I.L.R. 11 Cal. 655; 21 I.C. 392; (1927) 29 Bom.L.R. 414: A.I.R. 1927 Bom. 367.

Absence of words "to the Court" in S. 122 which appear in this section signify that S. 122 is of general application: 1967 Cr.L.J. 1511: A.I.R. 1967 Ker. 228.

The practice of employing legal advisers who are well qualified in law has recently grown up; the nature of their duty is to advise their employers on legal questions, rather on all matters pertaining to law and litigation; the same as that of barristers, pleaders, vakils or attorneys except that they do not appear in Courts. There is, thus, no reason why they should not get the same protection as the legal advisers who appear in Courts. The communications made in confidence to them by their employers or *vice versa* are protected under Ss. 126 and 129: A.I.R. 1982 Bom. 6: 1982 Mah.L.J. 798: 1982 Hindu L.R. 93.

A communication in the nature of legal advice from a law officer or law department does not fall under S. 126; it is, however, privileged to a limited extent under S. 129, and cannot be looked into as evidence if the person in receipt of the advice does not tender it as evidence; but where he sues on the basis of legal advice, the Court may compel him to disclose the advice: 1986 All.W.C. 191.

Legal advice is not information, information must relate to fact; advice cannot be a fact. Between a lawyer and his client the communication is privileged and it cannot be forced to be brought on record in view of S. 129. If a confidential communication between a person and his legal professional advisor cannot be required to be disclosed, the name of the legal advisor also would be exempt from such a disclosure: 1985 All.W.C. 662.

The sending of a communication to an advocate on behalf of his client is virtually a communication made to the client himself. As such there is no publication of the imputation concerning the client. [A.I.R. 1934 Bom. 299, Rel. on]: A.I.R. 1988 Ker. 18: 1988 Cr.L.J. 124: 1986 Ker.L.T. 1361: I.L.R. (1987) 1 Ker. 547.

Confidential communication between the Director and the Standing Counsel whether can be looked into. *See* 1989 Lab.I.C. 566.

An unsigned and undated letter allegedly written by the accused-advocate to his client,

130. Production of title-deeds of witness not a party.—No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

131. Production of documents which another person, having possession, could refuse to produce.—No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

132. Witness not excused from answering on ground that answer will criminate.—A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture, of any kind:

Proviso.—Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

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who was a terrorist to remain absconding and which letter did not reach him, *held*, could not be used against said advocate in evidence taking into consideration the fact that he had appeared for the members of the group to which said terrorist belonged before various Courts; said letter could not be taken as an abatement under S. 3(3) of the Terrorist and Disruptive Activities Act, 1987: 1992 Cr.L.J. 2168 (Mad.).

Section 130—Note.

Witness present in Court, if can be compelled to produce document. *See* 12 Cr.L.J. 450: 14 Cal.L.J. 120. Effect of non-production: (1912-13) 17 Cal.W.N. 108: 13 I.C. 120.

Section 132—Synopsis.

1. Scope and applicability.
2. Witness.
3. Proviso.
4. "No such answer".
5. "Shall be compelled to give".

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1. Scope and applicability.—The imperative language of S. 132 does not permit a witness, required to answer a relevant question, to refuse to answer on the ground that it would amount to self-incrimination; but under S. 94 of the Representation of the People Act, 1951, a voter cannot be required to disclose for whom had he cast his vote; the prohibition under S. 94 of 1951 Act is, however, not absolute; the voter has the privilege to disclose or not to disclose the candidate for whom he had voted; S. 94 of 1951 Act is, thus, to that extent, an exception to S. 132: A.I.R. 1980 S.C. 1362.

There is no privilege to the maker of a statement under S. 161 of the Cr.P.Code: (1985) 1 Crimes 414 (Guj.).

As the Evidence Act does not apply to interrogatories by a Customs Officer exercising powers under S. 171-A of the Sea Customs Act (corresponding to S. 108 of the Customs Act, 1962), S. 132 of the Evidence Act is not attracted to such cases: A.I.R. 1971 S.C. 44: 1970 M.L.J. (Cr.) 490: (1970) 1 S.C.R. 821.

Privilege under Art. 20(3) of the Constitution—Confined to accused—Not applicable to witnesses: A.I.R. 1957 All. 396: 1957 Cr.L.J. 698.

S. 132, Evidence Act, if overridden by S. 478(5), Companies Act, 1956—Officer of company under public examination—If can refuse to answer incriminating questions or claim protection in respect of same: (1970) 2 Comp.L.J. 46: 1971 Mah.L.J. 282: (1971) 41 Comp. Cas. 70.

2. Witness.—S. 132, Evidence Act, does not apply to a statement made by a person during an investigation under S. 161, Cr.P.Code. An investigation under Chapter XIV, Cr.P.Code, may be a proceeding but is certainly not a suit or a civil or criminal proceeding. A person who is interrogated under S. 161 by a Police Officer making an investigation is not a witness. The word "witness" used in S. 132, Evidence Act, refers only to a person who enters the witness-box and is sworn as a witness: A.I.R. 1960 All. 623: 1960 All.L.J. 109: 1960 All.Cr.R. 118.

An accused who had been jointly charged with another but whose case has been separated before the trial commenced so that he could be examined as a witness in the case of the other accused cannot be denied the benefit of the proviso to S. 132 of the Evidence Act. He is as much a witness as any other, when once he is not an accused person within the meaning of S. 342, Cr.P.Code. The legal position of such a witness does not differ from the position of any other ordinary witness, and there is nothing that could prevent such a person from taking benefit under the proviso to S. 132 of the Evidence Act. When an oath could be administered to such a person, naturally the incidents of S. 132 of the Evidence Act will also attach themselves to such a person as a witness: I.L.R. (1957) Mad. 715: A.I.R. 1957 Mad. 727.

Examination of self-confessed criminal in conspiracy as witness—Propriety and legality—Objection to admissibility of testimony—Criminal conspiracy to smuggle gold: 1968 Cr.L.J. 1124: A.I.R. 1968 S.C. 938.

A witness is legally bound to answer any question which is relevant to the matter in issue even if the answer to such question is likely to criminate him directly or indirectly. The provisions of proviso to S. 132, clearly protect a witness from being prosecuted on the basis of the answers given by him in a criminal proceeding which tend to criminate him directly or indirectly. Thus, the apprehension of co-accused-turned-approver that his evidence as an approver in the present case would be used against him in other criminal cases where he figured as an accused was misconceived: A.I.R. 1989 S.C. 598: 1989 Cr.L.J. 986: (1989) 37 Del.L.T. 200.

A person who is tried for an offence under S. 3 of the Gambling Act has every right to cite as his witness another person who is a co-accused with him for an offence under S. 4 in a separate trial. The co-accused's position is sufficiently protected by S. 132: 73 I.C. 521: A.I.R. 1924 Lah. 247. As to privilege of statement made before the coroner, *see* I.L.R. 50 Bom. 56: A.I.R. 1926 Bom. 141 (F.B.).

Person summoned to appear before authorities under Sea Customs Act—Position of: (1960) 1 M.L.J. 267: A.I.R. 1960 Mad. 225.

Companies Act, 1913, S. 185—Proceedings under against managing director—Criminal proceedings in respect of same subject-matter also pending against managing director—Recording of evidence for managing director in proceedings under S. 185—Adjournment of proceedings till after decision of criminal cases in view of Art. 20(3) of the Constitution if can be claimed by managing director—Managing director if compelled to be a witness against himself: I.L.R. (1962) 1 Punj. 468: A.I.R. 1962 Punj. 101.

3. Proviso.—In a case where a party to a civil litigation gives evidence, it is possible to presume that he gives the evidence on his own accord. Similarly, if the accused in a criminal case offers himself to be examined as a witness, a presumption may arise that the evidence given by him is voluntary. That would not be the position with regard to the evidence given by witness summoned by the Court. The answer given by a witness in a Court, whose presence is required by the Court either by issuance of summons or by other means cannot be equated with the answer given by a party in a civil litigation or the statement of an accused as a witness, in a criminal case. The answer given by such a witness cannot be characterised as a mere voluntary statement and without any compulsion. Where the petitioner was summoned as a witness and while being examined he gave an answer incriminating himself, *held*, that answer could not be used against him in subsequent criminal proceedings as he was clearly protected under the proviso to S. 132. [(1987) 2 Ker.L.T. 222, Approved; 1989 Cr.L.J. 986, Foll.]: 1989 Cr.L.J. 2455 (Ker.) (D.B.).

As the proceedings before the Lokayukta under the Gujarat Lokayukta Act, 1986 are deemed to be civil proceedings by virtue of its being deemed to be a civil Court, the protection provided by proviso to S. 132 of the Evidence Act applies to a witness who has been compelled to answer any question

during the investigation: A.I.R. 1992 Guj. 10: (1992-1) 33 Guj.L.R. 223 (D.B.).

Prosecution for offence of cheating—Petitioners cited as witnesses therein—*Held*, petitioners were bound to answer all questions and they could not be prosecuted for their answers: 1970 Cr.L.J. 945 (Raj.).

Where respondent was accused of bigamy and during course of hearing father of first wife of accused made an application asking that second wife of accused might be summoned as a witness but an objection was raised that if she was summoned as a witness, then she would be deposing against her own interest and it would amount to compelling her to make a statement against herself which was rejected by the lower Court, *held*, objection was rightly rejected: 1988 Cr.L.J. 1239 (All.).

Where in a prosecution for contravention of the Motor Spirits and High Speed Diesel Oil (Maintenance and Regulation of Supplies) Order, 1979, a witness turned hostile and for that reason he was made an accused under S. 319(1) of the Cr.P.Code and was ultimately convicted alongwith other accused persons for contravention of the said order, *held*, there being no evidence against him to connect him with the crime even remotely, the trial Judge overlooked the requirements of S. 319(1), Cr.P.Code and violated the prohibition contained in proviso to S. 132 of the Evidence Act: 1990 Cr.L.J. 100 (Ker.).

Witness voluntarily making defamatory statements before Court—Is not protected under proviso to S. 132: (1965) 2 Cr.L.J. 705(1): A.I.R. 1965 All. 597.

A witness must claim the benefit of the protection afforded by S. 132 before he makes the statement in respect of which a question is subsequently raised: I.L.R. 40 All. 271: 43 I.C. 823; A.I.R. 1928 Nag. 58.

His status, motive, etc., go a great way to determine his criminal responsibility: A.I.R. 1928 Nag. 58.

The distinction between the eighth exception to S. 499, Penal Code and S. 132 of the Evidence Act is that the former excludes a statement from the definition of defamation altogether whereas the latter excludes prosecution for defamation and bars proof of the accusation in a trial for defamation: A.I.R. 1960 All. 606.

A person who answers questions put to him by Counsel without seeking the protection of S. 132 is not entitled to protection in a charge of defamation and all he is entitled to is the limited privilege under S. 499, I.P. Code: I.L.R. 52 Mad. 422: A.I.R. 1929 Mad. 236: 56 M.L.J. 570.

So, defamatory statements made by persons in answer to interrogatories during investigation under S. 161 are not protected under S. 132, Evidence Act: 1960 All.L.J. 109: 1960 All.Cr.R. 118: A.I.R. 1960 All. 623.

A person making a defamatory statement as a party or as a witness in a judicial proceeding is liable to be charged under S. 500, I.P.Code, irrespective of the liability for perjury. Such person can be protected if he pleads and succeeds in applying any of the exceptions mentioned in S. 499, I.P. Code: 10 I.C. 682: 12 Cr.L.J. 193. The English doctrine of absolute privilege in cases of defamation does not apply in India: 13 Cr.L.J. 25: 5 Sind L.R. 133; A.I.R. 1934 Sind 114: 28 Sind L.R. 251. *See* also 51 M.L.J. 112 (F.B.).

Proviso—Suit for defamation—Privilege of witness—Principles stated—Plaintiff and defendant arrayed respectively as accused and prosecution witnesses in cross cases under S. 107, Cr.P. Code—Abusive language of defendant, during cross-examination by plaintiff, a lawyer though held to be a gross abuse of the privilege of a witness, in view of the peculiar position of plaintiff, defendant held was not liable: 1967 All.L.J. 158: 1967 All.W.R. (H.C.) 163: A.I.R. 1967 All. 476.

4. "No such answer".—The taking of a thumb-impression is not equivalent to asking a question and receiving an answer and may be proved against the person in any criminal proceeding and the proviso to S. 132 does not apply where no objection is taken to the thumb-impression being taken: I.L.R. 39 Cal. 348: (1911-12) 16 Cal.W.N. 503. Where a charge for perjury is based on two contradictory statements, every possible presumption in favour of their reconciliation should be made: 15 Cr.L.J. 379: 23 I.C. 747; 24 I.C. 576: 15 Cr.L.J. 488.

S. 132 applies only to questions asked in the course of trial: I.L.R. 39 Cal. 348: (1911-12) 16 Cal.W.N. 503.

5. "Shall be compelled to give".—The compulsion contemplated in the proviso to S. 132 is something more than being put into the box and being sworn to give evidence; the compulsion may be expressed or implied. It is not necessary that the compulsion must be in any set form of words or that the

asking for protection should be in a particular form. If the witness is made to understand that he must answer all questions without exception, it would amount to compulsion: A.I.R. 1939 Rang. 371.

The question as to when it can be said that a witness has been "compelled" to answer within the meaning of the proviso to S. 132 is a question of fact to be determined by the Tribunal in each case. S. 132 does not require that a witness, before he can claim protection under the proviso, must first ask to be excused from answering the question on the ground that the answer will incriminate him. Questions which are allowed by the Court in spite of objection by the pleader of the witness must be deemed to be relevant so far as the witness is concerned, and he is bound to give an answer. Answer so given is an answer which the witness is "compelled to give" within the meaning of S. 132 and the witness is entitled to the protection of the proviso. He cannot, therefore, be prosecuted for defamation in respect of a defamatory statement made by him in such an answer; whether the answer was true or deliberately false is irrelevant: I.L.R. 21 Pat. 778: A.I.R. 1943 Pat. 117; A.I.R. 1962 Madh. Pra. 241: 1962 M.P.L.J. 305; 1971 M.P.L.J. 284.

"Compelled to answer questions" meaning of: 28 Sind L.R. 251: A.I.R. 1934 Sind 114; 1939 Rang.L.R. 479: A.I.R. 1939 Rang. 371.

The mere record of a deposition is not by itself sufficient evidence of compulsory or voluntary nature of the statement of a witness: A.I.R. 1928 Nag. 58. The protest from a witness is not necessary in respect of every question for the benefit of the privilege afforded by S. 132: A.I.R. 1921 All. 362. But *see* 27 Cr.L.J. 1383: A.I.R. 1926 Lah. 385.

Unless a person objects to any question the answer to which is likely to incriminate him, he cannot be said to have been compelled to give such answer within S. 132, proviso of the Act: 59 I.C. 324: (1920) 22 Bom.L.R. 1247; I.L.R. 50 Bom. 162: (1926) 28 Bom.L.R. 1: A.I.R. 1926 Bom. 141 (F.B.); 10 O.W.N. 735: A.I.R. 1933 Oudh 370. *See* also 17 Mys.L.J. 102: 43 Mys.H.C.R. 675.

Where the witness was compelled to answer the question put to him by the Judge under S. 132, proceedings for defamation could not be taken against him: I.L.R. 10 Luck. 169: A.I.R. 1934 Oudh 386; I.L.R. 42 All. 257: 21 Cr.L.J. 186: 54 I.C. 890: A.I.R. 1920 All. 140.

In order to be entitled to the protection given by S. 132 of the Evidence Act, the witness must object to the question which tends to incriminate him and the mere fact of the witness being called to the witness-box, sworned and questioned about relevant facts, does not imply that he was compelled to answer the question. The question whether a statement was made voluntarily or under compulsion is a question of fact. But an obligation under law to state the truth as a witness on oath cannot *ipso facto* be equated with compulsion and admissions made by a witness in the witness-box about the commission of an offence by him can be used against him in evidence. *Held*, on facts, in the case of witnesses subsequently tried for offence under S. 201, I.P.Code, that although the admissions made by the accused could be used against them, their explanation during their examination under S. 342, Cr.P. Code, could be regarded in the context as true and sufficient for the purpose of discharging the onus of explaining away the admissions and the answers given by the accused in their examination under S. 342 could be taken into consideration to explain the admissions: I.L.R. (1962) Cut. 965: (1963) 2 Cr.L.J. 475.

Where the complainant and his witnesses sworn as witnesses gave certain answers containing defamatory matter in their examination-in-chief without any protest or hesitation and without begging to be excused from answering the questions put to them, it cannot be said that they were compelled to give answers within the meaning of the proviso to S. 132, Evidence Act, so that they are not entitled to claim the protection of the proviso and can be prosecuted for defamation and the accusation made by them in their depositions can be proved against them. The compulsion referred to in the proviso does not include the compulsion by the general or common law of the land; there should be special compulsion by the Presiding Officer of the Court. The giving of evidence is a matter of duty and not of compulsion and the duty cannot be treated as compulsion within the meaning of the proviso.

The compulsion contemplated by the proviso must arise out of the refusal of his prayer to be excused: A.I.R. 1960 All. 606: 1960 All.W.R. (H.C.) 543: 1960 All.Cr.R. 345.

133. Accomplice.—An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Section 133—Synopsis.

[*See* also Notes under Ss. 24, 30 and S. 114, *Illus.* (*b*)]

1. Scope—Sections 133 and 114, *Illustration* (*b*).
2. Accomplice—A competent witness.
3. Value of accomplice's or approver's evidence.
4. Reasons for corroboration.
5. Necessity for corroboration.
6. Nature and extent of corroboration.
7. Whether maxim *falsus in uno falsus in omnibus* is applicable to approvers.
8. Whether one accomplice can corroborate another.
9. Corroboration of approver's evidence by another co-accused.
10. Corroboration by approver's relative.
11. What is good corroboration and what is not.
12. Duty of Judge to jury.
13. Corroboration in sexual offences.
14. Corroboration to evidence of abducted girl.
15. "Accomplice"—Meaning of.
16. Accessory after the fact.
17. Person who is not *participis criminis*.
18. Witnesses no better than accomplices.
19. Person held to be accomplice.
20. Person held to be not accomplice.
21. Accomplice and spy—Distinction.
22. Accomplice and decoy witness.
23. Accomplice and informer.
24. Accomplice and partisan and interested witness.
25. Evidence of raiding party.
26. Accomplice and trap witness.
27. Evidence of Executive Magistrate as trap witness—Value of.
28. Persons taking part in negotiations for bribe or themselves bribe giver.
29. Bribery cases—Generally.
30. Applicability of rule that accomplice is unworthy of credit to departmental proceedings.
31. Delay in making statement—Effect.
32. Antecedents of approver—Effect.
33. Retracted statement is admissible.
34. Evidence of accomplice who was not granted pardon.
35. Evidence of co-accused against whom charge was unconditionally withdrawn.
36. Evidence of convicted and sentenced accused.
37. Punter—Value of evidence.
38. Confession—Value of.
39. Miscellaneous.

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1. Scope — Sections 133 and 114, *Illustraton* (*b*).—The combined effect of Ss. 133 and 114, *Illus.* (*b*) may be stated as follows: According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore, though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. There should be corroboration of the approver in material particulars and *qua* each accused: A.I.R. 1963 S.C. 599; (1965) 2 Cr.L.J. 557 (Ker.).

The provision under S. 133 has to be considered along with another rule of prudence or caution suggested in *Illus.* (*b*) given under S. 114 of the Evidence Act. Both rules in terms appear to be confined to criminal cases and are really in unison. They only represent different stages in the judicial assessment of evidence against an accused person against whom evidence produced consists of the statement of his alleged accomplice. Under S. 114 of the Act, a presumption may be made when an accomplice's statement is put before a Court in relation to the particular offence which is alleged to have been committed by the accused person and the circumstances in which it is so done. The power under S. 114 to draw presumption is discretionary. It is possible to conceive of a case where the Court might consider it unnecessary to require corroboration of what the accomplice has stated though such occasions may be rare. On conviction the basis of uncorroborated testimony of an accomplice would not be illegal. S. 133 of the Act depicts rather an exception to the general rule of prudence

indicated in *Illus.* (*b*) under S. 114 of the Act. It may safely be accepted as a workable rule that except where there are special reasons and exceptional circumstances, the ordinary rule of caution indicated above has to be considered first in relation to facts of a particular case by a Court. The rule illustrated under *Illus.* (*b*) of S. 114 of the Act, is a rule of prudence rather than a statutory inhibition and it has to be applied wherever considerations similar to those indicated therein arise for consideration. From the nature of things the propriety of applying the principle underlying the above rule cannot depend upon the nature of particular Tribunal which is required to consider it but rather upon the nature of the issue involved. Consequently, even in a civil case, while assessing evidence, the Court ought to require corroboration of evidence of accomplice for any other reason but that the witness has a serious strain upon his evidence as a participator in a nefarious act: 1965 M.P.L.J. 791: 1965 Jab.L.J. 933: I.L.R. (1965) Madh. Pra. 800.

The provision in S. 133 is an absolute rule of law. Although it says that it is not illegal to convict an accused on the uncorroborated testimony of an accomplice, it does not go to the extent of saying that such conviction is proper. It does not rule out precautions being taken in appreciating the evidence of an accomplice. What is said in *Illus.* (*b*) to S. 114 is only a rule of caution or guidance to be observed in practice. It is not at all a rule of law. In that respect *Illus.* (*b*) to S. 114 is complementary to S. 133. The resulting position is that there is nothing legally wrong in convicting an accused on the uncorroborated testimony of an accomplice but prudence demands corroboration in material particulars of his evidence before conviction is entered. The reasons for taking usual precautions before accepting the evidence of an approver are not far to seek. An approver is an accused converted as a prosecution witness. In order to escape the possible consequence of the charges against him he is one likely to swear falsely. He is an immoral person having participated in the crime. Consequently, he cannot have much regard for the sanction of oath. The thought of pardon always makes him lean towards the prosecution. His inclination is always to make his own share in the transaction as slight as possible and to place the serious blame on others. If there is other independent evidence about the crime the testimony of an accomplice is superfluous Therefore, in practice Police usually invites a party to become an approver only after they have failed in every other way to supply the missing links. For all these reasons an approver, is a suspect witness, and his evidence can be accepted only if it is materially corroborated: 1969 Ker.L.T. 471: 1969 Cr.L.J. 1577; 1988 Cal.Cr.L.R. 155.

The combined effect of S. 114(*b*) and S. 133 is that though a conviction based on the sole testimony of an accomplice is not illegal, prudence requires that the Judge should look for independent corroboration. An accomplice is according to law a participant in crime; that stigma is attached to him; his reliability could be doubtful. But it must be made clear that all accomplices are not participants in the criminal act equally; there is always a difference of degree; there could be a person who might unwillingly join other or is only a servant getting salary; there are grades and grades of accomplices; one may get the entire ill-gotten wealth and the other may only get a paltry salary out of it. The needs and objects of different persons differ: (1982) 23 Guj.L.R. 299: (1981) 1 Guj.L.H. 328 (D.B.).

An accomplice is competent to give evidence under S. 133 of the Act but according to S. 114 of the Act it is unsafe to convict on his testimony alone.

The Court in the first instance has to satisfy itself that the statement of the approver is credible in itself and that there is evidence other than the statement of the approver that the approver himself has taken part in the crime. After the Court is satisfied about these two things, the Court has to seek corroboration of the approver's evidence with respect to the part of the other accused persons in the crime and this evidence has to be of such a nature as to connect the other accused with the crime: 1970 Cr.L.J. 1206 (Raj.).

An accomplice is a competent witness vide S. 133 and the conviction is not illegal merely because it proceeds on uncorroborated testimony of an accomplice. But this section has to be read alongwith *Illus.* (*b*) to S. 114, which in express terms says that an accomplice is unworthy of credit unless he is corroborated in material particulars. The corroborating evidence, broadly stated, must

connect or tend to connect the accused with the crime charged. This is so because of the danger of the approver introducing some innocent person or persons into an otherwise true prosecution story. Such evidence, however, need not by itself be sufficient for sustaining the conviction of the accused for in that case the evidence of the approver would be wholly unnecessary and mere surplusage. The Court should evaluate the evidence of an approver *de hors* the corroborating pieces of evidence for, if his testimony is itself uninspiring and unacceptable justifying its rejection outright, then, it would be futile and wholly unnecessary to look for corroborating evidence. It is only when the approver's evidence is considered otherwise acceptable that the Court applies its mind to the rule that his testimony needs corroboration in material particulars connecting or tending to connect each one of the accused with the crime charged: A.I.R. 1973 S.C. 1188: (1973) 3 S.C.C. 805: 1973 Cr.L.J. 914; A.I.R. 1990 S.C. 658: 1990 Cr.L.J. 889: (1990) 2 Bom.C.R. 630.

The combined effect of Ss. 133 and 114 *Illus.* (*b*) is that though a conviction based upon accomplice evidence is legal, the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another. [A.I.R. 1963 S.C. 599; (1916) 2 K.B. 658, Rel. on]: 1970 Cr.L.J. 9: A.I.R. 1970 S.C. 45: (1970) 1 S.C.R. 130.

Illus. (*b*) to S. 114 is to be read alongwith S. 133, and neither rule is to be ignored in the exercise of judicial discretion. It is the duty of the Court which has to deal with an accomplice's testimony to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though at the same time the Court may rightly in exceptional cases, in the absence of this corroboration, give credit to the accomplice's testimony against the accused if it sees good reason for doing so upon other grounds: I.L.R. 11 Luck. 662: A.I.R. 1936 Oudh 156.

The corroboration of the evidence of an accomplice must be by independent testimony which confirms in material particulars not only the evidence of the crime which was committed but also that the accused committed it. S. 133 of the Evidence Act of course lays down that an accomplice shall be a competent witness and a conviction based on the uncorroborated testimony of an accomplice is not illegal on that account. There is, however, a rule of guidance laid down in *Illus.* (*b*) to S. 114 of the Evidence Act to which the Court should also have regard, namely, that an accomplice is unworthy of credit unless he is corroborated in material particulars. The rules laid down in Ss. 114, *Illus.* (*b*) and 133 are part of one subject and neither is to be ignored in the trial of a case. The effect of these two provisions, on the whole, is that the Legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person unless he is corroborated in material particulars in respect to that person, and that it is duty of the Court which in any particular case has to deal with the testimony of an accomplice to consider whether the maxim applies to exclude that testimony or not: A.I.R. 1951 Pat. 84: 52 Cr.L.J. 766.

S. 133 contemplates no legal taboo against convicting an accused on the uncorroborated testimony of his accomplice; that is, however, a legal theory; in practice no Court would do so; it may have to presume that an uncorroborated accomplice in material particulars is not worthy of credit, a caution sounded in S. 114 (*b*). As per A.I.R. 1968 S.C. 832, "this rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law": 1991 Cr.L.J. 2941: (1991) 1 Ker.L.J. 784: (1991) 2 Ker.L.T. 119 (D.B.).

Ss. 133 and 114, *Illus.* (*b*) read together lay down that though conviction on the testimony of an accomplice is not illegal but the Courts will not accept such evidence as a matter of practice without its corroboration in material particulars. However, the Court must first satisfy itself from his evidence which must show him to be a reliable witness. It is only after this test is satisfied that the question of corroboration would become relevant if the approver's evidence is totally

unreliable and does not inspire the Court's confidence, it has to be rejected at the threshold. The corroboration required is of two kinds: (*1*) that which reassures the Court that the approver himself is a trustworthy witness, and (*2*) the corroboration in material particulars not only of the commission of the crime but also of the accused's complicity therein: 1991 Cr.L.J. 859 (Mad.) (D.B.).

Although S. 114, *Illus.* (*b*) provides that a Court may presume that the evidence of an accomplice is unworthy of credit unless corroborated, the word "may" is not "must" and no decision of a Court can make it "must": I.L.R. 17 Luck. 516: 1941 O.A. 1018: A.I.R. 1942 Oudh 221; 23 Pat.L.T. 606: A.I.R. 1942 Pat. 271; A.I.R. 1943 Bom. 74; I.L.R. 22 Pat. 27: A.I.R. 1943 Pat. 146.

S. 133 and S. 114 (*b*) deal with the law relating to the evidence of an accomplice, namely, a guilty associate in crime but a competent witness; though under S. 133 a conviction based on uncorroborated testimony of an accomplice is not illegal, but the rule of guidance embodied in S. 114 (*b*) has resulted in the settled practice which requires that the evidence of the accomplice must be corroborated which has virtually attained the force of law: (1994) 4 S.C.C. 478: 1994 S.C.C. (Cr.) 1252: 1994 Cr.L.J. 3071: (1994) 2 Crimes 1: (1994) 2 An.L.T. (Cr.) 429.

A pardoned accomplice examined as a prosecution witness is, under S. 133, a competent witness and his testimony is admissible. Under S. 114 (*b*), he may be presumed to be unworthy of credit unless corroborated in material particulars; such a presumption is, however, not conclusive or irrebuttable. The two provisions are, thus, not irreconcilable; if the Court raises no presumption or it stands rebutted, conviction of the accused based on uncorrborated testimony of the accomplice is not illegal: 1983 Raj.L.W. 226.

Undoubtedly, law permits conviction on uncorroborated testimony of an accomplice if the Court is satisfied that his evidence is true and reliable but the rule of prudence says that such testimony should not be accepted unless there is some evidence, direct or circumstantial, from independent sources as may reassure that the approver's version is truthful and can be safely acted upon to convict the accused as laid down in S. 114, *Illus.* (*b*). However, the nature and extent of corroboration would vary with the facts and circumstances of each case; there can be no invariable rule covering all cases: 1980 Cr.L.R. 227 (Raj.); 1979 Cr.L.R. 425: 1979 W.L.N. 342: 1979 Cr.L.J. (N.O.C.) 215 (Raj.) (D.B.).

There is no antithesis between S. 133 and *Illus.* (*b*) to S. 114 of the Evidence Act because the illustration only says that the Court "may" presume a certain state of affairs. It does not seek to raise a conclusive and irrebutable presumption. Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is meant that there has to be some independent evidence tending to incriminate the particular accused in the commission of the crime. [(1916) 2 K.B. 658; A.I.R. 1952 S.C. 54; A.I.R. 1949 P.C. 257; A.I.R. 1958 S.C. 500; A.I.R. 1964 S.C. 1184; A.I.R. 1968 S.C. 832; A.I.R. 1975 S.C. 856, Rel. on]: A.I.R. 1977 S.C. 1579: 1977 Cr.L.J. 1206: (1977) 3 S.C.C. 68.

The difficulty in understanding the combined effect of S. 114 (*b*) and S. 133, though they are parts of one and the same subject and neither can be ignored in the exercise of judicial discretion except in cases of exceptional nature, arises largely due to their placement in two different Chapters of the Act; the better course was to insert the *Illus.* (*b*) as an explanation or in any case as a proviso to S. 133: A.I.R. 1994 S.C. 2420: 1994 Cr.L.J. 3271.

2. Accomplice—A competent witness.— An accomplice is a competent witness against an accused and a conviction will not be illegal if it proceeds upon his uncorroborated testimony; but the absolute rule of law as regards the evidence of accomplice is subject to a rule of guidance contained in *Illus.* (*b*) of S. 114 that an accomplice is unworthy of credit unless it is corroborated in material particulars: 114 I.C. 609: A.I.R. 1929 Nag. 233; (1984) 1 Rec.Cr.R. 205 (Del.).

The rule of law says that an accomplice is competent to give evidence and the rule of practice says that it is almost always unsafe to convict upon his testimony alone. But the rule of law to this extent triumphs over the

rule of practice that if special circumstances exist which render it safe, in an exceptional case to act upon the uncorroborated testimony of an accomplice and upon that alone, the Court will not merely for the reason that the conviction proceeds upon such uncorroborated testimony say that the conviction is illegal. This is the plain meaning of S. 133. Their is no difference between the law in India and the law in England in this respect: 1937 Rang.L.R. 110: A.I.R. 1937 Rang. 209.

An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious taint in his evidence and Courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. It would not, however, be right to expect that such independent corroboration should cover the whole of the prosecution case or even all the material particulars of the prosecution case. If such a view is adopted, it will render the evidence of the accomplice wholly superfluous. On the other hand, it will not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. It is well settled that the appreciation of approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all the witnesses. If the test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration: A.I.R. 1969 S.C. 961.

As laid down by S. 133, an accomplice is a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon uncorroborated testimony of an accomplice. But it has long been a rule of practice, which is now virtually equivalent to a rule of law, that it is dangerous and unsafe to base a conviction on the uncorroborated testimony of an accomplice.

The nature and the extent of corroboration, must necessarily depend on the facts and circumstances of each case, including the nature of the offence involved.

It is also by now very well-settled that independent corroborative evidence need not come up to the standard of being sufficient by itself to sustain conviction. What is needed is the existence of some additional evidence showing that the version given by the accomplice is probably true and that it is reasonably safe to base a conviction thereon: 1960 Cr.L.J. 989: A.I.R. 1960 Punj. 364: I.L.R. (1960) Punj. 111.

An approver is undoubtedly a competent witness under the Indian Evidence Act. Under S. 133 an accomplice shall be a competent witness against an accused and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice: (1976) 42 Cut.L.T. 292 (D.B.); (1991) 2 Rec.Cr.R. 424 (S.C.).

An accomplice will be a competent witness no doubt in eye of law, but his evidence must receive sufficient corroboration. It would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted it would render the evidence of the accomplice wholly superfluous. [1957 Cr.L.J. 1014 (S.C.), Rel. on].

The fact that the accomplice is a man of questionable character is not by itself sufficient to reject his evidence: 1977 Cr.L.J. 1243 (Pat.); (1972) 38 Cut.L.T. 683.

Though an approver is a competent witness he being a participant in the offence and as usually interested and infamous witness, his evidence requires to be corroborated by other evidence: 1957 An.L.T. 709: I.L.R. (1957) Andh. Pra. 742: A.I.R. 1958 Andh. Pra. 165.

An approver is undoubtedly a competent witness under the Evidence Act. But the appreciation of his evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied, the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver: 1960 Cr.L.J. 1360: A.I.R. 1960 Pat. 459. Every person who is a competent witness is not a reliable witness and the test of reliability has to be satisfied by an approver all the more before the

question of corroboration of his evidence is considered by criminal Courts. The Court may accept the evidence of an approver if he is found to be reliable and his testimony receives corroboration from independent sources, the corroboration while it need not cover the entire story or all its material particulars, should be of such a nature as to afford the assurance that the main story disclosed by him can safely be accepted. In other words, while it is not necessary to insist on complete corroboration, nevertheless it is well to bear in mind the fact that the witness having won pardon for his part in the crime on the undertaking to help to obtain the conviction of his erstwhile collaborators, it is not at all unlikely that he may indulge in exaggeration or prevarication in an attempt to carry out his part of the bargain: I.L.R. (1962) 2 Ker. 492: (1962) 2 Ker.L.R. 499.

If it is found that the approver's account against one of the accused person is wholly discrepant, this finding itself should inevitably lead the Court to scrutinise his evidence in respect of the other accused persons with greater caution.Where the statements made by the approver on subsequent occasions merely add details which were not included in the first statement, it may perhaps be a different matter. It is true that omissions have not included always the same significance as contradictions. But where it is patent that the two sets of statements, are wholly inconsistent and irreconcilable, that obviously leads to a very serious infirmity in the character of the witness: A.I.R. 1957 S.C. 637 followed in A.I.R. 1959 Andh. Pra. 387.

An approver's statement has to pass a double test. The first test is of reliability, being common to all witnesses. The second test required is that there must be some other independent evidence which corroborates or tends to corroborate the statement of the approver not only with regard to the commission of the offence but also with regard to the connection of the accused with the offence. [A.I.R. 1959 S.C. 1199, Foll.].

S. 133 of the Evidence Act, 1872, lays down a rule of law while *Illus.* (*b*) to S. 114, which, as its language clearly connotes, is merely a rule of prudence, reading these sections together, the Courts in India have held that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it corroborates in material respects so as to implicate the accused. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge and in jury cases must find place in the charge before a conviction, without corroboration can be sustained. *Held*, that the approver in this case was not such a trustworthy witness whose testimony could be safely relied upon without corroboration connecting or intending to connect the accused with the crime: (1963) 65 Punj.L.R. 163: (1963) 2 Cr.L.J. 104.

Per *Khan, J.*—There is a double test for the evidence of an approver. The first test is whether he is reliable and that is a test which is common to all witnesses. The second test is whether the approver's evidence has received sufficient corroboration.

Per *Shiv Dayal, J.*—An approver is duty-bound to disclose the whole truth before the Court. He does not fulfil his undertaking if he suppresses any material fact. Where he suppresses any material fact, it casts a cloud on the veracity of the approver.

Where in a murder case the approver was the only eye-witness to the occurrence, what actually happened at the scene of occurrence is a very significant matter to be disclosed by the approver. If he suppresses that material point, no useful purpose is served by granting him pardon: (1962) 2 Cr.L.J. 672 (Madh. Pra.).

The evidence of an approver has to fulfil two tests for its acceptance. Firstly, it must be natural and credible. Where this is *prima facie* lacking, there is really no question of further corroboration and the prosecution can only rely upon other peices of evidence. Secondly, even if a Court is inclined to accept the evidence as natural or convincing, it must be corroborated in material particulars with regard to the participation of the accused concerned.

The corroboration of a co-accused in a judicial confession is of the weakest character, and can only be considered in order to be

thrown into the scale when other evidence is also fairly adequately available: 1960 Cr.L.J. 1344: A.I.R. 1960 Mad. 462.

The corroboration for the approver's evidence to convict the other accused which the Court seeks is generally of two kinds: (*1*) the approver's statement should be credible and must find support in other evidence of his being a participant in the offence; (*2*) the Court should then seek corroboration of the approver's testimony in regard to the other accused's part in the offence to connect them with the offence; the Court's exercise must be composite and not separated in two water tight compartments: 1988 Cr.L.J. (N.O.C.) 50 (Cal.) (D.B.).

An approver though a competent witness and a conviction based on his evidence alone may not be legally bad, it is recognised rule of law that before convicting an accused person on that evidence, it must be firstly credible in itself or say of a reliable witness, at the same time showing that he had taken part in the crime. Secondly, if that initial test is satisfied, the Court has to find out whether his evidence finds sufficient corroboration both with regard to the crime, as also in relation to the identity of accused in connection therewith from other reliable material on record. Thirdly, credibility or reliability of an approver can well be considered as a whole along with the other evidence in the case. The corroborative evidence should be independent and reliable since that weighs with the mind of the Court in acting upon the other part of the evidence of the approver relating to the crime committed by the accused in any such case: (1970) 11 Guj.L.R. 258.

Accomplice has to satisfy twin tests of credibility and corroboration on material particulars from independent sources: 1970 Cr.L.J. 944 (Punj.).

Every competent witness is not necessarily a reliable witness; the testimony of an accomplice has, therefore, to satisfy a double test; it must be, like that of any other witness, first determine whether it is truthful; it is only after his having been found to be reliable that the second test of corroboration has to be satisfied: 1983 Raj.L.W. 226.

Approver's evidence—Credibility—Tests to be applied in determining whether his evidence should be acted upon: (1964) 3 S.C.R. 297: (1963) 2 Cr.L.J. 671: A.I.R. 1963 S.C. 1850; 1985 Cr.L.J. 1311: 60 Cut.L.T. 9; 1982 Cr.L.J. 1156 (Ori.).

The evidence of an approver, if believed, is sufficient foundation whereon to repose a conviction, but in practice in Court *ex majori cautela* insists upon corroboration of the approver's statements in material particulars: 69 I.C. 462: A.I.R. 1923 Lah. 153; 151 I.C. 473: A.I.R. 1934 Cal. 719 (F.B.). *See* also 1938 Rang.L.R. 213; 1937 A.M.L.J. 18; 1942 O.W.N. 403: A.I.R. 1942 Oudh 435; I.L.R. (1957) Andh. Pra. 742: 1958 M.L.J. (Cr.) 31.

Approver's evidence—Corroboration in material particulars—Necessity: 1959 Cr.L.J. 1492: A.I.R. 1959 S.C. 1199.

Approver's evidence—Credibility. *See* (1967) 69 Punj.L.R. (Del.) 168; 1958 Raj.L.W. 527.

The approver is a competent witness but the position in law is fairly well settled that on the uncorroborated testimony of the approver it would be risky to base the conviction, particularly in respect of a serious charge like murder: A.I.R. 1986 S.C. 1438: 1986 Cr.L.J. 1072.

No doubt the evidence of accomplice ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must, however, vary according to the extent and nature of the complicity: (1946-47) 51 Cal.W.N. 900: (1947) 49 Bom. L.R. 688: (1947) 2 M.L.J. 328 (P.C.) followed in 1957 M.L.J. (Cr.) 209: A.I.R. 1957 Mad. 769.

The Court may call in aid the statement of an accomplice witness and use it to lend assurance to the other evidence and thus fortify itself into believing that without the aid of the statement it would not be prepared to accept: 1956 Cr.L.J. 32: A.I.R. 1957 All. 53.

The foremost essential condition for accepting the approver's statement is that it must be trustworthy statement: 114 I.C. 623: A.I.R. 1929 Nag. 222.

Where the accomplice's evidence is found to be truthful, there is no need for corroboration: I.L.R. 8 Pat. 235: A.I.R. 1928 Pat. 630; 1930 Mad.W.N. 169.

Credibility of approver's testimony depends upon the extent of removal of "taint" in his evidence: A.I.R. 1929 Lah. 850.

Where the complicity of a person is solely due to coercion and his evidence cannot be ascribed to any desire to escape legal

consequence, the discredit attaching to his evidence is practically negligible: 19 I.C. 207: 1912 Mad.W.N. 1108.

The evidence of an accomplice stands on the same footing as any other evidence. The Court is not obliged to hold that he is unworthy of credit and must be corroborated. It is for the Court to consider, after taking into consideration all the circumstances, one of these being that he is an accomplice, whether it does or does not rely on the evidence. To entirely rule out the uncorroborated evidence of an accomplice might in many cases lead to miscarriage of justice: 1941 O.W.N. 1255: A.I.R. 1942 Oudh 163; A.I.R. 1929 Cal. 822; I.L.R. 8 Pat. 235: A.I.R. 1928 Pat. 630; 11 Pat.L.T. 545.

The statement made by an accomplice should be accepted when it is strongly corroborated in material particulars by clear and cogent evidence, the authenticity of which is not open to doubt: 120 I.C. 257 (2): A.I.R. 1930 All. 29.

3. Value of accomplice's or approver's evidence.—Accomplice evidence—Use and value of: A.I.R. 1957 All. 53: 1957 Cr.L.J. 32.

The testimony of a professed accomplice requires to be carefully scrutinised with anxious search for possible corroboration: 29 Mad.L.W. 155: A.I.R. 1929 P.C. 15 (P.C.). *See* also A.I.R. 1930 Cal. 430; A.I.R. 1930 All. 740; 145 I.C. 251: A.I.R. 1933 Rang. 116.

Evidence of accomplice—Value of—Conviction on—Rule of prudence: (1965) 67 Bom.L.R. 317: I.L.R. (1965) Bom. 648: A.I.R. 1965 Bom. 195.

Testimony of accomplice—Accomplice giving evidence against accused—*Held*, much reliance could not be placed on evidence of accomplice: A.I.R. 1968 Del. 68.

The guidelines to appraise the approver's testimony are: (*1*) a conviction based on uncorroborated testimony of an approver, a competent witness, under S. 133, is not illegal; (*2*) the Court may, however, presume that the approver is untrustworthy unless corroborated in material particulars; (*3*) the accused should not ordinarily be convicted unless the approver's testimony against him is corroborated in material particulars; (*4*) such corroboration may be direct or indirect; (*5*) if the approver's testimony is intrinsically impossible or otherwise unreliable, it should be straightway discarded without seeking corroboration; (*6*) the approver's reliability may be adjudged in several ways including its corroboration in material particulars; and (*7*) the approver must necessarily be a *participis criminis* either on his own admission or the evidence on record: 1976 Raj.L.W. 484: 1977 Cr.L.J. 1428.

Evidence of approver—Presumption: 1969 Cr.L.J. 1435: A.I.R. 1969 S.C. 961. *See* also 1981 Cr.L.J. (N.O.C.) 223 (Del.).

Where the approver's evidence has failed to pass the test of reliability, the question whether it has secured that independent corroboration, both with regard to the crime and the criminal which the law requires, does not really arise. The inquiry should rather be whether the remaining evidence in the case is sufficient to sustain the conviction: 1958 M.L.J. (Cr.) 412: 1958 Ker.L.T. 181 [Overruled on another point 1974 Ker.L.T. 328 (D.B.).]

Evidence of approver—Dependability—Tests to be satisfied—Conviction on his testimony alone—Not safe under S. 114 of the Act: 1970 Cr.L.J. 1206 (Raj.).

Accomplice's evidence—Court will not accept it unless corroborated in material particulars: A.I.R. 1970 S.C. 45: 1970 Cr.L.J. 9: (1970) 1 S.C.R. 130.

Approver's evidence—Appreciation of—Test of credibility—His evidence must show that he is a reliable witness and must receive sufficient corroboration. [A.I.R. 1957 S.C. 637, Foll.]: I.L.R. (1964) 14 Raj. 651: 1964 Raj.L.W. 264; 1969 Ker.L.R. 471: 1969 Cr.L.J. 1577.

It cannot be laid down as a matter of law that the evidence of witnesses who support the statement of an approver is not corroborative evidence merely because their evidence was known to the Police before the approver was given pardon. In such a case, it can, however, be said that the approver might have been tutored by the Police to make a statement fitting with the evidence already known to the Police. But where there does not exist any such suggestion on the record it can corroborate the evidence of the approver: A.I.R. 1954 Punj. 286: 56 Cr.L.J. 86.

The approver being in Police custody during the material period is likely to have been influenced by the prosecution and most of his performances before the verifying Magistrate possibly were on the basis of guidance given by the Police Authorities. One would

accordingly attach no importance at all to the verification proceedings. The prosecution is thus deprived of the assurance that could have been gathered as a result of the verification made by the Magistrate with reference to the evidence given by the approver. The verification proceeding conducted on the basis of the confession of the approver which normally lends support to the confessional statement and the approver's evidence, are thus not of value in the case: (1972) 38 Cut.L.T. 683.

When the accomplice gives his statement to the Police, he does not know that he would be granted pardon and possibly for that reason does not come out with all the facts known to him and he does so while making his statement before the Magistrate as he knows by then that he would be tendered pardon on condition that he would disclose all the facts known to him. The omission in the Police statement, therefore, by itself would not necessarily render his evidence unreliable. In considering whether the approver's evidence passed the test of reliability, the Court would have to consider whether taken as a whole and in the light of the facts and circumstances of the case it was a credible version or not. *Held*, on facts and circumstances that, even assuming that the trial Court was in error in not permitting the omission in the statement made by the approver before the Police to be brought on record, there was enough circumstantial evidence to corroborate the approver's version relating to the accused-appellant: A.I.R. 1970 S.C. 1006: 1970 Cr.L.J. 898.

All persons coming technically within the category of accomplice cannot be treated as precisely on the same footing: 13 Pat.L.T. 802: A.I.R. 1933 Pat. 96.

Prima facie involvement of others—Uncorroborated testimony of accomplice may be sufficient to indicate: 1982 Cr.L.J. 2040: (1981) 22 Del.L.T. 139.

Though it is not always safe to rely on the evidence of an accomplice, but it is not the law that under no circumstances, the evidence of an accomplice shall be relied on. Therefore, there must be some additional evidence rendering it reasonably safe to act upon: 1993 Cr.L.J. 3151 (Ker.) (D.B.). *See* also 1982 Cr.L.J. 2303: I.L.R. (1982) 2 Ker. 752.

Where the approver's evidence threw all the blame on the co-accused and assigned to himself only a slight role and his testimony got no corroboration from independent evidence on record including medical evidence itself, *held*, no conviction could be based on his evidence: 1980 Cr.L.R. 227 (Raj.).

Where the approver's testimony of the accused going to Dubai to bring back synthetic yarn was corroborated by the seizure of the vessel containing the goods and the clear *panchanama* prepared, *held*, it could not be said that the trial Court did not appreciate the evidence properly or committed any error of fact or law; conviction upheld: 1984 Cr.L.R. (Guj. & Mah.) 266.

Conviction under S. 133-B of Customs Act (1962)—If can be based on the sole testimony of an accomplice. *See* (1982) 23 Guj.L.R. 299: (1981) 1 Guj.L.H. 328 (D.B.).

4. Reasons for corroboration.—The law as to accomplice evidence is well-settled. The Evidence Act in S. 133 provides that an accomplice is a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The effect of this provision is that the Court trying an accused may legally convict him on the single evidence of an accomplice. To this there is a rider in *Illus.* (*b*) to S. 114 of the Act which provides that the Court may presume that accomplice is unworthy of credit unless he is corroborated in material particulars. This cautionary provision incorporates a rule of prudence because an accomplice, who betrays his associates, is not a fair witness and it is possible that he may, to please the prosecution, weave false details into those which are true and his whole story appearing true there may be no means at hand to sever the false from that which is true. It is for this reason that Courts, before they act on accomplice evidence, insist on corroboration in material respects as to the offence itself and also implicating in some satisfactory way however small, each accused named by the accomplice. In this way the commission of the offence is confirmed by some competent evidence other than the single or unconfirmed testimony of the accomplice and the inclusion by the accomplice of an innocent person is defeated. This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law: A.I.R. 1968 S.C. 832: 1968 Cr.L.J. 1017.

Evidence of an accomplice is generally held untrustworthy for three reasons: (*i*) because he is likely to swear falsely in order to shift the guilt from himself, (*ii*) because he, as a participator in crime and consequently an immoral person, is likely to disregard the sanction of an oath, and (*iii*) because he gives his evidence under promise of a pardon or in the expectation of an implied pardon: I.L.R. (1971) 21 Raj. 209.

Every approver comes to give evidence in return for immunity; he is to start with an unreliable person; he is a person of low morals, a participator in crime who has let down his companions, the rule of caution, therefore, calls for material corroboration, a requirement of the time-worn judicial practice. Like all other witnesses, his evidence must be reliable and must not be uninspiring and unacceptable and liable to outright rejection. If he passes the test, the rule of caution would come into play; the Court then must look for corroboration in material particulars which connect or tend to connect each of the accused with the crime committed; he must bridge closely the distance between the crime and the accused to give needed assurance for acceptance of his testimony: 1985 Cr.L.J. 1573 (Ori.).

An approver is a most unworthy friend, if at all, having bargained for his immunity, he must prove his worthiness for credibility in Court. This test is fulfilled: (*1*) if his story involves him in the crime and appears intrinsically natural and probable catalogue of events, and contains minute details in accord with reality, which is likely to save it from being rejected *brevi manu*; (2) once that hurdle is crossed, his story must implicate the accused in such a manner as to give rise to the conclusion of guilt beyond reasonable doubt. Though in a rare case taking into consideration all the factors, circumstances and situations, a conviction based on the approver's uncorroborated evidence confidently found by the Court to be true and reliable may be permissible, but ordinarily the approver's statement has to be corroborated in material particulars, bridging closely the distance between the crime and the criminal; clinching features of involvement disclosed by an approver appertaining directly to an accused, if found reliable by the touchstone of other independent credible evidence, would provide the needed assurance for acceptance of his testimony as true whereupon conviction may be based. [A.I.R. 1974 All 324, Reversed]: A.I.R. 1975 S.C. 856: (1975) 3 S.C.C. 742: 1975 Cr.L.J. 765.

The double test propounded in A.I.R. 1957 S.C. 637 does not contemplate appraisal of the approver's testimony into two separate compartments. An approver is not an inpenitence but a deserter in hope of pardon; he is likely to weave into his testimony some untruths; it is for that reason that the Courts view his testimony, in the start, with suspicion and search for its corroboration; if found to be unreliable, it must be rejected there and then; but if found to be reliable or which is rare, wholly reliable, he can be believed with or without corroboration; it is only when the Court is unable at once to accept him to be wholly reliable that it calls for corroboration, direct or circumstantial, of the role played by the accused: 1976 Raj.L.W. 484: 1977 Cr.L.J. 1428; I.L.R. (1977) 27 Raj. 904.

The demanding degree of proof traditionally required in criminal cases and the devaluation suffered by a trap witness, naturally involved in the outcome of the case, suggest the legitimate search for corroboration from independent or unfaltering source-human or circumstantial—to make judicial certitude doubly sure. Such an approach casts no pejorative reflection in the integrity of the witness but is necessitated because of the hazard of holding a man guilty on interested, even if honest, evidence which may impair confidence in the system of justice: A.I.R. 1974 S.C. 989: (1974) 4 S.C.C. 84: 1974 Cr.L.J. 784.

The testimony of an accomplice witness is a tainted one; and that taint is not removed in respect of a particular offence simply because he had to act or part in the commission of that offence although his complicity is clear in respect of another offence, the two offences having been committed in some series of acts so connected together as to form the same transaction: 1953 Cr.L.J. 708: A.I.R. 1953 Bilaspur 3.

An approver's evidence is in itself tainted evidence though in some cases it may be worthy of belief: 4 L.L.J. 284: 23 Cr.L.J. 251.

Witnesses to whom assurances are given are themselves guilty of offences—They are accomplices and their evidence will be

looked as tainted: 1968 Cr.L.J. 493: A.I.R. 1968 Mad. 117.

5. Necessity for corroboration.—The rule in S. 114, *Illus.* (*b*) that an accomplice is unworthy of credit, unless he is corroborated in material particulars, has become a rule of practice of so universal application that it has now almost acquired the force of law: 120 I.C. 721: A.I.R. 1930 Nag. 97. *See* also 184 I.C. 545: A.I.R. 1939 Rang. 361.

All that is insisted on as a matter of prudence is that before acting upon his evidence the Court must be satisfied that his evidence has been corroborated in material particulars by other items of independent evidence: I.L.R. (1957) Ker. 559: 1957 M.L.J. (Cr.) 443: A.I.R. 1957 Ker. 134; A.I.R. 1959 All. 149 (bribe givers).

An approver's evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence: 13 I.C. 998: 13 Cr.L.J. 182; I.L.R. (1953) Bom. 670: A.I.R. 1953 Bom. 297. *See* also I.L.R. 9 Lah. 550: A.I.R. 1928 Lah. 193; I.L.R. 9 Luck. 355: A.I.R. 1934 Oudh 90; 73 I.C. 808: A.I.R. 1924 Lah. 235; 19 All.L.J. 725: 63 I.C. 455; 34 I.C. 976: (1916) 18 Bom.L.R. 266; 1942 O.W.N. 403: A.I.R. 1942 Oudh 435; A.I.R. 1953 Manipur 2; A.I.R.1955 J.&K. 13; 1970 M.L.J. (Cr.) 123.

A conviction based on the evidence of an accomplice is not bad but in established practice it is necessary that such evidence should be corroborated by some untainted evidence in material particulars: 24 I.C. 174: (1913-14) 18 Cal.W.N. 550; 73 I.C. 963: 4 Pat.L.T. 381; 2 Pat.L.T. 773: A.I.R. 1921 Pat. 337; A.I.R. 1929 Lah. 850; 1954 Ker.L.T. 801: A.I.R. 1955 Trav.-Co. 87. *See* also 1983 Cr.L.J. 1788: 1983 Kash.L.J. 279; 1981 Cr.L.R. 460 (Guj.). The testimony of an approver is generally looked upon with suspicion as he is considered to be a man of low morals and not wholly trustworthy: 1994 Cr.L.J. 2320: 1994 S.C.C. (Cr.) 851: (1994) 1 Crimes 1017.

A statement of accomplice would be unworthy of belief unless corroborated by other good evidence: 1955 All.L.J. 330: A.I.R. 1955 All. 138.

The law as to accomplice evidence is well settled. Under S. 133 an accomplice is a competent witness against an accused person; and a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice. This is a rule of law. There is, however, a rule of prudence contained in *Illus.* (*b*) to S. 114 under which the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The necessity of corroborations is stressed therein. S. 133 should not be read in isolation but together with S. 114, *Illus.* (*b*). An accomplice witness as well as an ordinary witness are competent to testify, but in one case of an ordinary witness there is no presumption as in *Illus.* (*b*) to S. 114 and for good reasons. The evidence of an accomplice, though admissible, remains suspect evidence because of the tainted source from which it comes. S. 146 can properly be invoked to test his veracity and also discover who he is and what is his position in life and shake his credit by injuring his character. It is possible to conceive that one circumstance alone may be sufficient corroboration. Conduct of accused may also be capable of supplying corroboration. The corroboration should not only be in regard to the crime but also in regard to the identity of the person charged. What is necessary is to be reasonably satisfied, as prudent man, that the story of the accomplice that the accused and no one else committed the crime, is true: 1969 Cr.L.J. 739: A.I.R. 1969 Goa 68. *See* also A.I.R. 1968 S.C. 832: 1968 Cr.L.J. 1017; (1965) 1 Cr.L.J. 393 (Punj.); A.I.R. 1950 Lah. 34: 51 Cr.L.J. 419.

It is a well-established rule that the evidence of an accomplice or approver who, from the very nature of things has participated in the crime, should not ordinarily be made the basis for convicting an accused person without corroboration in material particulars. Corroboration does not of course mean that there should be independent evidence of that which the accomplice relates; nor is it necessary that he should be confirmed in every detail. It is sufficient if there is confirmation as to the material circumstances of the crime and as to the identity of the accused in relation to the crime. The evidence required for corroboration need not necessarily be direct; it may be circumstantial. Nor can the degree and extent of the corroboration be defined exactly, since that is a matter for the decision of the Court in each particular case. If the Court does not lose sight of this fundamental principle which is to be observed in appreciating the evidence of the approver, it cannot be said that a

conviction based on the evidence of the approver, is unjustified or unsustainable: I.L.R. (1951) Trav.-Co. 644: A.I.R. 1952 Trav.-Co. 155; 1974 Cr.L.J. 43 (D.B.); 1973 Cr.L.J. 955 (D.B.).

A conviction cannot be based on the evidence of accomplice unless it is corroborated in material particulars by the evidence of persons who are not accomplices. Tainted evidence cannot corroborate other tainted evidence: (1948-49) 53 Cal.W.N. 479: A.I.R. 1949 Cal. 594.

Without material corroboration there should ordinarily be no conviction, when accused can explain for articles found with them: 76 I.C. 716: A.I.R. 1923 Lah. 385.

It is unsafe but not illegal to convict on the uncorroborated testimony of an accomplice. An accomplice's evidence must be viewed with suspicion: A.I.R. 1928 Cal. 233; 13 Pat.L.T. 802: A.I.R. 1933 Pat. 96; A.I.R. 1933 Pat. 500; A.I.R. 1934 Sind 185; A.I.R. 1934 Sind 78(2); I.L.R. 9 Luck. 355: A.I.R. 1934 Oudh 90; 1938 Mad.W.N. 1272: A.I.R. 1939 Mad. 266; 175 I.C. 465: A.I.R. 1938 Rang. 177 (F.B.) (retracted confession of co-accused is no corroboration); A.I.R. 1937 Rang. 209; 16 Mys.L.J. 147; (1939) 41 Punj.L.R. 333: A.I.R. 1939 Lah. 429; 5 Lah.L.J. 572: A.I.R. 1923 Lah. 683; A.I.R. 1923 Lah. 76: 68 I.C. 821; 20 Cr.L.J. 561: 52 I.C. 49 (All.); 19 I.C. 321: (1913) 15 Bom.L.R. 288; I.L.R. 15 Mad. 814; (1912) 14 Bom.L.R. 367; I.L.R. 3 Lah. 144; 65 I.C. 622: 23 Cr.L.J. 158; 20 P.R. (Cr.) 1919: 49 I.C. 607; I.L.R. 35 Mad. 397: 14 I.C. 896 (F.B.); 17 P.R. (Cr.) 195; 16 Cr.L.J. 634; 17 Cr.L.J. 97; 17 Cr.L.J. 107; A.I.R. 1927 Cal. 63; A.I.R. 1927 Cal. 536; I.L.R. 2 Luck. 631: A.I.R. 1927 Oudh 369; A.I.R. 1927 Lah. 78; A.I.R. 1927 Lah. 10; A.I.R. 1927 Lah. 36; 120 I.C. 721: A.I.R. 1930 Nag. 97; A.I.R. 1937 Cal. 433 (S.B.); 1957 Cr.L.J. 67 (Madh. Bh.).

Law is well settled that the approver's evidence must receive sufficient corroboration: (1973) 39 Cut.L.T. 559 (D.B.); 1982 Cr.L.J. 487 (Ori.).

It is needless to say that evidence of the approver, if his version is found *prima facie* acceptable, is required to be corroborated in material particulars, connecting each accused with the crime: A.I.R. 1979 S.C. 569.

Accomplice evidence requires corroboration in material respects as to offence implicating accused: 1971 Mys.L.J. (S.N.) 387.

Accomplice evidence—Corroboration of A.I.R. 1970 S.C. 1330. *See* also A.I.R. 1968 Tripura 57; (1965) 67 Punj.L.R. 168; A.I.R. 1964 All. 139: (1964) 1 Cr.L.J. 378; (1964) 66 Punj.L.R. 30: A.I.R. 1964 Punj. 130; A.I.R. 1957 Andh. Pra. 482: 1957 Cr.L.J. 939; A.I.R. 1956 Madh. Bh. 262: 1956 Cr.L.J. 1401.

Although the evidence of an accomplice is good evidence against his co-accused under S. 133, and although there is no rule of law that corroboration is essential before there can be a conviction on the testimony of an accomplice, the necessity of corrboration as a matter of prudence, except where the circumstances make it safe to dispense with it must be present to the mind of the Judge before a conviction without corroboration can be sustained. As a rule of prudence, therefore, sufficient corroboration is insisted upon with reference to the circumstances and other details to show that the testimony of the approver is, in fact reliable: I.L.R. 38 Pat. 1251: (1961) 1 Cr.L.J. 841: A.I.R. 1961 Pat. 260.

It is well settled that, except in special circumstances, the Courts are duty bound to raise the presumption under S. 114 (*b*). A.I.R. 1963 S.C. 599; A.I.R. 1973 S.C. 1188; A.I.R. 1975 S.C. 856 crystallize a definite rule that though a conviction can be based on uncorroborated evidence of an accomplice but as a rule of prudence it is unsafe to rely on such uncorroborated testimony: A.I.R. 1994 S.C. 2420: 1994 Cr.L.J. 3271.

Witness either accomplice or of character analogous to accomplice—His evidence must be corroborated in material particulars: (1969) 35 Cut.L.T. 175.

Version given by an accomplice unless corroborated in material particulars by independent and reliable evidence, is unworthy of credit: (1964) 2 Cr.L.J. 497: A.I.R. 1964 All. 481.

The evidence of an approver should not be believed without material corroboration and in order to see whether there is such corroboration, the Court should scrutinize and marshall out very carefully the facts: 91 I.C. 232: 12 Cr.L.J. 35. *See* also A.I.R. 1948 Nag. 342. But even if corroborated, it cannot be acted upon unless the Court is satisfied that the evidence of the accomplice is reliable: (1983) 1 Crimes 457 (Ker.).

The statement of an approver, veracious though it may appear to be, and though the

truth of a large part of it be established beyond all doubt nevertheless requires corroboration: 34 I.C. 993: 17 Cr.L.J. 273.

It is established as a rule of prudence that the testimony of accomplice if it is thought reliable as a whole conviction could only be based if it is corroborated by independent evidence either direct or circumstantial connecting the accused with the crime. Thus, where evidence of the approver showed that he had claimed to be a spectator at every moment and had not participated at any stage and his version did not appear to be natural, *held*, in absence of any independent corroboration, conviction could not be based on his testimony: A.I.R. 1988 S.C. 599: 1988 Cr.L.J. 842.

Before a conviction can be founded on the evidence of an accomplice, his testimony must be substantially corroborated. Thus, the various corroborative circumstances, when considered in the context of the evidence of the accomplice, corroborated by his statements before the Customs Authorities and reaffirmed by his plea of guilty and the conviction which followed, left no manner of doubt that the evidence of the accomplice could reasonably and safely be accepted as true and conviction recorded by acting upon the same. [1967 Cr.L.J. 1014 (S.C.), Foll.]: 1980 Cr.L.J. 618 (Del.) (D.B.).

The conviction is not illegal which proceeds upon the uncorroborated testimony of an accomplice but the rule of corroboration must be present to the mind of the Judge and corroboration may be dispensed with only if the peculiar circumstances of the case make it safe to dispense with it. It is not necessary that corroboration would be on each and every point. Corroboration on material particulars is enough. Thus, where a subordinate official (merely a clerk) working in the Municipal Corporation under the two accused (Deputy Engineer and Overseer) procured the municipal labour and material and carried out the repairs to the house of the accused No. 1 on receiving instructions from the two accused and he had no axe to grind against any of the accused and would not have carried out the repairs had the accused not given any instructions to him, *held*, in the circumstances, his evidence, even assuming it was an accomplice's testimony, could be accepted without corroboration: 1978 Cr.L.J. 431 (Bom.).

Evidence of approver may, in exceptional cases and for reasons stated, be admitted though uncorroborated: 17 Cr.L.J. 220: 34 I.C. 332.

Testimony of—Rule of law and rule of prudence—Uncorroborated evidence of accomplice—Court's duty in respect of: (1963) 2 Cr.L.J. 104 (Punj.).

Need for corroboration specially in conspiracy case: A.I.R. 1935 All. 162: 155 I.C. 369.

Conviction on uncorroborated evidence, when approver is a scoundrel, is not warranted: 77 I.C. 429: A.I.R. 1924 Rang. 173.

Election petition alleging corrupt practice—Standard of proof is that in criminal case—Evidence of accomplice—Corroboration necessity: (1965) 2 An.L.T. 136: A.I.R. 1966 Andh. Pra. 331.

6. Nature and extent of corroboration.—Whether English and Indian law on the point are the same. *See* 17 Nag.L.R. 113: A.I.R. 1921 Nag. 39; I.L.R. 5 Pat. 63: A.I.R. 1926 Pat. 232; 1929 Mad.W.N. 698.

Accomplice—Evidence of—Nature and extent of corroboration required—Duty of Court: (1957) 2 An.W.R. 182: 1957 M.L.J. (Cr.) 455; A.I.R. 1965 Bom. 195: (1965) 67 Bom.L.R. 317: I.L.R. (1965) Bom. 648.

Testimony of accomplice—Corroboration—Nature and extent: A.I.R. 1966 S.C. 821.

Evidence of accomplice—Value of—Nature and extent of corroboration: (1965) 1 Cr.L.J. 393 (Punj.); 1982 Cr.L.J. 1519 (Gau.).

The nature and extent of corroboration of accomplice's evidence varies from case to case. It is not safer to base a conviction in serious crimes on accomplice's evidence without corroboration on material particulars: A.I.R. 1988 S.C. 139: 1988 Cr.L.J. 398: (1988) 1 S.C.C. 1: (1988) 1 Rec.Cr.R. 60.

There should be direct and material corroboration of the statement of an approver who is of very bad character: 32 I.C. 843: 17 Cr.L.J. 107.

An approver is generally regarded as a person of little moral worth who is purchasing his own freedom at the expense of others, and though in law the accused can be convicted upon the uncorroborated evidence of the approver it is only prudent that the evidence of the approver should be corroborated. The corroboration should be with

regard to the actual factum of the crime and also the identity of the accused. The corroboration required however, is to be such as to tend to convict the accused with the crime and need not be of such a nature that by itself it should be sufficient proof connecting the accused with the crime. The corroborative evidence may be circumstantial, but if it points clearly to the accused, it can be safely acted upon and made the basis of the conviction. The amount of corroborative evidence varies with the facts and circumstances of each particular case. But much or little the purpose of corroborative evidence is to satisfy the Court that the approver, when he implicates a particular individual, does so truly: I.L.R. (1944) Kar. 456: A.I.R. 1945 Sind 132; A.I.R. 1930 Oudh 455. *See* also 6 Mys.L.J. 419 [Courts require material corroboration as a matter of prudence and practice.]

What the law requires in the case of an accomplice's evidence is that there should be such corroboration of the material part of the story connecting the accused with the crime as will satisfy reasonable minds that the approver can be regarded as a truthful witness. The corroboration need not be direct evidence of the commission of the offence by the accused. If it is merely circumstantial evidence of his connection with the crime it will be sufficient and the nature of the corro-boration will depend on and vary with the circumstances of each case: 1966 Cr.L.J. 205: A.I.R. 1966 S.C. 821; I.L.R. (1971) 21 Raj. 209.

It is necessary that the testimony of an approver should be strengthened by corroboration, but it is impossible to lay down any rigid formula as to what kind of evidence should be treated as corroboration. However, generally, the following two principles are kept in view: (*1*) the corroboration must come from independent sources and thus, ordinarily, the testimony of an accomplice would not be sufficient to corroborate that of another, and (2) the corroboration need not be by direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime: 1977 Cr.L.J. 32 (P.&H.).

"Corroborative evidence" contemplates only supporting evidence which renders the accomplice evidence more probable; corroboration required is only of a general kind rendering it probable that the version of the accomplice is true and can safely be acted upon. And it need not be by direct evidence; it may even be circumstantial, "working cumulatively in geometrical progression and eliminating other possibilities". [(1972) 3 W.L.R. 910; A.I.R. 1954 S.C. 54; A.I.R. 1970 S.C. 45; (1970) 2 S.C.W.R. 70; (1956) 2 Q.B. 432; (1973) 2 W.L.R. 254, Rel. on; 1958 Ker.L.T. 181, Overruled]: 1974 Ker.L.T. 328 (D.B.).

In discussing the evidence of the approver, it is erroneous to segregate the incidents deposed to by the approver and seek their corroboration in isolation. It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction.

The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. S. 157, Evidence Act, makes no exceptions. The weight to be attached to it is, of course, another matter and it may be that in some cases the evidentiary value of two statements emanating from the same tainted source may not be high, but in view of S. 118 its legal admissibility as corroboration cannot be questioned: 1960 B.L.J.R. 565: 1960 Cr.L.J. 1360: A.I.R. 1960 Pat. 459. *See* also 1963 Ker.L.T. 992: (1963) 2 Cr.L.J. 454.

The warning of the danger of convicting on uncorroborated evidence is given when the evidence is that of an accomplice. The primary meaning of accomplice is any party to the crime charged and some one who aids and abets the commission of crime. The nature of corroboration is that it is confirmatory evidence and it may consist of the evidence of second witness or of circumstances like

the conduct of the person against whom it is required. Corroboration must connect or tend to connect the accused with the crime. When it is said that the corroborative evidence must implicate the accused in material particulars, it means that it is not enough that a piece of evidence tends to confirm the truth of a part of the testimony to be corroborated. That evidence must confirm that part of the testimony which suggests that the crime was committed by the accused. The first test of reliability of approver and accomplice evidence is for the Court to be satisfied that there is nothing inherently impossible in evidence. After that conclusion is reached as to reliability, corroboration is required: A.I.R. 1970 S.C. 1330: 1970 Cr.L.J. 1158.

Extent of corroboration varies with the circumstances of each case including the character and antecedents of the approver: A.I.R. 1929 Lah. 850: 107 I.C. 97. *See* also A.I.R. 1941 Lah. 82.

Illus. (*b*) to S. 114 requires corroboration in "material particulars" to rebut the presumption of untrustworthiness which ordinarily attaches to the testimony of an accomplice. The nature and extent of the corroboration would depend upon, and vary with, the circumstances of each case, particularly the nature of the offence charged, the character and antecedent of the approver and the degree of suspicion attaching to his evidence. It is now well settled that the minimum amount of corroboration required to make it safe to act on the testimony of an approver is that his evidence must be corroborated not only as to the *corpus delicti* but also as to the identity of the accused persons. The corroborative evidence must show or tend to show that the story of the approver that the accused committed the crime is true; in other words, the corroborative evidence must be such as confirms not only the evidence that the crime has been committed but also the evidence that the accused committed that crime: (1950) 52 Punj.L.R. 248; A.I.R. 1951 Simla 178: 52 Cr.L.J. 116; 1957 M.L.J. (Cr.) 455. In law, the statement alone of the approver can be taken as sufficient proof to establish the crime, but it is the invariable practice of the Court to require in the case of an approver's statement, evidence corroborating not only the approver's own part in the crime, but the fact that the accused has been truthfully implicated: A.I.R. 1948 Lah. 24: 48 Cr.L.J. 967: (1947) 49 Punj.L.R. 42. *See* also 1975 B.B.C.J. 221.

The nature of corroboration necessarily varies according to the particular circumstances of the offence charged. The corroboration need not be such as to confirm the accomplice in every detail of the crime; nor need it be by direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime: A.I.R. 1933 Lah. 294. Corroboration may be circumstantial: 120 I.C. 721: A.I.R. 1930 Nag. 97; I.L.R. (1956) Cut. 195: 1956 Cr.L.J. 1208.

There must be independent evidence connecting the accused with the offence. It is, however, not true that independent corroboration of an approver's evidence should cover the whole of the prosecution story or even all the material particulars. All that is required is that the approver's testimony should be corroborated in material particulars by other independent evidence and this as a rule of caution and prudence and not as a statutory requirement though the rule has come to find an honored place in our criminal jurisprudence. According to statute, a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice and rule of caution and prudence is based on *Illus.* (*b*) to S. 114, according to which an accomplice is unworthy of credit unless corroborated in material particulars. The nature and extent of corroboration required by this rule of prudence must, from the very nature of things, vary with the circumstances of each case and it is impossible if not also dangerous, to formulate with precision the kind of evidence which should or may be regarded as sufficient corroboration to sustain conviction. What is required is that some additional evidence should be forth coming rendering it probable that the story of the approver is true and it is reasonably safe to act upon it and also that it reasonably connects or tends to connect the accused with the offence charged. The corroboration coming from independent source need not be direct, connecting the accused with the crime; circumstantial evidence may be sufficient to satisfy the test of the rule of prudence: (1964) 66 Punj.L.R. 30: A.I.R. 1964 Punj. 130.

While it would be desirable to record a conviction on the uncorroborated testimony

of an approver, it would be unreasonable to expect that such corroboration should cover the whole of the prosecution story. It is sufficient if the approver's evidence is corroborated in material particulars and connects the accused with the crime. At the same time it would not be safe to act upon such evidence merely because it is corroborated in minor particulars: (1964) 1 Cr.L.J. 378: A.I.R. 1964 All. 139.

The question as to whether corroboration is necessary and, if so, to what extent is a question to be decided on the facts of each particulars case. Much depends on the nature of the offence, the extent of the complicity of the witness in it and the circumstances under which the accomplice makes his statement: A.I.R. 1934 Sind 185. The corroboration of the evidence of an approver need not consist of evidence which standing alone, would be sufficient to justify the conviction of the accused person whom he seeks to implicate. If this were the law, it would be unnecessary to examine an approver at all. All that is required is that the corroboration should be sufficient to afford some sort of independent evidence to show that the approver is speaking the truth with regard to the accused person: I.L.R. (1944) 2 Cal. 327: A.I.R. 1945 Cal. 441.

The evidence of an accomplice, although it may require corroboration, need not be corroborated in regard to every small detail, for if there be such corroboration, the evidence of the accomplice would be totally unnecessary. The case might well stand on the other evidence alone.

In any event, it is not illegal to base a conviction on the evidence of an accomplice alone, nor is a Court required to set aside a verdict of the jury merely on the ground that it is based upon the uncorroborated testimony of an accomplice unless it is clear that by the omission to require corroboration, a failure of justice has, in fact, occurred: 1952 Cr.L.J. 1154: A.I.R. 1952 Cal. 534.

An accomplice is a competent witness and conviction can rest on his testimony but the Courts will rely on such testimony only if they are satisfied in regard to its truthfulness. It is not necessary that the testimony of the approver should be corroborated in every minor detail. In a murder case recovery of articles belonging to deceased from different accused and the dead body from a particular place in pursuance of the statement of the approver, was held to be sufficient corroboration of the approver's statement, connecting different accused with the crime: (1963) 2 Cr.L.J. 148: A.I.R. 1963 J.&K. 34.

Corroboration is required only of material circumstances and not confirmation of every detail deposed to by the accomplice. There must be corroboration of the crime as well as of the identity of the persons charged. The corroboration must be by independent testimony and corroboration need not be by direct evidence and may be circumstantial. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration. Except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection with the crime. Therefore, the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars: (1965) 2 Cr.L.J. 713: A.I.R. 1965 Cal. 598.

The law is well settled that the Court looks with some amount of suspicion on the evidence of an accomplice witness which is a tainted evidence and even S. 133 clearly provides that the evidence of an accomplice witness should not be accepted unless corroborated. At the same time, it must be remembered that corroboration must be in respect to material particulars and not with respect to each and every item however minor or insignificant it may be. Actually the requirement of corroboration is a rule of prudence which the Courts have followed for satisfying the test of the reliability of an approver and has now been crystallized into a rule of law. It is equally well settled that one tainted evidence cannot corroborate another tainted evidence because if this is allowed to be done then the very necessity of corroboration is frustrated: A.I.R. 1979 S.C. 1761.

The evidence of an accomplice is always open to suspicion and so has to be corroborated by independent evidence, direct or circumstantial confirming not merely the material particulars of the alleged offence but also some particulars connecting the accused with it: A.I.R. 1952 Him. Pra. 57: 1952 Cr.L.J. 1939. *See* also A.I.R. 1957 Andh. Pra. 482: 1957 Cr.L.J. 939 [Corroboration need not be by way of direct evidence and it can be in the shape of circumstances]. Only in exceptional cases the corroboration can be dispensed with. The evidence in corroboration of the approver's evidence need not be direct evidence. It is sufficient that it is merely circumstantial: 118 I.C. 423: A.I.R. 1929 Oudh 321(2); 152 I.C. 934: A.I.R. 1935 All. 86; 146 I.C. 935: A.I.R. 1933 Pat. 112; I.L.R. 58 Bom. 40: (1933) 35 Bom.L.R. 1040: A.I.R. 1933 Bom. 482; I.L.R. 15 Lah. 673; 1936 O.W.N. 64: A.I.R. 1936 Oudh 156. *See* also A.I.R. 1929 Lah. 850; A.I.R. 1928 Oudh 207; A.I.R. 1930 Oudh 353.

Courts are naturally reluctant to act on the tainted evidence of an approver unless it is corroborated in material particulars by other independent evidence. But it would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted, it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details, because in such a case corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true: A.I.R. 1957 S.C. 637; 1962 M.L.J. (Cr.) 695: A.I.R. 1962 Mys. 275.

Approver's evidence—Corroboration in material particulars necessary—Every material particular need not be corroborated but it must be of such nature as to connect or tend to connect accused with crime—Such corroboration absent—Accused must be acquitted: I.L.R. (1964) 14 Raj. 651: 1964 Raj.L.W. 264.

Approver's evidence—Corroboration necessary—There should be corroboration in material particulars and *qua* each accused: A.I.R. 1963 S.C. 599.

Corroboration of the evidence of an accomplice does not mean that everything said by the accomplice should be spoken by some other witness; if that were so, there would have been no need of the evidence of an accomplice. It is precisely because the prosecution cannot prove its case wholly and fully by evidence that the law permits the evidence of an accomplice. The corroboration required by law should be such that would lead the Court to believe that the testimony of the accomplice is truthful and can be acted upon. In case of wholly reliable accomplice witnesses no corroboration need be necessary to act upon their testimony; one accomplice witness may be corroborated by another witness if there is no collusion amongst them. [(1972) 3 W.L.R. 910; A.I.R. 1954 S.C. 54; A.I.R. 1970 S.C. 45; (1970) 1 S.C.W.R. 70; (1956) 2 Q.B. 432; (1973) 2 W.L.R. 254, Rel. on; 1958 Ker.L.T. 181, Overruled]: 1974 Ker.L.T. 328 (D.B.).

The corroboration must be such as would lead the Court to believe that the accomplice is giving truthful evidence and that it would be safe to act upon that evidence. The corroboration must come from independent sources and ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. Further, it is not sufficient that there should be corrobroation of the accomplice evidence that a crime was committed, but there should be corroboration of his testimony that the accused was in some way connected with that crime. Finally, the corroboration need not be by direct evidence, it can also be by circumstantial evidence: (1953) 55 Bom.L.R. 191: I.L.R. (1953) Bom. 670: A.I.R. 1953 Bom. 297; 1959 Cr.L.J. 947: A.I.R. 1959 Andh. Pra. 387.

Corroboration evidence should confirm in some material particulars not only the evidence that the crime has been committed, but also that the accused committed it: A.I.R. 1963 Lah. 294; A.I.R. 1964 Kutch 20: 1964 Cr.L.J. 793; 230 I.C. 431: 48 Cr.L.J. 651; I.L.R. (1956) Cut. 195: A.I.R. 1956 Ori. 177.

An accused should not be convicted on the statement of an approver unless such testimony is strongly corroborated and the corroboration distantly implicates the accused with crime committed: 40 I.C. 696: 9 P.W.R. (Cr.) 1917; 39 I.C. 680: 9 P.R. (Cr.) 1917: A.I.R. 1939 Pat. 164: 11 Pat.L.T. 545; 146 I.C. 701: A.I.R. 1933 Nag. 352; 147 I.C. 1172: A.I.R. 1934 Cal. 114.

The corroboration of an approver's evidence need not be of a kind which proves the

offence against the accused. It is sufficient if it connects the accused with the crime: A.I.R. 1957 S.C. 340: 1957 Cr.L.J. 422.

It is unsafe to rely upon the uncorroborated testimony of the approver; the corroboration must be of the statement connecting the accused with the offence: 12 I.C. 513: 12 Cr.L.J. 537 (A); 1929 Mad.W.N. 794.

It is unsafe to act upon the evidence of an accomplice witness, unless it is corroborated; the corroboration should be independent and should be in respect of the offence as well as of the connection of the accused with the offence and the degree of corroboration would vary according to and depend upon the circumstances of each case: I.L.R. (1952) Bom. 53: A.I.R. 1952 Bom. 184.

The evidence of an accomplice being that of an interested witness or tainted one, caution requires that there should be corroboration from an independent source in some material aspect not only commission of crime but also his involvement in it, before its acceptance. However, it is not necessary to expect corroboration on all the circumstances of the case or every detail of the crime. It would be sufficient to have corroboration as to material circumstance of the crime and of the identity of the accused in relation of the crime. Where evidence of approver was corroborated on material aspects from truthful independent sources, *held*, evidence of the approver could be believed: 1994 Cr.L.J. 1791: (1994) 1 Bom.C.R. 648 (D.B.).

Where an accomplice is coerced and threatened into submission to commit an offence, he is not a criminal of the basest kind. The corroboration necessary to establish his credit will be less than if his complicity in the offence had been voluntary and spontaneous: 150 I.C. 917: A.I.R. 1934 Sind 78.

The rule that testimony of an approver must be corroborated not only as to the crime but also as to the identity of each accused person and that the corroboration must proceed from an untainted source is not a technical rule, but is founded on long judicial experiment: I.L.R. 38 Cal. 559: (1910-11) 15 Cal.W.N. 593; A.I.R. 1929 Nag. 22; A.I.R. 1929 Lah. 850; (1932) 34 Punj.L.R. 866.

Approver's statement as to identity of accused should be corroborated: 48 Cal.L.J. 481. *See* also A.I.R. 1930 Cal. 430 (most careful scrutiny is needed).

For basing conviction on the evidence of an approver, it must be found that he was a reliable witness and his version was intrinsically credible and his evidence should be corroborated in material particulars by other evidence direct or circumstantial. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. [1970 S.C.C. (Cr.) 404; A.I.R. 1970 S.C. 1330; A.I.R. 1952 S.C. 54, Foll.]: 1981 M.P.L.J. 622: 1981 Jab.L.J. 324.

Corroboration is required of accomplice's evidence only to enable the Court to convict an accused as it is not prudent to base a conviction on the uncorroborated evidence of an accomplice. Corroboration by itself cannot make the story of the accomplice acceptable when on the face of it, it has to be rejected: A.I.R. 1958 Ori. 228.

The probative value of the evidence of an accomplice is practically the same as the confession of a co-accused. [I.L.R. 38 Bom. 156, Foll.]. A conviction based on the evidence of an accomplice or the confession of a co-accused is not illegal, though it is not safe to act on such testimony, unless corroborated in material particulars: 24 I.C. 153: 15 Cr.L.J. 417: A.I.R. 1929 Nag. 15; 7 O.W.N. 862: A.I.R. 1930 Oudh 455.

The corroboration required for the evidence of an accomplice need not prove the commission of the offence by the accused; it would be suffice if it connects the accused with the crime committed and should lend assurance that the approver is speaking the truth; it should be of material particulars and *qua* each accused. It is additional evidence which renders the approver's version probably true and reasonably safe to act upon; it need not cover the entire prosecution story nor the entire material particulars; it is not meant to render the accused's version superfluous; it can be direct or indirect but must be independent of the approver's evidence: (1994) 4 S.C.C. 478: 1994 S.C.C. (Cr.) 1252: 1994 Cr.L.J. 3071: (1994) 2 Crimes 1: (1994) 2 An.L.T. (Cr.) 429.

Evidence of accomplice and confession of co-accused—Distinction between. *See* (1936) 38 Bom.L.R. 1122: A.I.R. 1937 Bom. 31.

Accomplice—Extent of corroboration required—Case of an accomplice is different from confession of accused. [A.I.R. 1965 Ori. 175, Foll.]: A.I.R. 1970 Ori. 54 (D.B.).

Evidence proving that the accused were, at the time the crime was committed, near the scene of the crime and so placed as to justify the inference that they were accompanying persons whose complicity in the crime has been satisfactorily proved by independent evidence, is sufficient corroboration of the evidence of the accomplice: I.L.R. (1944) 2 Cal. 312.

While looking for corroboration to the evidence of approvers, one must first look at the broad spectrum of the approver's version and then find out whether there is other evidence to lend assurance to that version. The nature and extent of the corroboration may depend upon the facts of each case. The corroboration need not be of any direct evidence that the accused committed the crime. The corroboration even by circumstantial evidence may be sufficient. But such evidence as to corroboration must be independent and must not be vague or unreliable. Thus, where in a murder case, there was evidence regarding the presence of the accused alongwith the approver in the house of the deceased and the prosecution also recovered weapons of the crime at the instance of the accused which also lent re-assurance by way of corroboration to the evidence of approver, *held*, the approver's evidence could be relied upon for convicting the accused: A.I.R. 1988 S.C. 672: 1988 Cr.L.J. 845.

Admittedly, it is not necessary that the story of the approver should be corroborated in every detail of the crime nor is it necessary that the corroborative evidence should itself be sufficient for conviction. (Evidence of the approver held was corroborated by recovery of a shirt having human bloodstains and other articles on the information given by the accused): A.I.R. 1954 Punj. 286: 56 Cr.L.J. 86.

Approver's evidence—Corroboration on material particulars by witnesses who were believed in—No interference with conviction of accused: 1967 Cr.L.J. 671: A.I.R. 1967 S.C. 792.

Where the case was entirely dependent on the approver's evidence but there was no satisfactory evidence to corroborate approver's evidence on material particulars regarding accused's participation, *held*, the accused was entitled to acquittal: A.I.R. 1980 S.C. 1871 (2): (1980) 2 S.C.C. 369.

One of the prosecution witnesses stated that the approver had made a confession of his participation in the offence of the murder of the deceased. The other witness stated that the knife with which the murder of the deceased was alleged to have been committed was prepared by him at the instance of the two accused persons. The knife was discovered at the instance of accused No. 1. The two accused were convicted on this evidence under S. 302, read with S. 34, Penal Code. *Held*, that the statement of the first witness was no corroboration of the approver. The evidence of the other witness also could not operate as a corroboration of the approver's story because the knife was got prepared by the two accused nine weeks before the murder. The time gap in the preparation of the knife and murder was great and it was possible in such circumstances that the accused No. 2 might have recanted and not proceeded with the commission of the offence. The finding of the knife at the instance of the first accused also was no corroboration of the approver's story which would be sufficient to connect the accused No. 2 with the murder under S. 34 of the Penal Code. In the circumstances the conviction of accused No. 2 was not sustainable: A.I.R. 1963 S.C. 599.

7. Whether maxim *falsus in uno falsus in omnibus* is applicable to approver.—Approver's evidence — Conditions for its acceptance — Appreciation of approver's evidence — Principles — Maxim *falsus in uno falsus in omnibus*—Maxim is not applicable to approvers or to any class of witness in India: 1967 Cr.L.J. 134: A.I.R. 1967 All. 64.

If the evidence of an approver is discarded, it must be discarded as a whole and the defence cannot base arguments on it any more than the prosecution: 11 Pat.L.T. 520: A.I.R. 1930 Pat. 164. But *see infra*. Statement reliable in part and unreliable in part—Reliable portion corroborated by best reliable evidence—It can be relied upon, while rejecting the rest. [A.I.R. 1939 All. 567, Foll.]: I.L.R. (1953) 5 Assam 136: A.I.R. 1954 Assam 27.

8. Whether one accomplice can corroborate another.—For the purposes of the rule of practice, the evidence of one accomplice is not corroborative of the evidence of another: A.I.R. 1949 P.C. 172: 50 Cr.L.J. 642 (P.C.); 1953

Ker.L.T. 160: A.I.R. 1953 Trav.-Co. 280; A.I.R. 1951 Pat. 84: 52 Cr.L.J. 766.

The evidence of one accomplice is not sufficient corroboration of the evidence of their accomplices, nor are previous statement, made by the same person sufficient: 21 M.L.J. 283: 9 I.C. 897; A.I.R. 1928 Nag. 213; A.I.R. 1929 Lah. 850; A.I.R. 1933 Cal. 1466; 146 I.C. 1064: A.I.R. 1933 Oudh 355; 1954 Ker.L.T. 801: A.I.R. 1955 Trav.-Co. 87; I.L.R. (1953) Bom. 670: A.I.R. 1953 Bom. 297.

There is nothing in S. 133 to suggest that the statement of one approver cannot be regarded as corroborating that made by another approver. No doubt if it could be shown that the approvers had ample opportunity of consultation their corroborative value would be greatly diminished: A.I.R. 1923 Lah. 366. *See* also 76 I.C. 698: A.I.R. 1923 Lah. 335; A.I.R. 1923 Lah. 153: 96 I.C. 127: A.I.R. 1926 All. 705; (1932) 34 Punj.L.R. 639: A.I.R. 1933 Lah. 946.

Accomplice in different stages of crime—Their evidence is not mutually corroborative: 1933 Mad.W.N. 1129. *See* also 146 I.C. 701: A.I.R. 1933 Nag. 352: 16 Nag.L.J. 186.

The fabrication of a false defence cannot be regarded as sufficient to corroborate an approver. The evidence of one approver cannot be said to corroborate another except where both have, at the earliest opportunity and before there has been any chance of consultation, deposed to the same acts as having been committed by particular accused person: I.L.R. 3 Lah. 144: A.I.R. 1922 Lah. 1.

One accomplice witness may be corroborated by another witness if there is no collusion amongst them. [1958 Ker.L.T. 181, Overruled]: 1974 Ker.L.J. 328 (D.B.).

9. Corroboration of approver's evidence by another co-accused.—Corroboration of an approver's evidence by another co-accused amounts to one tainted piece of evidence being corroborated by another tainted piece of evidence and conviction thereon is bad: A.I.R. 1928 Cal. 745: (1928-29) 33 Cal.W.N. 58; (1933-34) 38 Cal.W.N. 777: A.I.R. 1934 Cal. 678; A.I.R. 1934 Lah. 171; I.L.R. 15 Lah. 491: A.I.R. 1934 Lah. 873; 16 Nag.L.J. 186: A.I.R. 1933 Nag. 352: 146 I.C. 701; A.I.R. 1937 Rang. 264; 1938 Mad.W.N. 962; A.I.R. 1937 Rang. 218; A.I.R. 1937 Cal. 433 (S.B.); I.L.R. (1938) Nag. 516: A.I.R. 1938 Nag. 328; (1938) 40 Punj.L.R. 61: A.I.R. 1938 Lah. 339; (1939) 41 Punj.L.R. 333; 146 I.C. 364 A.I.R. 1933 Lah. 946; 146 I.C. 303: A.I.R. 1933 Rang. 320; I.L.R. 55 All. 91: 1932 All.L.J. 1125: A.I.R. 1933 All. 31.

10. Corroboration by approver's relative.—Statement made by an approver to a near relation of his, disclosing the crime committed by him, as early as could reasonably be expected in circumstance of the case, is admissible under S. 157, as corroborating the evidence of the approver. The evidence of the relation to whom the disclosure is made, in the circumstances of the case, cannot be deemed to be a statement of an accessory after the fact and therefore, of an accomplice.

Three conditions must unite to render one an accessory after the fact, *viz.*, that the felony must be complete, that the accessory must have knowledge that the principal committed the felony, and that the accessory must harbour or assist the principal felon. The mere fact, that one had knowledge that a crime had been committed, and that he concealed or failed to disclose such knowledge, does not render him an accomplice. Nor would a person who remains passively silent after obtaining knowledge of the commission of the crime be an accessory or an accomplice within the rule as to the testimony of accomplices. The evidence of this witness is not of much probative value since he deposes only to the statement of the approver himself. There is, however, no bar to the statement of the approver being used as corroboration whatever be the value of his evidence in Court: 1960 B.L.J.R. 565: 1960 Cr.L.J. 1360: A.I.R. 1960 Pat. 459.

Where the testimony of an approver was sought to be corroborated by his sister's son, a young college student not ignorant of the possible impact of his testimony which might implicate his maternal uncle and, therefore, not an independent witness and the accused was not asked any question about such testimony, *held*, it could not be said that the testimony of the accomplice had been corroborated; conviction set aside: 1983 Raj.L.W. 226.

11. What is good corroboration and what is not.—The discovery of blood-marks on the person and in the house of the accused as well as his suspicious conduct immediately after the murder were held to be sufficient corroboration of the evidence of the accomplice: 4 Lah.L.J. 405: A.I.R. 1921 Lah. 392.

The evidence of an approver can be acted upon when there are corroborations as required under the law. When there is no inherent improbability in the evidence and it is not falsely concocted or tutored by the Police, and further the dacoities committed by the accused at different places are corroborated by the evidence of the persons in whose houses the dacoities were committed, it can be safely acted upon: 1972 Cr.L.J. 1074 (D.B.).

Where there were circumstances completing the links in the chain of circumstantial evidence against the accused, *held*, it constituted substantial and sufficient corroboration of the approver's statement in material particulars: A.I.R. 1975 S.C. 1320: (1975) 4 S.C.C. 234.

Where apart from the approver, two accused in their confession had implicated other accused in the commission of the offence, *held*, the confessions of the two accused can be used to lend corroboration to the approver's testimony about the involvement of other accused: 1988 Cr.L.J. (N.O.C.) 50 (Cal.) (D.B.).

The fact that the accused who was charged with dacoity at the house of a person who was a money-lender, was indebted to him, is no corroboration of the evidence of the accused's accomplice: 1957 Cr.L.J. 939: A.I.R. 1957 Andh. Pra. 482.

Where the testimony of the approver, a participant in a bank dacoity, was vivid and detailed and was corroborated by evidence of the bank employees except in the matter of the strong room having been locked by the other dacoits which arose from the peculiarity of the place —he was kept to keep watch at the entrance wherefrom the strong room was not visible—*held*, the approver's evidence being quite credible could be used to convict the other accused: 1988 Cr.L.J. (N.O.C.) 50 (Cal.) (D.B.).

Where the only witness who corroborated an accomplice was his son aged 7 years who parrot-like repeated what he had been tutored to say, *held*, that it was unsafe to convict the accused on such evidence: A.I.R. 1929 Lah. 587.

Where inspite of certain discrepancies in the evidence of certain persons who had in one way or the other helped the accused in furthering their objectives, the trial Court accepted their evidence as accomplice evidence on being satisfied that their evidence was credible in the sense that the things which they had deposed were true and there was sufficient corroboration to their evidence, *held*, it could not be said that the trial Judge acted on the accomplice evidence without applying the double test *i.e.*, test of reliability and necessity of corroboration as laid down in A.I.R. 1957 S.C. 637. [A.I.R. 1960 S.C. 961, Rel. on]: A.I.R. 1973 S.C. 450: 1972 Cr.L.J. 1277: (1972) 3 S.C.C. 511.

Where the approver's evidence was amply corroborated by eyewitnesses and other circumstantial evidence, *i.e.*, recovery of weapons etc., *held*, prosecution established the case to that extent beyond all reasonable doubt: 1993 (Supp.) 4 S.C.C. 7: 1994 S.C.C. (Cr.) 23.

Where the approver did not depose that the axe, the murder weapon was concealed by the accused at the place wherefrom it was recovered but without human blood stains on its blade nor were there any such stains on the approver's clothes and the blood stains on the *ghagra* of the deceased's wife could have been resulted from her contact with the blood lying on the beddings and grounds where the murder had taken place, *held*, recovery of the axe or *ghagra* could not be taken as corroborative evidence of murder by the accused: 1980 Cr.L.R. 227 (Raj.).

Where an accomplice who was involved in transaction of drug trafficking and it was through this evidence that the prosecution sought to prove that the accused was in possession of brown sugar but his evidence was not corroborated and was in basic variance with the evidence of his mother who received drugs for safe custody, *held*, evidence of the accomplice was unreliable: 1989 Cr.L.J. 1296 (Bom.) (D.B.).

Several accomplices simultaneously and without previous concert giving consistent account of the crime implicating accused—Court may accept the several statements as corroborating each other. [A.I.R. 1963 S.C. 599; (1916) 2 K.B. 658, Rel. on]: A.I.R. 1970 S.C. 45: 1970 Cr.L.J. 9: (1970) 1 S.C.R. 130.

Where both the approver and the accused had a common motive to murder the deceased and the Courts below had concurrently found that the conviction based on the approver's testimony was adequately

corroborated and the Supreme Court sustained the conviction but commuted the sentence of death to one of life imprisonment because the Court could not be oblivious of the tendency to minimise one's own part and to shift the dominant role to the accused, a tendency inherent in the evidence of all accomplices, which tendency could not be said to be wholly absent from the testimony of the approver: A.I.R. 1975 S.C. 139: 1975 Cr.L.J. 226: (1975) 3 S.C.C. 414.

Where the approver's evidence in regard to the complicity of the wife of the deceased, in the conspiracy of murder, lacked corroboration on certain material particulars necessary to connect her, *held*, she was entitled to the benefit of doubt: A.I.R. 1988 S.C. 139: 1988 Cr.L.J. 398: (1988) 1 S.C.C. 1.

12. Duty of Judge to jury.— The Evidence Act nowhere requires that there should be corroboration of the testimony of an accomplice. Although it says in S. 114(*b*) that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars, it makes it clear in S. 133 that an accomplice shall be a competent witness against the accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. There is no doubt, therefore, that the uncorroborated evidence of an accomplice is admissible in evidence. But it has long been a rule of practice at Common law, which has become virtually equivalent to a rule of law, and which is exactly the law in India, so far as accomplices are concerned, and it is certainly not any higher in the case of sexual offences, that the Judge should warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and it lies in the discretion of the Judge, to advise them not to convict upon such evidence; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. If after this proper caution by the Judge, the jury nevertheless convict the prisoner, his conviction will not be quashed, merely upon the ground that the accomplice's testimony was uncorroborated. The only clarification necessary in India is where this class of offence is sometimes tried by a Judge without the aid of a jury. The true rule in every case of the type is that the rule about the advisability of corroboration should be present to the mind of the Judge. In such cases, it is necessary that the Judge should give some indication in his judgment that he had this rule of caution in mind, and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case. It is wrong for a Judge to think that he could not, as a matter of law, convict without corroboration. The nature and the extent of the corroboration that is required must necessarily vary with the circumstances of each case, and also according to the particular circumstances of the offence charged. It is, however, clear (*i*) that it is not necessary that there should be independent confirmation of every material circumstances; all that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or the complainant) is true and that it is reasonably safe to act upon it. (*ii*) The independent evidence must not only make it safe to believe that the crime was committed but must in some ways reasonably connect the accused with it. (*iii*) The corroboration must come from independent sources and thus, ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another accomplice. (*iv*) The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime, "independent" merely means independent of sources which are likely to be tainted: I.L.R. 43 Pat. 781: A.I.R. 1956 Pat. 404.

To let the evidence of approvers go to a jury without giving them proper warning is a misdirection. For a Judge to withdraw consideration of the guilt or innocence of the accused from the jury by telling them that a conviction cannot be based upon uncorroborated testimony of an approver would be no less a misdirection and directly contrary to the statute. The Judge is bound to caution the jury and to advice them that generally speaking the natural presumption for them to make is that the evidence of the approver is unreliable though they are not compelled in law to act on the presumption. Nature of corroboration required pointed out: A.I.R. 1933 Pat. 500. The production of stolen property

by an accused person even from a place which is not in his own possession may be accepted as material corroboration of the evidence of an accomplice who has deposed that the accused joined him in committing the burglary or theft: 111 I.C. 447: 29 Cr.L.J. 863.

It has long been a rule of practice for Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice, and it is in the discretion of the Judge to advice them not to convict upon such evidence, but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. This rule of practice, which has virtually become a rule of law has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required as corroboration is some additional evidence rendering it probable that the story of the accomplice is true and that is reasonably safe to act upon it. It is not necessary to require confirmation of all the circumstances of the crime. It is sufficient if there is confirmation as to a material circumstance of a crime and of the identity of the accused in relation to the crime: 31 Sind L.R. 82: A.I.R. 1937 Sind 162. *See* also 42 Pat.L.R. 67; A.I.R. 1942 Oudh 163; (1943) 45 Bom.L.R. 64: A.I.R. 1943 Bom. 74; A.I.R. 1943 Pat. 146: I.L.R. 22 Pat. 27; A.I.R. 1945 Nag. 143: I.L.R. (1945) Nag. 315; A.I.R. 1941 Lah. 82; 198 I.C. 78: A.I.R. 1942 Pat. 271. *See* also A.I.R. 1948 Cal. 187: 49 Cr.L.J. 297; 49 Cr.L.J. 331; A.I.R. 1948 Lah. 24; 47 Cr.L.J. 202; 47 Cr.L.J. 159; 47 Cr.L.J. 196.

In case where a Judge combines the functions of a Judge and jury, he is bound under law to scrtunise the accomplice's evidence—with the required degree of care and caution, which is required of him in a trial by jury, and just as he is bound to give a warning to the jury, he must warn himself that it is unsafe to convict a person on accomplice's evidence in the absence of substantial corroboration by independent evidence: 114 I.C. 457: A.I.R. 1929 Nag. 215; A.I.R. 1934 Cal. 114: (1932-33) 37 Cal.W.N. 934.

The uncorroborated evidence of an accomplice is admissible in law; but it has long been a rule of practice, which has virtually become equivalent to a rule of law, that the Judge must warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice. Where the offence is tried by a Judge without the aid of a jury, it is necessary that the Judge should give some indication in his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case: A.I.R. 1958 S.C. 500.

13. Corroboration in sexual offences.—(*See* also S. 118, Note 7, *supra*). Though a girl who is a victim of an outrageous act such as rape is, generally speaking, not an accomplice the rule of prudence requires that her evidence should be corroborated before a conviction can be based upon it. The nature and the extent of the corroboration that is required when it is not considered safe to dispense with it must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged: (1962) 2 Cr.L.J. 751: A.I.R. 1962 Cal. 641. If the jury has been appraised of the necessity, ordinarily speaking of corroboration of the evidence of the prosecutrix, it is for the jury to decide whether or not it will convict on the uncorroborated testimony of a prosecutrix in the particular circumstances of the case before it. It is well established that the nature and extent of corroboration, necessary, will vary with the circumstances of each case. The nature of the corroborative evidence should be such as to lend assurance that the evidence of the prosecutrix can be safely acted upon: A.I.R. 1958 S.C. 143: 1958 M.L.J. (Cr.) 311.

It is a rule of caution that in sexual offences it is not safe to rely on the evidence of the prosecutrix, unless it is corroborated in material details. But where the evidence of the prosecutrix herself furnishes such material that it falsifies the whole, story, corroboration is not of much help in establishing the guilt of the accused: 1959 Cr.L.J. 237: A.I.R. 1959 Tripura 11.

In a case of rape, the principle requiring corroboration in respect of accomplice witness cannot be applied in considering the evidence of the prosecutrix because she cannot be treated as an accomplice in a rape case. Further, the Evidence Act nowhere provides that the evidence of a prosecutrix in a rape case required corroboration. But as a matter

of prudence the Courts have insisted on the need of corroboration of the evidence of the prosecutrix. Therefore, there can be no hard and fast rule as to the nature and extent of the evidence required to corroborate the case. However, any corroboration should be such as to render the prosecution story reliable and safe to act upon it by proving the commission of the crime and establishing the identity of the offender. In short, the question whether the statement of the prosecutrix requires corroboration and in what particular and what kind of corroboration should be considered sufficient, are in the ultimate analysis questions relating to the correct and proper appreciation of evidence and must be answered with reference to the facts and circumstances of individual cases. The principles of corroboration laid down in cases should be looked at merely as guiding principles and not as inflexible rule of law: 1967 Cr.L.J. 922: 1967 Raj.L.W. 326: A.I.R. 1967 Raj. 159.

There is no rule of law or a practice which makes it obligatory that the evidence of the prosecutrix should be corroborated before a conviction for rape could be entered. The only rule that demands corroboration in such a case is rule of prudence and even this rule of prudence hardened into a rule only because decided cases had a tendency to treat the victim of a rape (of any sexual or unnatural offence, for that matter) as an accomplice which in several cases the victim is not. And what this rule of prudence requires is that this should be present to the mind of the Judge. Merely for the reason that there is no corroboration for the evidence of the victim of an outrageous act, such evidence should not be rejected if it appears from the circumstances that the victim is speaking the truth: 1969 Cr.L.J. 818 (Ker.); 1982 Cr.L.J. 2162 (Ori.).

It cannot be laid down that in no case could a conviction for a sexual offence follow unless the victim was supported by other independent evidence. If the Court feels without hesitation that the account given by the prosecutrix is veracious and that it is free from those taints that make a witness's statement difficult of acceptance without reservation, it can proceed to convict the offender as the law does not insist that in every case and under every circumstance, to warrant a conviction, the complainant must be corroborated by other evidence. The guarantee of safety in the matter of depending upon the testimony of a solitary witness is the satisfaction of the Court: I.L.R. (1953) Patiala 328 A.I.R. 1954 Pepsu 72. *See* also 1953 Raj.L.W 255.

Where a male is charged by a female with a sexual offence, even if the prosecutrix is to be treated as an accomplice, still, since a conviction can be based on the uncorroborated testimony of an accomplice alone, and it is properly so based when the accomplice is proved to be worthy of credit—a prosecutrix also can serve as the sole witness where the evidence discloses nothing against her, either as respects her past character, or as respects the truth of the accusation made by her or as respects her being a consenting party to the act charged. Particularly that seems to be the position in a case where the prosecutrix is a mere child. Thus, where the evidence of the prosecutrix is clear, firm, realistic and entirely convincing, it is pre-eminently a case where the conviction of the accused can safely be based on the evidence of the prosecutrix alone. Per *P. B. Mukheri, J.*— In cases of rape the jury may convict on the uncorroborated evidence of the prosecutrix but the Judge should warn the jury that it is dangerous to do so. There is no warrant in law for the presumption that the complainant victim in a rape case must *ipso facto* be regarded as accomplice. Whether such complainant is an accomplice or not must be determined independently by reference to the actual facts in each individual case: I.L.R. (1953) 1 Cal. 330.

It is well settled that the prosecutrix cannot be considered as an accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence. As a rule of prudence, however, Court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated: A.I.R. 1972 S.C. 2661: 1973 Cr.L.J. 179; (1972) 2 Mys.L.J. 59.

Testimony of prosecutrix—Corroboration: 1968 Cr.L.J. 690(2) (Manipur). *See* also (1987) 3 Crimes 831 (Gau.).

A prosecutrix of a sex offence is not an accomplice but a victim; unless the evidence discloses a strong reason to falsely implicate the accused, *held*, the Court should ordinarily have no hesitation in accepting

her testimony. [(1990) 1 S.C.C. 550, Foll.]: (1992) 3 S.C.C. 615.

The rule of prudence to look for corroboration of the evidence of an accomplice by other independent evidence, based on human experience, is embodied in S. 114(*b*); however, though a victim of rape is not an accomplice, yet due to a long line of judicial decision spread over a number of years, her evidence is treated almost like that of an accomplice requiring corroboration; though a conviction on the sole testimony of a victim of rape is not illegal on that Court, the judgment should show that the Judge was conscious of the rule of prudence; if the victim is a grown up married woman, it is always safe to insist on corroboration. [A.I.R. 1952 S.C. 54; A.I.R. 1972 S.C. 2661; A.I.R. 1980 S.C. 1252 and (1916) 2 K.B. 658, Foll.]: A.I.R. 1983 S.C. 911: 1983 Cr.L.J. 1285: (1983) 4 S.C.C. 10.

In a rape case, the prosecutrix is not regarded as an accomplice and, therefore, the rapist can be convicted on the uncorroborated testimony of the ravished woman, if it is found true and inspires confidence. Law does not require corroboration of the testimony of the victim of rape in order to convict the accused. If the corroboration is there, it would give additional strength to the prosecution. But the absence of corroboration does not wipe of or erase the testimony of the victim, and it can safely be acted upon to convict the accused provided it is genuine, trustworthy and impressive. Thus, where the testimony of prosecutrix, in itself was strong enough to seek conviction of the accused and moreover, it was corroborated in material particulars from many sources, *held*, conviction of accused was sustainable: 1984 Raj.L.W. 262. *See* also 1995 Cr.L.J. 1561 (Ori.) (D.B.).

Evidence of prosecutrix of tender age—Necessity of corroboration: (1961) 63 Punj. L.R. 513: 1961 All Cr.R. 163.

The evidence of the girl ravished is treated somewhat along the same lines as accomplice evidence. The rule as to corroboration, which has hardened into one of law, is not that corroboration is essential before there can be a conviction, but that the necessity of corroboration as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge before a conviction without corroboration can be sustained: I.L.R. (1977) Karn. 1413: (1977) 2 Karn.L.J. 308.

In the case of a rape there is nothing in law to prevent a conviction on the sole testimony of the prosecutrix. Corroboration of her evidence is not absolutely essential since she does not stand in the position of an accomplice. But the rule of prudence requires that there must be some corroboration of the evidence of the prosecutrix. Where rape is denied the sort of corroboration one looks for is the medical evidence showing injury to the private parts of the complainant, injury to the other parts of her body, seminal stains on her clothes or the clothes of the accused, or on the places where the offence is alleged to have been committed and in all cases importance is always attached to the subsequent conduct of the complainant. Whether she makes a charge promptly or not is always relevant. The tender years of the child which is the victim of a sexual offence, coupled with other circumstances may render corroboration unnecessary but that is a question of fact in every case: (1961) 1 Cr.L.J. 689 (Ori.).

On a question as to the necessity for corroboration of the complainant's evidence in the case of an offence of rape, *held* the Evidence Act nowhere says that corroboration in such cases is necessary. A woman who has been raped is not an accomplice. If she was ravished she is the victim of an outrage. If she consented there is no offence unless she is a married woman, in which case questions of adultery may arise. In the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned, but if she consented her testimony will naturally be as suspect as that of an accomplice. So also in the case of unnatural offences. A large volume of case law has grown up which treats the evidence of the complaintant somewhat along the same lines as accomplice evidence and the position now reached is that the rule of prudence that such evidence should be corroborated has hardened into one of law. But the true rule is that in every case of this type the rule about the advisability of corroboration should be present in the mind of the Judge. In a jury case he must tell the jury of it and in a non-jury case he must show that it is present to his mind by indicating that in his judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case before him, either the jury or where there is no jury, he himself is satisfied that it is safe to do so. The

rule is not that corroboration is essential before there can be conviction, but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in jury cases, must find a place in the charge before a conviction without corroboration. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand. The nature and extent of the corroboration required when it is not considered safe to dispense with it must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But the general rules are: (*1*) It is not necessary that there should be independent confirmation of every material circumstances. (2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice of complainant that the accused committed the crime. (*3*) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. (*4*) The corroboration need not be direct evidence that the accused committed the crime. On the question whether a previous statement of an accomplice or complainant can be accepted as corroboration, *held*, S. 157 of the Evidence Act dealing with corroboration makes no exceptions and therefore, provided the condition prescribed therein, that is to say "made at or about the same time, etc." are fulfilled, there can be no doubt that such a statement is legally admissible in India as corroboration. The weight to be attached to it is of course, another matter, but in view of S. 118 of the Evidence Act, its legal admissibility as corroboration cannot be questioned: A.I.R. 1952 S.C. 54.

If the evidence of the victim of rape does not suffer from any basic infirmity, and the "probabilities-factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification: Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the "probabilities-factor" is found to be out of tune. Because:—(*1*) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred; (2) she would be conscious of the danger of being ostracized but the society or being looked down by the society including by her own family members, relatives, friends, and neighbours; (*3*) she would have to brave the whole world; (*4*) she would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered; (*5*) if she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family; (*6*) it would almost inevitably and almost invariably result in mental torture and suffering to herself; (*7*) the fear of being taunted by others will always haunt her; (*8*) she would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo; (*9*) the natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy; (*10*) the parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour; (*11*) the fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence; (*12*) the reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by Counsel for the culprit, and the risk of being disbelieved, act as a deterrent: A.I.R. 1983 S.C. 753: 1983 Cr.L.J. 1096: (1983) 3 S.C.C. 217.

The prosecutrix of a sex offence is not at par with an accomplice; in fact, she is a victim. Undoubtedly a competent witness, her evidence must receive the same weight as any victim of physical violence; nowhere does the Act bar its acceptance unless

corroborated in material particulars. What is necessary is that the Court must be alive to the fact that she is interested in the outcome of the trial and if the Court feels satisfied about the reliability of her evidence it is not required to look for corroboration. The High Court's view that it is only in the rarest of rare cases if the Court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary is not correct; the law is otherwise: A.I.R. 1990 S.C. 658: 1990 Cr.L.J. 889: (1990) 2 Bom.C.R. 630.

Criminal cases—Conviction on evidence of single witness—Testimony of approver of victim of sexual offence—Corroboration—Necessity for—Where there are no exceptional reasons operating, it becomes duty of Court to convict, if it is satisfied that testimony of a single witness is entirely reliable: A.I.R. 1957 S.C. 614.

Assuming the person on whom rape is committed met other women just after the incident and had talked to them about it, that does not constitute sufficient corroboration, in the case when the story related by such person is unnatural. It is true that the talks would be statements made to the witnesses on or about the time when the fact took place, and would be admissible as corroboration under S. 157, Evidence Act. However, the weight to be attached to them is another matter, and though they may emanate from the same source their evidentiary value may be nil if the source itself is tainted: A.I.R. 1955 Sau. 96: 1955 Cr.L.J. 1525.

Where the allegations of the prosecutrix regarding abduction, wrongful confinement and rape were found to be infirm and exaggerated and medical evidence also did not support her version and further none of the evidence was corroborated by independent witnesses, *held*, offence against accused was not established beyond reasonable doubt and he could not be convicted on the basis of version of prosecutrix: 1994 Cr.L.J. (N.O.C.) 283 (Madh. Pra.).

14. Corroboration to evidence of abducted girl.—Generally stated, an abducted woman is not an accomplice and her evidence does not require corroboration. But, the rule, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstance make it safe to dispense with it must be present to the mind of the Judge, before a conviction without corroboration can be sustained: 1968 Cr.L.J. 1390 (Manipur).

Evidence of girl abducted—Sufficiency for conviction: A.I.R. 1958 Pat. 412: 1958 Cr.L.J. 929.

Evidence of girl abducted must be taken with a great amount of caution: A.I.R. 1957 Him. Pra. 42: 1957 Cr.L.J. 847.

Corroboration of prosecutrix in trial under S. 366, Penal Code, is not necessary. *See* A.I.R. 1955 Nag. 121: I.L.R. (1954) Nag. 922: 1955 Nag.L.J. 61. *See* also (1978) 1 Karn.L.J. 26.

Case under S. 366, I.P Code—Evidence of prosecutrix—Her case that she was compelled, threatened or otherwise induced to go with accused who was alleged to have raped her without her consent—Her statement, in order to base conviction of accused upon, must be corroborated in some material particulars from independent source: (1970) 1 S.C.W.R. 767: A.I.R. 1970 S.C. 1029.

15. "Accomplice"—Meaning of.—The expression "accomplice" means a person who knowingly or voluntarily co-operates with or aids and assists another in the commission of a crime. The expression obviously includes principals in the first and second degree. It is wide enough to include persons who are known to the English law as accessories after the fact: (1946) 48 Punj.L.R. 410: A.I.R. 1947 Lah. 220; I.L.R. (1971) 21 Raj. 209.

The word "accomplice" has not been defined by the Act and should, therefore, be presumed to have been used in its ordinary sense. An accomplice means a guilty associate or partner in crime, or who, in some way or other, is connected with the offence in question or who makes admissions of facts showing that he had a conscious hand in the offence. An accomplice confesses himself a criminal who has been concerned in the commission of a crime *participis criminis*, whether he is concerned in the strict legal sense as principal in the first or second degree, or merely as accessory before or after the fact. Persons to be accomplice must participate in the commission of the same crime as the accused persons in a trial are charged: I.L.R. 17 Luck. 516: A.I.R. 1942 Oudh 221; (1943) 45 Bom.L.R. 64: A.I.R. 1943 Bom. 74; 6 Sau.L.R. 118: A.I.R. 1954 Sau. 55; A.I.R. 1959 Punj. 332.

The word "accomplice" is inter-changeable with an associate in crime who is consciously so connected with the criminal act done by his confederate, that he on account of the presence of the necessary *"mens rea"* and his participation in the crime in some

way or other can be tried along with that confederate actually perpetrating the crime: I.L.R. (1952) Patiala 512: A.I.R. 1953 Pepsu 82.

An accomplice is a person who participates in the commission of the actual crime charged, against an accused. He is to be a *participis criminis*. There are two cases, however, in which a person has been held to be an accomplice even if he is not a *participis criminis*. Receivers of stolen property are taken to be accomplices of the thieves from whom they receive goods, on a trial for theft. Accomplices in previous similar offences committed by the accused on trial are deemed to be accomplice in the offence for which the accused is on trial, when evidence of the accused having committed crimes of identical type on other occasions be admissible to prove the system and intent of the accused in committing the offence charged: (1963) 1 S.C.R. 253: A.I.R. 1962 S.C. 1821.

An accomplice means a guilty associate or partner in a crime; a person who is connected with the offence or who makes admissions of facts showing that he had a conscious hand in it. Where a witness is not concerned with the commission of the crime he cannot be said to be an accomplice although he gives no information about it until the arrival of the Police owing to fear of the accused: I.L.R. (1950) Lah. 183: A.I.R. 1950 Lah. 129.

Accomplice—Person witnessing arson being committed—Position of: 1958 An.L.T. 856.

As to who is an "accomplice", *see* A.I.R. 1934 Sind 185: 28 Sind L.R. 336; (1933-34) 38 Cal.W.N. 777: A.I.R. 1934 Cal. 678 (F.B.); A.I.R. 1934 Lah. 171.

Accomplice, who is—Though witness concerned may not confess to his participation in crime, Court has to decide on a consideration of the entire evidence whether he is an accomplice. [A.I.R. 1963 S.C. 599; (1916) 2 K.B. 658, Rel. on]: A.I.R. 1970 S.C. 45: 1970 Cr.L.J. 9: (1970) 1 S.C.R. 130.

A person who cannot be indicted owing to the absence of the element of *mens rea*, he having acted under pressure exerted by the principal, is not an accomplice and his evidence does not require corroboration: I.L.R. (1945) Nag. 315: 1945 Nag.L.J. 134: A.I.R. 1945 Nag. 143.

An accomplice is a witness and not an accused person: 9 P.R. (Cr.) 1911: 10 I.C. 340: 12 Cr.L.J. 267.

It is now well settled law that while under S. 133 of the Evidence Act, an accomplice can be competent witness, such evidence to be acted upon should be corroborated in material particulars. This rule of prudence and caution is derived from the principle set out in *Illus.* (*b*) to S. 114 of the Evidence Act. But this principle pre-supposes that the witness in question is an accomplice in the sense of one who was a *participis criminis*. He should be one who is tarred with the same brush as the accused in the crime though not to the same extent. A person who totally exculpates himself from the crime and says he was only a passive eye-witness to the commission of the offence cannot be called "accomplice" in the strict sense even though the formalities of granting a pardon, etc., is gone through before he is called upon to give evidence as an approver. Still the principle of prudence and caution applicable to the evidence of an "accomplice" in the strict sense, will be applicable to such cases also. Even the evidence of person, who was present with the accused at the time of the commission of the offence, but who completely exculpates himself and does not admit having taken any part whatever in the commission of the offence or in any active or passive preparation for the same, will also have to be corroborated in material particulars before it could be acted upon: (1970) 1 M.L.J. 450.

The word accomplice has not been defined in the Act; but he is generally understood to mean a guilty associate or partner in crime; and on becoming an approver, he becomes a prosecution witness: (1994) 4 S.C.C. 478: 1994 S.C.C. (Cr.) 1252: 1994 Cr.L.J. 3071: (1994) 2 Crimes 1: (1994) 2 An.L.T. (Cr.) 429.

A person who assisted the criminals to the extent of keeping a look-out to see whether the Police were approaching, is an accomplice whose evidence requires corroboration: I.L.R. (1944) 2 Cal. 312.

An accomplice is one who has concurred in the commission of an offence and is a guilty associate in the crime. Accomplices are usually interested and always infamous witnesses. One accomplice cannot corroborate another and the corroboration of the evidence of accomplices must come from independent sources: (1985) 59 Cut.L.T. 510.

The word "accomplice" is ordinarily used in connection with law of evidence and rarely in the substantive law of crimes; its primary meaning, as per A.I.R. 1970 S.C. 1330, is "any party to the crime charged and someone who aids and abets the commission of crime". And S. 306 of the Cr.P.Code treats

"any person supposed to have been directly or indirectly concerned in or party to an offence" as an accomplice: 1991 Cr.L.J. 2941 (Ker.) (D.B.).

An "accomplice" is a person who has concurred in commission of an offence; its dictionary meaning is a partner in crime, an associate in guilty; he is a guilty associate who could be jointly indicted with the accused. In two cases, however, persons who are not *participis criminis* have bene held to be accomplices, namely (*i*) receivers of stolen property have been held to be accomplices of the thieves from whom they receive goods, in a trial for theft, and (*ii*) where a person has been charged with a particular offence and evidence of other similar offences by him has been admitted as proving system and intent and negativing accident. Persons who have not taken any part in the commission of the crime (murders) but only dug pits at the instance and direction of the accused *R* who was the District and Sessions Judge under whom those persons served as peons and who had no idea that murders would be committed and the pits were dug for accommodating the dead bodies, cannot be said to be "accomplices" and their evidence cannot be treated as the evidence of accomplices: 1975 Cr.L.J. 354 (Gau.) (D.B.).

So far as the statutory provisions are concerned, there is nothing in law to justify the proposition that evidence of a witness, who happens to be cognisant of a crime, or who made no attempt to prevent it, or who did not disclose its commission should only be relied upon to the same extent as that of an accomplice. The real question in such a case is the degree of credit to be attached to the testimony of such a witness; and that depends on all the facts and circumstances of the particular case, and the principle of caution and the requirement of corroboration on material particulars should also be applied if the circumstantial evidence calls for it.

A person gave evidence of the occurrence only two days after the occurrence and did not incriminate himself in the occurrence from the very beginning. He was treated as an approver by granting pardon and was kept under arrest throughout and even at the time of giving evidence. There were discrepancies between his evidence in the Court and his earlier statement before the Police and his evidence contained serious improbabilities.

Held, that in the absence of circumstantial evidence connecting the accused with the crime, the accused could not be convicted on the basis of testimony of such witness without corroboration thereof on material particulars: 1969 Mad.L.W. (Cr.) 112: 1970 Cr.L.J. 288.

The mere fact that a witness did not reveal the knowledge of the intended crime to the proper authorities is not sufficient to make him an accessory or an accomplice so as to vitiate his evidence: I.L.R. (1939) 1 Cal. 511: A.I.R. 1939 Cal. 335. *See* also 1979 Bom.C.R. 30.

A person cannot be treated as an accomplice merely because he was present when the offence was committed and was fully aware of the person who committed it but did not disclose it to the proper authorities: I.L.R. (1945) Nag. 395: 1945 Nag.L.J. 191: A.I.R. 1945 Nag. 186; 1956 Madh. Bh.L.J. 571: A.I.R. 1956 Madh. Bh. 262.

A person who is present at the commission of the crime and who is interested in not disclosing the commission of the crime is a person who is in the position of an accomplice: I.L.R. (1957) Cut. 347: A.I.R. 1957 Ori. 260.

A man who quietly looks on at a murder, may not necessarily be an accomplice; but he is not a safe witness against the alleged murderer: 1953 Cr.L.J. 1193: A.I.R. 1953 Vindh. Pra. 38.

Witnesses witnessing murder but remaining inactive are to be treated as accomplices. Their evidence must be corroborated in material particulars by independent evidence: I.L.R. (1953) Hyd. 32: A.I.R. 1953 Hyd. 161.

Witness to a crime who does not give information of the same, though not an accomplice in the strict sense of the term, still his evidence is not free from suspicion: 11 O.W.N. 1383: A.I.R. 1935 Oudh 1; 11 O.W.N. 661: A.I.R. 1934 Oudh 315. *See* also 49 Mys. H.C. Rep. 444 (Accessory after the fact).

A person's knowledge of the deliberations in the course of which the dacoity was planned, his having seen the accused departing for a particular purpose or his having accompanied the accused when the latter went for disposal of the stolen articles cannot be said to be an accomplice and his evidence does not require corroboration on material

particulars: 6 Sau.L.R. 118: A.I.R. 1954 Sau. 55.

A wife who is cognisant of the fact that the accused intended to kill her husband but did not disclose that fact to him, must be regarded as an accomplice and her testimony cannot carry any higher value than the testimony of an accomplice: (1936) 38 Punj.L.R. 226: A.I.R. 1936 Lah. 731. A person who knowingly aids in the disposal of stolen property is an accomplice: A.I.R. 1934 Mad. 721: 67 M.L.J. 693.

The primary meaning of an accomplice is any party to the crime charged and someone who aids and abets the commission of crime. Where a person in a murder case only assisted the accused in removing the dead body and burying it in the river bed acting under duress, he cannot be termed as an accomplice: 1984 Mah.L.J. 709 (D.B.).

To attract S. 133, a person should be an accomplice, *i.e.*, he should have participated in the crime.

When a driver of a truck shot the deceased who was sleeping in the truck and the cleaner helped him to remove the body of the deceased to a pit and covered it with tarpaulin and sprinkled diesel on it and set it on fire, he must be held to have taken part in commission of the crime and is an approver: 1981 M.P.L.J. 622: 1981 Jab.L.J. 324.

16. Accessory after the fact.—One who deposes that he only helped the accused in disposing of the body of the deceased after he was killed by the accused is not an accomplice: 73 I.C. 506: A.I.R. 1923 Lah. 345. *See* also 161 I.C. 289: A.I.R. 1936 Cal. 101; 45 Cal.L.J. 581: (1925-26) 30 Cal.W.N. 816; 99 I.C. 929: A.I.R. 1927 Lah. 78; 145 I.C. 240: A.I.R. 1933 Rang. 199; A.I.R. 1937 Rang. 513 (accessory after the fact).

Indian law does not recognise any such thing as an accessory after the fact. A man who does not abet a crime cannot be regarded as an accomplice. Although a person who assists in disposal of the dead body may become liable to punishment under S. 201, Penal Code, this is quite another offence, and helping to dispose of the body of a man who had been murdered, without having taken any part in the murder itself, does not make a man an accomplice with regard to the murder: A.I.R. 1937 Rang. 513; I.L.R. 13 Luck. 115: A.I.R. 1937 Oudh 259; 164 I.C. 677: A.I.R. 1936 Rang. 373 [Corroboration not necessary in every detail]. *See* also 163 I.C. 681: A.I.R. 1936 P.C. 242 (P.C.); 165 I.C. 144: 1936 O.W.N. 848; I.L.R. 17 Lah. 518: A.I.R. 1936 Lah. 400; I.L.R. 58 All. 695: A.I.R. 1936 All. 337.

A, while working as a Chairman of certain local board, took out huge sum of money from the treasury for the payment of stipends of the primary school teachers and appropriated it to his own use. *B* succeeded him as Chairman and *B* and *C*, the Head Clerk of the Board, tried to screen *A* by committing irregularities, first by drawing large sums of money from the treasury without proper bills in some cases and then, utilising the money drawn for current stipends, towards payment of arrear stipends of teachers. They also continued the practice of insisting on the teachers not to put the dates while signing the stamped receipts and thus, created the impression that the arrears were properly paid. *B* and *C* were shown joined as co-accused with *A* in F.I.R. but later on *B* and *C* were produced as prosecution witnesses and *A* alone was tried for an offence under S. 409, I.P.Code. *Held*, that *B* and *C* were clearly "accessories after the fact" and a Court must insist on adequate corroboration of their testimony before it could sustain the conviction: 25 Cut.L.T. 269: A.I.R. 1959 Ori. 159.

17. Person who is not *participis criminis*.—Evidence of person who is not *participis criminis*—Reliability of—Depends on facts and circumstances of each case—Principle of corroboration on material particulars should be applied to such evidence if circumstantial evidence calls for it: 1969 M.L.J. (Cr.) 112: 1970 Cr.L.J. 288.

Accomplice—*Participis criminis* in respect of actual crime charged is an accomplice—Though witness concerned may not confess to his participation, Court has to decide on a consideration of the entire evidence whether he is an accomplice. [A.I.R. 1963 S.C. 599; (1916) 2 K.B. 658, Rel. on]: 1970 Cr.L.J. 9: A.I.R. 1970 S.C. 45: (1970) 1 S.C.R. 130.

18. Witnesses no better than accomplices.—Persons who assisted in the concealment of the offence are no better than accomplices: 120 I.C. 190: A.I.R. 1929 Lah. 540.

Persons having knowledge of commission of offence and keeping quiet for some

days is no better than accomplice: (1925-26) 30 Cal.W.N. 816. But *see* contra (1933-34) 38 Cal.W.N. 77: A.I.R. 1934 Cal. 678.

A suspected participator in the crime appearing as a prosecution witness is on the same basis as an accomplice and a conviction cannot be based upon his uncorroborated testimony: 15 Cr.L.J. 440: 24 I.C. 146.

Even where the object of the person who instigates another to commit a crime is to catch him in the act of committing the crime, *e.g.*, Police decoys, the instigation amounts to an abetment of the offence, and the abettors must be regarded as accomplices when the object of the instigation is to make the offender commit the crime and the person who is instigated actually commits the offence. Even if they are not accomplices in the strict legal sense, their evidence has to be viewed with caution, and it is not safe to act upon their evidence without material corroboration: A.I.R. 1938 Mad. 893. But *see* A.I.R. 1936 Nag. 245.

Where a prosecution witness admitted that he had intentionally made a false statement regarding non-availability of the case property (film Kissa Kursi Ka) earlier, *held*, cannot be relied upon for convicting the accused; such witness, being no better than an accomplice, cannot be believed unless his testimony finds corroboration from reliable sources: A.I.R. 1980 S.C. 1382: (1980) 2 S.C.C. 665: 1980 Cr.L.J. 965.

In case of witness not in better position than an accomplice, *held*, corroboration in material particulars is necessary as of prudence and practice: 1982 Jab.L.J. 823.

Offence under S. 468, I.P.Code—Witness typing the document alleged to have been forged by accused—Testimony of such witness, almost of an accomplice, sought not to be relied upon without corroboration: 1963 Raj.L.W. 416.

19. Person held to be accomplice.—Witness stating that she accompanied accused to isolated place knowing that accused was to deliver child—Witness further stating that accused killed her newly born child by twisting umbilical cord round its neck and strangulating it—Witness not disclosing this fact to anybody even after taking accused back to latter's house—*Held*, witness was no better than an accomplice—Her testimony because of her subsequent conduct was not above suspicion—Conviction on such evidence could not be sustained: 1969 Mad.L.W. (Cr.) 231: 1970 Cr.L.J. 1020: (1970) 1 M.L.J. 560: A.I.R. 1970 Mad. 298 (D.B.).

Leaders of a community accepting money for voting from a candidate at an election—Leaders are accomplices: 1968 Cr.L.J. 1199: A.I.R. 1968 Punj. 416 (F.B.).

Where a cycle shop owner from whom 7 tape recorders were recovered stated that he had purchased them from a person who used to visit his shop to hire cycles and there was no evidence as to the price for which the records were purchased or he made any enquiry from their seller as to the source from which the seller had obtained it and he merely identified the seller from a photograph shown, *held*, apparently the cycle shop owner was either the thief or the receiver of stolen property and on being caught he concocted the excuse to save his skin; he is an accomplice and his testimony could not be accepted without corroboration which was clearly lacking: (1982-1) 23 Guj.L.R. 35: (1981) 1 Guj.L.H. 421.

20. Person held to be not accomplice.—The rule of prudence, which is now recognised as a rule of law, that evidence of accomplice before it is utilised for convicting an accused person must be corrborated in material particulars in so far as it involves the accused, can have no application where the evidence is led only for the purpose of proving that the complainant was in possession of some property which is alleged to be stolen. For persons who have helped the complainant in disposing of the stolen property cannot be said to be accomplices of the accused who are being prosecuted for committing offence of extortion against the complainant: 1956 Cr.L.J. 605: A.I.R. 1956 Bom. 341.

The clerk in the office of the Municipal Corporation was a subordinate of both the accused (Deputy Engineer and Overseer). He was actually working directly under accused No. 2 and at the instance of these accused he procured the municipal labour and material and carried out the repairs to the house of accused No. 1. In the circumstances, it cannot be said that the clerk, in any way was a party to the offence under S. 409, Indian Penal Code and cannot be dubbed as an accomplice: 1978 Cr.L.J. 431 (Bom.).

The mere fact that a witness of the election petitioner printed the offending leaflet which prejudiced the prospects of latter's election in the general elections could not clothes him with the character of a guilty associate or partner in the crime of corrupt practice within the meaning of S. 123 (4) of the Representation of the People Act, 1951. The omission on the part of such a witness to send to the concerned District Magistrate a copy each of the declaration and the printed material as required by sub-S. (2) of S. 127-A of the Act might lay him open to prosecution for an offence under sub-S. (4) of S. 127-A of the Act but would not make him an accomplice or render his statement untrustworthy: A.I.R. 1976 S.C. 2169.

Prevention of Food Adulteration Act (1954)—Prosecution for sale of adulterated milk—It is not a rule of law that evidence of Food Inspector cannot be accepted without corroboration—He is not an accomplice. [(1970) 11 Guj.L.R. 530, Affirmed]: A.I.R. 1971 S.C. 1277: 1971 U.J. (S.C.) 500: 1971 Cr.L.J. 1075.

The person having no prior knowledge whatsoever about the designs of the accused, *held*, cannot be branded as accomplice: 1984 Cr.L.R. 384 (Guj.).

The company's bank account at Bombay was to be operated by one *R*, at Delhi and by the accused at Bombay. *R* signed blank cheques and gave them to the accused. The accused was tried under S. 409, Penal Code. *Held*, that the mere signing of the blank cheques by *R* was hardly an index of complicity when the bank account had to be operated both by accused and *R* jointly. *R* had to sign blank cheques in order to avoid delay in payment and possible occasional falling through of the transactions. No sinister intention could be imputed to *R* on account of his signing blank cheques in the expectation that those cheques would be properly used by the accused. *R* was not, therefore, an accomplice: (1963) 1 S.C.R. 253: A.I.R. 1962 S.C. 1821.

Accused engaging coolie to carry bundle containing stolen property—Coolie having no knowledge that bundle contained stolen article—Coolie is not in a position of accomplice—Article held to be in possession of accused engaging the coolie: I.L.R. 32 Pat. 243: A.I.R. 1954 Pat. 109.

The accused invited the prosecution witnesses for taking liquor at a certain place. On reaching the place, the witnesses were not supplied with liquor and they saw the dead body of the victim tied with ropes and being removed towards a nearby paddy field. Nothing was suggested as to why they would falsely implicate the accused. *Held*, witnesses were not accomplices and that their evidence could be relied upon, without corroboration being required: 1969 Cr.L.J. 1255: A.I.R. 1969 Ori. 245.

21. Accomplice and spy—Distinction.—A person who, as a spy or a detective, associates with criminals solely for the purpose of discovering and making know their crimes and without any criminal intent, is not an accomplice, and it is immaterial that he encourages or aids in the commission of the crime. An accomplice on the other hand is a person who has concurred in the crime and who acknowledges himself to be a criminal. A spy does not acknowledge himself to be a criminal, if a witness merely lends himself to a scheme for the purpose of convicting the guilty he is not an accomplice: 1946 Nag.L.J. 586: I.L.R. (1946) Nag. 982: A.I.R. 1946 Nag. 109.

The detective and accomplices are distinguished clearly when a conspiracy contains persons of both the character. The former enter with a design of detecting or betraying it, while the latter do concur fully with other accomplices till they are alarmed or they turn upon their associates and expose them. In the case of those, corroboration equal to that of others is necessary: 16 I.C. 257: (1911-12) 16 Cal.W.N. 1105.

Per *Panigrahi, J.*—The question whether a witness who is engaged by the Police to act as a spy is to be believed must be decided by the Judge who tries the case and his reliability would be determined by the circumstances of the particular case. There can be no rule of general application. The fact that a person is engaged to witness a crime does not make him an accomplice unless he is proved to have participated in the commission of the crime. If he has participated in the crime, the mere fact that he was engaged by the Police will not entitle him to claim immunity from being charged as an accomplice. Whether he is the one or the other will depend upon the view taken by the Judge of fact having regard to all the circumstances of

the case: I.L.R. (1952) Cut. 678: A.I.R. 1953 Ori. 160 (S.B.).

A person who lends his aid for the purpose of detecting an offence, is not an accomplice: I.L.R. (1951) Nag. 930: 1952 Nag.L.J. 129: A.I.R. 1952 Nag. 58.

An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be jointly indicted with the defendant (principal). The act of a detective in supplying marked money and placing bets with the accused for detection of a crime has no element of *mens rea* and so cannot be treated as that of an accomplice and hence his evidence does not require corroboration: I.L.R. (1937) Nag. 181: A.I.R. 1936 Nag. 245. But *See* 48 Mad.L.W. 322: A.I.R. 1938 Mad. 893.

The evidence of witnesses, even if they are spies has to be judged by fact in order to find out whether the witnesses by themselves are reliable witnesses. A person who offers bribe and another person who goes with him are clearly witnesses who are agents provocateurs and are such whose evidence need corroboration: 1954 Cr.L.J. 545: A.I.R. 1954 Punj. 89.

Though it may sometimes be necessary to employ spies or decoys for detection of offences which cannot be detected in any other way, the practice is not looked upon with much favour because in their enthusiasm these men soon degenerate into agents provocateur instigating or provoking the commission of crimes. If a man makes himself an agent for the prosecution before associating with the wrongdoer or before the offence is committed or if with a view to protect his own interest or that of others pretends to associate with such persons with the object of preventing the commission of an offence by giving timely information to the authorities, he is not an accomplice. But if such a person or a spy or an informer in the exuberance of his enthusiasm actually instigates another to commit a crime even if it be for detection of offence or to get the credit of having him arrested, he is an abettor under the penal law and his position cannot be anything other than that of an accomplice: 1958 Cr.L.J. 906: A.I.R. 1958 Mad. 368.

22. Accomplice and decoy witness.—A distinction has to be drawn between an accomplice and a decoy witness, the former being a person who joins another with the intention of aiding the commission of an offence and the latter who is instrumental in provoking the commission of the offence with the object of discovering the offence and detecting the offender. An accomplice is an associate in crime. Mere aiding in the detection of a crime by becoming an instrument of detection without any intention to commit the crime and without any intention to make gain out of the perpetration of the crime cannot make the person so aiding an associate in crime: I.L.R. (1952) Patiala 512: A.I.R. 1953 Pepsu 82.

The fact that a person acts as decoy is not sufficient to reject his testimony, when it is supported in every particular by the other witnesses: 1958 Cr.L.J. 827: A.I.R. 1958 All. 481.

Decoy witness—Rule of prudence requires corroboration in material particulars of his testimony: I.L.R. (1967) Guj. 1046: (1968) 9 Guj.L.R. 278.

Evidence of decoy witness supported by another trap witness about sale of spurious parts of cycle by accused—Sufficiency to sustain conviction: 1960 Cr.L.J.1956: A.I.R. 1960 Punj. 641.

Decoy witness—Practice of supplying decoy witness with Government money for bringing about the completion of offence deprecated—(Penal Code, 1860, S. 161)—(Prevention of Corruption Act 1947, S. 4): A.I.R. 1956 Madh. Bh. 51: 1956 Cr.L.J. 227.

23. Accomplice and informer.—If at the time when a person joined the conspiracy he had no intention of bringing his associates to book but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice; and his position is not modified simply because later on he turns round and carries information to the Police: 110 I.C. 676: A.I.R. 1928 Lah. 647. *See* also I.L.R. 9 Lah. 500: A.I.R. 1928 Lah. 193.

In all cases depending upon informer's evidence the degree of support required for the evidence depends in each case upon the individual's credit: 15 I.C. 987: (1911-12) 16 Cal.W.N. 669.

24. Accomplice and partisan and interested witness.—Even in the matter of the evidence of an accomplice, corroboration is not required in every detail of the occurrence but corroboration in some of the material

particulars alone might be sufficient to believe the evidence of the accomplice. The reason is that he has his own axe to grind inasmuch as he desires to get away with a pardon and he is interested in securing his release by involving other persons. In the case of a partisan witness it cannot be said that his evidence is tainted just as that of an accomplice. Some caution is of course required in the matter of the evidence of the partisan witness also, but the corroboration may not be just of that type which is required in the case of an accomplice. Some corroboration in one or two material particulars inspire confidence in the evidence of a partisan witness. General observations made by the highest Courts are of course of great value, but it is the duty of the Court, deciding a particular case to carefully examine the circumstances in the context of which those observations were laid down. In bribery case it often becomes necessary to lay a trap and if simply on account of such a trap the evidence of the complainant and the Police party is to be discarded, it would be very difficult to bring the offenders to book. Of course as the complainant in a bribery case is interested like the complainant in other cases and the Police officials are more or less anxious that the trap might succeed, it might be said that it is advisable that some corroboration from independent sources might be sought. But it cannot be said that in no case should the evidence of the complainant and the Police officials of the raiding party be acted upon without corroboration: 1958 Raj.L.W. 596.

Evidence of accomplice and evidence of partisan witness — Distinction — Former needs corroboration for conviction while no corroboration is necessary in latter case: 1968 Cr.L.J. 150: A.I.R. 1968 S.C. 1323.

There is no inflexible rule that the evidence of the witnesses of the raiding party must be discarded in the absence of any independent corroboration. The correct rule is this: if any of the witnesses are accomplices who are *participis criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices; if they are not accomplices but are partisans or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the Court may even look for independent corroboration before convicting the accused person: 1958 Ker.L.T. 676: 1958 M.L.J. (Cr.) 758: A.I.R. 1959 Ker. 88; A.I.R. 1958 S.C. 500: 1958 M.L.J. (Cr.) 641.

Simply because a witness is present when the amount to be offered as bribe is given to the complainant and is also present when the recovery is made, it cannot be held that he is to be taken as a partisan witness. It may happen by accident that both the events might take place in the presence of the same witness. It may also happen that some witnesses might be asked to witness the recovery of the amount of the bribery from the bribe-taker and thereafter the amount to be offered might be delivered by the officer in their presence to the complainant: 1958 Raj.L.W. 596.

It is now well settled that while in the case of evidence of an accomplice, no conviction can be based on his evidence unless it is corroborated in material particulars, as regards the evidence of a partisan witness, it is open to a Court to convict an accused person solely on the basis of that evidence, if it is satisfied that evidence is reliable: (1973) 39 Cut.L.T. 337 (D.B.).

In the case of an interested or partisan witness as distinct from an approver or accomplice the evidence can be accepted even without corroboration if the Court thinks that it is acceptable. In the case of an accomplice or approver on the other hand, the evidence cannot be accepted without corroboration. [A.I.R. 1968 S.C. 1323; A.I.R. 1961 S.C. 1762, Rel. on]: 1971 Ker.L.T. 672.

Interested witness—Corroboration: A.I.R. 1957 S.C. 199: 1957 Cr.L.J. 325.

Where the corroborating witness is apparently interested, he being inimical to the accused, the evidence of the approver cannot form any basis for conviction: (1932) 34 Punj.L.R. 2.

Where Panch witness was a municipal employee in adulteration case, *held*, he could not be said to be a partisan witness: (1978) 1 Karn.L.J. 446.

25. Evidence of raiding party.—Independent corroboration does not mean that every detail of what the witnesses of the raiding party have said must be corroborated by independent witnesses. Even in respect of the

evidence of an accomplice, all that is required is that there must be some additional evidence, rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. Corroboration need not be direct evidence that the accused committed the crime, it is sufficient even though it is merely circumstantial evidence of his connection with the crime: A.I.R. 1958 S.C. 500: 1958 M.L.J. (Cr.) 641.

The mere fact that panch witnesses accompany the Police and witness the raid does not make them interested witnesses. They do not by reason of participation in those proceedings stand on the same footing as the complainant or the Police who are interested in the success of the raid. In the absence of any such participation or interest on their part, their evidence must be judged by the same standards as that of any other witness. Their status, the presence or absence of any motive to favour or disfavour, a party the dispassionate nature of their evidence and all other factors bearing on their independent and reliability and probabilities of their story may be taken into account: (1967) 8 Guj.L.R. 413: I.L.R. (1967) Guj. 386.

26. Accomplice and trap witness.—A trap witness does not fall under the category of accomplices and his evidence does not require corroboration. It is always for the Judge to decide whether it is safe to rely and act upon trap witness. Each case depends upon its own merits. His partiality for the prosecution is a factor which can hardly be ignored. The character, position in life, and the social standing of the witness would go a great way in helping the Judge to appreciate his evidence. The evidence of such witness should not be disbelived only because of his role but should be tested and should succeed and fail by reason of its own inherent strength or weakness: (1953) 2 M.L.J. 50: A.I.R. 1954 Mad. 326; A.I.R. 1959 Mad. 166: 1959 Cr.L.J. 484.

Though a trap witness is not an accomplice or an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely upon his evidence without corroboration. But the evidence of a trap witness is not a tainted one and it would only make a difference in the degree of corroboration required rather than necessity for it: 1968 Cr.L.J. 925: A.I.R. 1968 Goa 63.

Trap witnesses—Evidence—Corroboration—Trial of offences under Prevention of Corruption Act—Though trap witnesses are interested witnesses, as a matter of law, their evidence cannot be rejected for want of corroboration: (1968) 3 S.C.R. 189: A.I.R. 1969 S.C. 17.

The weight to be attached to his evidence will depend upon the character of each individual trap witness. Prudence requires that the Courts should demand and the prosecution should adduce some corroborative evidence. That evidence adduced to corroborate this trap witness need not be strong, absolutely convincing or sufficient in itself to support a verdict of guilty, nor even equivalent to the swearing of one credible witness. No general rule can be stated with respect to the quantum of evidence corroborating a trap witness's testimony. Each case must be governed by its own circumstances keeping in view the nature of the crime, the character of the trap witness's testimony and the general requirements necessary to sustain a conviction: 1959 Cr.L.J. 484: A.I.R. 1959 Mad. 166.

The rule of prudence requiring corroboration for the testimony of a trap witness has always been recognised. An accomplice, according to the accepted meaning, is a guilty associate or partner in a crime and spies, detectives and decoys who set a trap do not, generally belong to the category of accomplices, because they frequently act with the sole purpose of protecting the interests of the public and the society and do not share the *mens rea*. It is manifest that the question whether a particular trap witness is an accomplice in law or not must depend on the circumstances of each case. Where the trap witness was a person who was in the habit of bribing station masters in order to secure the booking of his goods and his story was that he had no grievance in that respect and that only because the Police Officer contacted him, he became a party to the trap the witness is in the position of an accomplice rather than an honest trap witness. The reasons why accomplice evidence is held to be untrustworthy and to require corroboration are that from the very nature of his evidence (*1*) he is a person of low character who has participated in a crime and is, therefore, likely to have no regard to the sanctity of his

oath; (2) he is interested in falsely distorting the facts in order to shift the guilt from himself; and (3) that he has the inducement of either a promise or implied pardon for his own part in the crime, and is, therefore, likely to be biased in favour of the prosecution. No doubt every one of these reasons might not apply to a trap witness. The trap witness in question was probably giving bribes to the station masters because he could not secure the booking of his goods otherwise, and to this extent was an unwilling accomplice. But he was a habitual bribe giver for which offence he expects not to be prosecuted, by shifting the blame on the station masters. He is also interested in the success of the trap, and for these reasons would be biased in favour of the prosecution. Therefore, the least that can be said is that he is a partisan witness: 1956 An.L.T. 256: 1956 An.W.R. 288: A.I.R. 1957 Andh. Pra. 441.

Evidence of trap witness—Corroboration of every detail not necessary: (1962) 2 Cr.L.J. 828: A.I.R. 1961 S.C. 1762.

Evidence of trap witness—Court can accept portion of evidence corroborated in material particulars by others evidence: (1962) 2 Cr.L.J. 828: A.I.R. 1961 S.C. 1762. *See* also 1975 B.B.C.J. 846.

It is true that it is very difficult to detect a case of bribery without the aid of a trap; yet it is also not safe for the Courts to rely on the persons who are laying the trap. They are known as "agents provocateur". They are in the nature of accomplices, particularly those who actually tender the money. The other witness and the Magistrate may be in a better position and, therefore, in a bribery case it is very necessary to examine the evidence rather closely and unless there is independent corroboration by the witnesses or by the circumstances of the case, it would not be safe to convict only on the sole testimony of the accomplice, who had tendered the money: 1957 All.W.R. (H.C.) 556. While it is true that independent corroboration, may not be possible in bribery cases yet the Courts have to be very careful at the time of recording a finding of conviction that the case has been proved beyond reasonable doubt. The Courts cannot allow suspicions, however strong, supported by tainted evidence, to take the place of proof only because it is difficult to find good evidence justifying a conviction of the accused person.

It is difficult to lay down what evidence should be or could be regarded as corroboration. Its nature and extent will always vary with the facts and circumstances of each case and no hard and fast rule can be laid down: 1957 All.W.R. (H.C.) 167.

Evidence of person participating in trap—Value of: 1959 Cr.L.J. 1421: A.I.R. 1959 Bom. 543.

Trap witness — Uncorroborated testimony of—Evidentiary value. *See* 1982 Cr.L.J. 954 (Ori.).

A distinction has to be made in the various kinds of a trap or payments of bribe. There may be a case in which a bribe is going to be paid in the normal course of business and on information being received by the Police a trap is arranged for watching this normal course of transaction. No legitimate objection for laying such a trap can be made but there may be another case in which it is not the intention of a bribe giver to pay any bribe and it is only the Police which wants that a bribe should be paid in order that an offence may be staged and detected. It is this kind of trap which has been disapproved in the pronouncement of the various High Courts as also by the Supreme Court: 1957 All.L.J. 934: 1958 Cr.L.J. 586: A.I.R. 1958 All. 334.

Evidence of accomplice—Credibility of—Bribery case—When a trap becomes illegitimate, the trap witnesses are no better than accomplice and their evidence cannot be accepted unless corroborated in material particulars: I.L.R. (1967) 1 Ker. 340: A.I.R. 1968 Ker. 60. *See* also A.I.R. 1990 S.C. 287; 1982 Cr.L.J. 1314: (1982) 2 Guj.L.H. 249: (1982) 23 Guj.L.R. 605.

It cannot be said that the evidence of Police can never be accepted without corroboration: 1958 M.L.J. (Cr.) 341: I.L.R. (1957) Mys. 177: A.I.R. 1958 Mys. 150.

An accomplice is a participator in the crime; a person who is not a participator is not an accomplice. A Police Officer who has no intention to and does not accept an amount offered to him as bribe or in order to enrich himself, but who merely lays a trap in order to bring to book the person offering it and to bring him to punishment for attempting to corrupt a public servant is not a participator and therefore, not an accomplice, and his evidence does not require corroboration: I.L.R. (1952) Bom. 900: (1952) 54 Bom.L.R. 153: A.I.R. 1952 Bom. 435.

Police Officials cannot be discredited in a trap case merely because they are Police officials nor can other witness be rejected for their being prosecution witnesses on some other occasions in the past; the Court has basically to judge their evidence in the light of probabilities and intrinsic credibility of the witnesses: A.I.R. 1974 S.C. 989: 1974 Cr.L.J. 784: (1974) 4 S.C.C. 84; A.I.R. 1974 S.C. 1024: 1974 Cr.L.J. 789: (1974) 4 S.C.C. 305.

There is no rule of prudence as such or which has crystallized into a rule of law requiring that evidence of the Police Officer who had laid the trap should be treated as evidence of accomplices requiring corroboration; in a particular case, the Court may be disinclined to act upon his evidence without corroboration, but, equally, in another appropriate case, if the Court may unhesitatingly accept evidence of such an officer, it is all a matter of appreciation; there can be no hard and fast rule nor any precedential guidance. [(1974) 1 Cr.L.T. 233 (Del.), Approved]: A.I.R. 1980 S.C. 873: (1980) 2 S.C.C. 390.

Whatever the criminal tendencies of a man might be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law, and this is all the more heinous where the temptation is at the instance of those who are the guardians and keepers of the law. Where such a method is employed, that alone might make the conviction illegal. *Held*, that the trap in the instant case was designed on the accused himself suggesting the bribe in the first instance and was not founded upon a solicitation of the accused and the pressing of temptation upon him. As such, the trap did not fall within the mischief of prohibited category referred to above: 1961 M.L.J. (Cr.) 776: (1961) 2 M.L.J. 547: A.I.R. 1961 Mad. 482.

Where in a trap raid in a corruption case one witness was concerned in laying the trap and the other witness was related to, and procured by him and no other eye-witness was examined, *held*, it was serious infirmity; the Department must seriously endeavour to secure really independent and respectable witnesses of the raid to inspire confidence; conviction set aside: A.I.R. 1976 S.C. 91: (1976) 1 S.C.C. 145: 1976 Cr.L.J. 172.

Student and another young man used as trap witnesses in detection of offences under Suppression of Immoral Traffic in Women and Girls Act, 1956—Employment of such persons for detection of offences under the Act deprecated: A.I.R. 1962 S.C. 1189: (1962) 2 S.C.R. (Supp.) 632.

Where in a case of bribery, the High Court magnified every minor detail or omission to falsify or throw even a shadow of doubt on the complainant's evidence, *held*, it would be the very antithesis of a correct judicial approach to the evidence of witnesses in a trap case; if such a harsh touchstone is prescribed to prove such a case, it will be difficult for the prosecution to establish any case at all: A.I.R. 1984 S.C. 63: 1984 Cr.L.J. 4: (1984) 1 S.C.C. 446.

27. Evidence of Executive Magistrate as trap witness—Value of.—The position of an Executive Magistrate is different from that of a regular Magistrate who discharges only judicial functions. The principles on which the employment of Magistrate as witnesses of police traps has been condemned have hardly any application where the Magistrate concerned are Executive Magistrates who perform no judicial functions. His evidence in regard to the statements made by the accused, would not become inadmissible on the ground that they were not recorded under S. 164 of the Cr.P. Code. [A.I.R. 1958 S.C. 500, Foll.]: A.I.R. 1960 Mys. 111: 1960 Cr.L.J. 934.

It is not necessary that Executive Magistrates should always keep away from operations intended to catch the criminal red handed; he is not so strongly motivated to get a suspect somehow or other punished; he is professionally detached and has a public responsibility to help detect a bribe-taker if credible requests are made; he is not a cloistered virtue unconcerned with social claims on his services. To condemn roundly every public official or man of the people as a *quasi* accomplice for participating in a raid is to harm the public cause: A.I.R. 1974 S.C. 1516: 1974 Cr.L.J. 1062: (1974) 4 S.C.C. 560.

May be a judicial officer should hesitate to get involved in Police trap experiments and expose himself to charges of unveracity: A.I.R. 1974 S.C. 1516: 1974 Cr.L.J. 1062: (1974) 4 S.C.C. 560.

28. Persons taking part in negotiations for bribe or themselves bribe giver.—Persons taking part in negotiations for bribes

cannot be said to be independent witnesses and their evidence is not free from doubt but persons merely present are not accomplices: 20 Cr.L.J. 258: 50 I.C. 18.

Persons who were either instrumental in negotiating the bribe or in arranging for its payment are in the position of accomplices and it is highly unsafe to base a conviction under S. 161 of the Penal Code on their testimony without independent corroboration: 34 Pat.L.R. 836: 147 I.C. 557.

Where a person does not himself demand any bribe but is invited to join in the conspiracy and at every stage takes care to keep his superiors informed of its progress, he cannot, under the circumstances, be regarded as an accomplice: A.I.R. 1955 Sau. 117.

It is obvious that a distinction must be drawn between a person who is threatened and becomes an accomplice and one who voluntarily takes part in the crime. In the former case corroboration necessary to establish the credit of such a person would be much less than in the latter case. In bribery cases this distinction becomes of great importance in view of the nature of the offence. When a person gives a bribe to a public servant with a view to induce him to abstain him from doing his duty, the bribe-giver is as much guilty as the taker; a greater amount of corroboration is necessary in the case. But, when the person is compelled by force of circumstances to give the bribe to induce the public servant to do his plain duty which he otherwise refuses to do, there is no doubt the element of wrong doing but the credibility of the giver would stand at a higher footing than in the previous case and very slight corroboration is sufficient: 3 Sau. L.R. 196: A.I.R. 1951 Sau. 25.

Though a person who gives a bribe is technically an accomplice of the person who receives it, his position is different from that of a co-offender. In cases where the accused is charged with extorting bribes from persons, the giver of the bribe becomes not a willing participant but a victim of the offence. The consideration that an accomplice is likely to swear falsely in order to shift the guilt from himself hardly applies to the evidence of one who testifies that he has bribed the accused thereby making himself out to be a briber. However, in the case of bribe-givers, it may not be prudent to base a conviction on their sole evidence in the absence of any corroboration whatsoever: 1960 Ker.L.T. 666 I.L.R. (1960) Ker. 783: A.I.R. 1961 Ker. 99 (F.B.).

A person who offers a bribe to a public officer is an accomplice and his evidence requires corroboration: 46 Cal.L.J. 331; 1947 Nag.L.J. 310; (1992) 1 Crimes 350 (Ori.).

A person who pays a bribe to the accused, not voluntarily but as a result of demand from the accused, and merely with a view to render necessary assistance in the detection of the crime cannot be said to be an accomplice in the commission of the offence under S. 161, because he has not the *mens rea* that he is paying the amount to secure a favour from the accused. It cannot be said that he aided or abetted the offence of illegal gratification by the accused: I.L.R. (1957) Ker. 559: 1957 M.L.J. (Cr.) 443: A.I.R. 1957 Ker. 134.

Where a person had given bribes to the accused on previous occasions, it is proper to require the same degree of corroboration for his evidence in regard to the alleged bribe as in the case of an accomplice: A.I.R. 1960 Mys. 111: 1960 Cr.L.J. 934. *See* also (1987) 1 Rec.Cr.R. 672.

A person who has given bribe to the accused is an accomplice and his testimony needs to be corroborated before it can be relied upon on the question of the purpose for which he gave the money to the accused: A.I.R. 1955 Pepsu 156: 1955 Cr.L.J. 1387.

Bribe-givers are of various categories. The unblushing one who pays the bribe to get an advantage and subsequently gives evidence for some ulterior purpose, he is an accomplice of the darkest hue. At the other extreme is the person who from the beginning has no intention of giving a bribe but make a show of offering and doing it so as to bring the dishonest public servant to book; such a one is far from being an accomplice, a good citizen to be respected and encouraged. Between the two there are many gradations and consequently need more or less corroboration by independent testimony. There is the giver who goes half way with the intention of paying but for some reason beyond his control thinks it wise and safe to report to the authorities and becomes a witness. He ranks next to the unblushing type. Another who changes his mind without external pressure

is still technically an accomplice and ranks next and is not so unreliable as the other two below him. The professional spy or decoy who gives the bribe for pecuniary or other advantage though not an accomplice is still a suspect all the same and requires corroboration. If the decoy is not acting for gain but being the victim of the demand for bribe helps spontaneously, from a sense of the citizens' duty, he is a reliable and respectable witness: A.I.R. 1951 Vindh. Pra. 17: 52 Cr.L.J. 561.

It all depends on the circumstances of each case as to whether the bribe-giver, that is the complainant was willing to give bribe or that he was compelled and reluctantly agreed to give bribe. If he was not willing to give bribe but under the circumstances was compelled to agree to give bribe then he cannot be treated as an abetter and his evidence cannot be treated as evidence of an accomplice and if the Court feels it safe to rely on the evidence of that witness after due caution, the order of conviction can be passed on the evidence of that witness and there is no need of independent corroboration of his evidence like that of an accomplice. However, if the Court feels it not safe to implicitly rely on the evidence of that witness, the Court may seek corroboration from other evidence. In a case where the Panch witnesses turned hostile and/or are found to be not independent, in such a case looking to the facts and circumstances of each case, the Court may rely on the evidence of the complainant and also that of the Police Officer for the purpose of convicting the accused when the attending circumstances are consistent with the guilt and not consistent with the innocence of the accused. [A.I.R. 1984 S.C. 1453, Foll.]: (1987-1) 7 Guj.L.H. 364: (1987-2) 28 Guj.L.R. 878 (D.B.).

After introduction of S. 165-A of the I.P.Code making the person who offers bribe guilty of abetment of bribery the complainant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon: A.I.R. 1979 S.C. 1191.

There is no reason why the evidence of an accomplice should be disbelieved, although necessarily it has to be received with caution, as it is generally regarded with suspicion. The rule of the Court which requires corrboration of the evidence of an accomplice, if it applies at all, applies with very little force to a case of bribery or receipt of illegal gratification under S. 161, I.P. Code. In such cases, the persons who pay the bribe and those who act as intermediaries are the only persons who can ordinarily be expected to give evidence about the receipt of bribe. The objections to the evidence of an accomplice cannot really apply where the alleged accomplice (the person paying the bribe) is not a willing participant in the offence, but is really a victim of that offence: I.L.R. (1948) Nag. 276: 1949 Nag.L.J. 92: A.I.R. 1948 Nag. 342; A.I.R. 1952 Tripura 2: 1952 Cr.L.J. 1201.

Case under S. 161, Indian Penal Code—Complainant's evidence—Corroboration—Necessity: 1959 Cr.L.J. 34: A.I.R. 1959 Bom. 30.

Trial of offences under Prevention of Corruption Act—Persons giving illegal gratification under coercion and fear of being harassed are not accomplice—Their evidence is not required to be corroborated: (1968) 3 S.C.R. 189: 1968 M.L.J. (Cr.) 668: A.I.R. 1969 S.C. 17.

Receiver of bribe in relation to the giver is an accomplice—He is unworthy of credit unless corroborated in material particulars: 1967 Cr.L.J. 691: A.I.R. 1967 Andh. Pra. 155.

By and large a citizen is somewhat reluctant, rather than anxious, to complain to the Vigilance Department and to have a trap arranged even if illegal gratification is demanded by a Government servant. Ordinarily, it is only when a citizen feels oppressed by a feeling of being wronged and finds the situation to be beyond endurance, that he adopts the course of approaching the Vigilance Department for laying a trap. His evidence cannot, therefore, be easily or lightly brushed aside. Of course, it cannot be gainsaid that it does not mean that the Court should be oblivious of the need for caution and circumspection bearing in mind that one can conceive of cases where an honest or strict Government official may be falsely implicated by a vindictive person to whose demand, for showing favours, or for according a special treatment by giving a go-by to the rules, the official refuses to yield: A.I.R. 1984 S.C. 1453: 1983 All.L.J. 1170: (1984) 1 S.C.C. 254.

In a case under S. 165-A, Penal Code, the complainant and the person to whom bribe

had been tendered must be regarded as a witness whose evidence should be corroborated before the same can be acted upon. Where the witness directly proving the tendering of the bribe is the full brother of the person to whom bribe was offered, his evidence has to be taken with some caution: 1956 Cr.L.J. 991: A.I.R. 1956 Cal. 385.

Being accomplices to the commission of crime because of their statements of payment of bribe-moneys to the appellant for three months, the evidence of these two self-condemned persons, who, on their own showing, had thrown moral scruples and sense of honesty, if they had any, to the winds for which, instead of refusing to meet the demand of the appellant, they had willingly paid bribe-amounts for three months would be unworthy of credit without corroboration in material particulars and through reliable sources. [A.I.R. 1980 S.C. 1382, Foll.]: (1985) 59 Cut.L.T. 510.

True, the person paying the gratification is, in a way, viewed from a wide angle, an accomplice; but before his evidence is dubbed as unworthy of credit for want of corroboration, it deserves a pragmatic or realistic approach. Where the bribe-giver voluntarily went to the offender and persuaded him to accept the bribe, he is an undiluted accomplice and as a rule of prudence, the Court should insist on independent corroboration; but if, on the other hand, he was persuaded to give, he actually became a victim of the offender's persuasion; to name him an accomplice and reject his testimony for want of corroboration would sometimes be unrealistic and imprudent. The Court must always bear in mind that insistence on corroboration is not based on any rule of law, but is a caution of prudence. On occasions where bribe giving or payment of gratification was done in a way that independent persons had no occasion to witness it, corroboration may not be possible; but when the accused collected amounts from persons with the promise to secure recruitments for them and not being able to get them recruited, he returned the money to them through cheques which bounced, *held*, there was thus, sufficient corroboration to the evidence of the bribe-givers; the accused was liable to be convicted: 1988 Cr.L.J. 1005 (Ker.).

Bribe giver—If accomplice: 1960 M.L.J. (Cr.) 695 (Ker.).

Where the person giving bribe had no intention of achieving his purpose by paying it but only in order to expose the conduct of the public servant and to bring him to book, he paid the amount as directed by the Police, *held*, he could not be treated as an accomplice: 1995 Cr.L.J. 955 (Mad.).

A person who is not a willing party to the giving a bribe and who is only actuated by the motive of trapping another cannot be regarded as an accomplice, but the evidence of such a witness is that of a partisan witness who was out to entrap another. A partisan witness merely means a person who is interested in the prosecution. There is no rule that in the case of an interested witness there must always be independent corroboration. The Courts must always weigh the evidence with particular caution, and if after scrutinizing the evidence of an interested witness, the Court finds it safe to accept such evidence, then independent corroboration is not necessary.

Whether a Panch acted as a Panch witness after the raid is over or during the course of the raid, he cannot be treated as a partisan witness unless the idea to make a raid originated from him. In order to provide independent evidence of what happened in the course of a raid, it is always necessary that the Police should get the assistance of independent Panchas and it is not reasonable to stigmatise Panchas are not independent but interested witnesses simply because they do their duty of providing independent evidence as to what happened in the course of the raid: (1961) 1 Cr.L.J. 50: A.I.R. 1961 Guj. 1.

Where the complainant, a Minister, who was offered a large bribe for a favour, gives impression of being interested and upon his complaint the conversation between the Minister and the accused is tape recorded, *held*, this not being a case wherein the demand emanated from the public servant, the Minister was not in the position of an accomplice; the accused could be convicted on the Minister's uncorroborated statement; on facts, the Minister's statement was amply corroborated: 1993 Cr.L.J. 2863 (Bom.).

One Nandlal was not a willing party to the giving of the bribe to the accused. The proposal came from the accused and it was only under the fear of being illegally detained by him that Nandlal apparently agreed to pay him the sum demanded. Soon

after his release from the pressure of the accused, Nandlal contacted one Bhuramal and with his help secured the assistance of the Anti-Corruption Police in trapping the accused. He sought the assistance of the Anti-Corruption Police as he had been harassed by the accused. He did not want to pay bribe to the accused, but wanted to get him arrested. *Held*, that this clearly showed that Nandlal was altogether unwilling to pay the bribe demanded by the accused, but gave his seeming consent simply to get away from the accused. Nandlal, therefore, could not be said to be an accomplice and could be described only as a partisan witness. *Held* further that one Patel helped Nandlal out of a difficult position by agreeing to stand as a surety for him for the payment of the bribe and thus obtained his release for the time being. He also was not an altogether willing party to the giving of bribe to the accused. However, in view of the fact that the amount of bribe was settled by the accused through his instrumentality, some suspicion could be entertained against him that he was not so unwilling regarding the payment of bribe as was Nandlal. Hence, this witness was more or less in the position of an accomplice: 1958 Raj.L.W. 596.

Where several Railway servants are prosecuted under S. 120-B, Penal Code, and S. 5, Prevention of Corruption Act, for having entered into a conspiracy not to allot wagons or book goods without extracing bribes at a time when there was great shortage of wagons, the Forwarding Agents and the Commission Agents or Merchants, who were alleged to have paid bribes to the accused in order to get as many wagons or booking as possible, such persons cannot be treated as the victims of bribery. They took full advantage of the alleged corruption to enrich themselves and cannot be treated as any thing other than accomplices. If the Forwarding Agents are treated as accomplices, their evidence must receive independent corroboration in respect of each of the accused persons from evidence which is not tainted before prudence will allow it to be accepted. In such circumstances, the evidence of one Forwarding Agent will not be sufficient to corroborate the evidence of others, nor will complaints made by them earlier to the authorities be a corroboration of the nature required. If the evidence of the Forwarding Agents or one or more of them is of such exceptional character as to indicate that it must be true, a conviction based on that evidence will not be illegal but in considering this fact care must be taken not to allow the mind to be influenced by general allegations of wholesale bribery rampant in the Railway Goods Booking Department. In considering whether there was sufficient independent corroboration, the principle that the corroboration must be on some material particular not only bearing upon the facts of the crime but upon the accused's implication in it, must not be lost sight of. Sufficient corroboration of the general allegation of bribery is not sufficient: 1956 Cr.L.J. 687: A.I.R. 1956 All. 358.

Where *D* was accused of taking bribe and was tried for the offence under S. 161, Penal Code and S. 5(2) read with S. 5(1) (*d*), Prevention of Corruption Act, and *J* the bribe-giver was a person against whom investigation for the offence of black-marketing was pending and *D* was convicted on the uncorroborated testimony of *J* that *D* demanded a bribe from *J* and another on pain of being prosecuted for black-marketing and therefore, he informed the authorities and a trap was laid for *D*. *Held*, that considering the fact of investigation of the offence of black-marketing against *J* and another was pending, *J* was interested in entrapping the accused and therefore, conviction could not be based on the evidence of *J* without independent corroboration: A.I.R. 1951 Simla 14.

29. Bribery cases—Generally.—Corroboration by independent evidence connecting the accused with the crime of bribery is necessary where the witnesses are in the position of trap witnesses against whom allegations of ill-will towards the accused are made and one of such witness had admittedly been convicted of an offence described as "forgery". Corroboration need not be by direct evidence that the accused received bribe. It is sufficient even though it is circumstantial evidence which connects him with the crime: 1968 Cr.L.J. 391 (All.).

It does not seem to be law that if the money given as bribe is provided by a particular officer of the Police then the evidence of all the witnesses become evidence of accomplices and must be looked at with suspicion. As regards corroboration of accomplice witnesses, it is not necessary that

there should be independent corroboration of every material circumstance. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice or the complainant is true and that it is reasonably safe to act upon it. The corroboration need not be direct evidence. It is sufficient if it is merely circumstantial evidence of the connection of the accused with the crime: 1960 Cr.L.J. 1380: A.I.R. 1960 S.C. 961.

Party presenting document for registration to Sub-Registrar—At the suggestion of the peon in the office of the Sub-Registrar that the Sub-Registrar expected some money for early return of the document, party paying some money to the Sub-Registrar and latter accepting same—*Held*, party could not be said to be an accomplice but all that could be said was that she was an interested witness—Court, *held*, should call for some corroboration before her evidence was accepted: 1961 M.L.J. (Cr.) 692: A.I.R. 1961 Mys. 44.

Where the Panch witness had been specially selected with the assistance of informant, *held*, version of those witnesses being highly unnatural, it merited rejection: (1986) 6 Guj.L.H. (U.J.) 21 (D.B.).

Where sole evidence on which the prosecution hinged was that of decoy witness and he was the person who played the role of bribe-giver and the explanation given by the appellant was found to be probable, *held*, without any corroboration of the evidence of said witness, it would be risky to convict the appellant: 1989 Cr.L.J. 172 (Ori.).

Charge of corrupt practice of bribery at an election—In election cases it is unsafe to base a finding of such corrupt practice on uncorroborated testimony of accomplices: 1968 Cr.L.J. 1199: A.I.R. 1968 Punj. 416 (F.B.).

Where out of the two accused tried for the offence of bribery the statement made by one under S. 342, Cr.P.Code is exclamatory, it cannot be used as evidence against the other accused, the conclusion arrived at by this method will be illegal: 1961 M.P.L.J. 721: 1961 M.P.C. 778.

30. Applicability of rule that accomplice is unworthy of credit to departmental proceedings.—Rule of evidence that accomplice is unworthy of credit has no application to departmental proceedings—If delinquent public servant is made aware that accomplice's report would be used against him and is given opportunity to cross-examine the accomplice, authorities can act upon report of accomplice: 1966 B.L.J.R. 825.

Departmental enquiry—Enquiry Officer can act on uncorroborated testimony of accomplice or partisan witnesses: (1965) 2 Mys.L.J. 490: A.I.R. 1966 Mys. 220.

Conviction is not illegal merely because it proceeds upon uncorroborated testimony of an accomplice—Rules of evidence as prescribed by the Evidence Act, however, do not strictly apply to departmental proceedings against a servant: (1981) 2 Serv.L.J. 507: 1981 Lab.I.C. 741 (All.).

The evidence of an accomplice in departmental enquiries is legal evidence; but the rule of caution requires that the disciplinary Tribunal should not act on that evidence unless it is corroborated or the Tribunal has, after cautioning itself as to the danger of acting solely on accomplice evidence, decided after the deliberation to accept it. [1971 Ker.L.T. 865, Rel. on]. Courts have held that in departmental enquiries, the evidence of an accomplice is not necessarily unacceptable: (1979) 1 Serv.L.R. 479: 1979 Lab.I.C. (N.O.C.) 125 (Ker.).

31. Delay in making statement—Effect.—Long delay in making their statements, would make evidence of accomplices liable to grave suspicion: 67 I.C. 828(2): 2 L.L.J. 296.

To support a conviction on the statement of an approver especially of one whose initial statement was very long delayed, the statement requires material corroboration connecting each individual accused with the crime committed: 63 I.C. 612: 22 Cr.L.J. 676 (L.); 10 O.L.J. 280: A.I.R. 1924 Oudh 65. *See* also 1929 Mad.W.N. 698 (mere presence of a person in the house is not such a corroboration). *See* also A.I.R. 1928 Cal. 309; 6 Mys.L.J. 419; 34 Pat.L.R. 866; (1932-33) 37 Cal.W.N. 934: A.I.R. 1934 Cal. 114; 150 I.C. 21: A.I.R. 1934 Lah. 346; (1943) 56 Mad.L.W. 737: (1943) 2 M.L.J. 634 (F.B.); I.L.R. 22 Pat. 681: A.I.R. 1944 Pat. 67.

The evidence of a witness who was cognizant of the crime and who did not divulge it until pressed by the Police needs very careful scrutiny, and a Court would be justified in a

particular case in not acting upon the evidence of such a witness unless there are circumstances to lend support to his evidence. But this does not mean that the corroboration which the Court requires in such a case is of that kind of corroboration which one requires in the case of the evidence of an approver or an accomplice: I.L.R. (1956) Madh. Bh. 104: A.I.R. 1956 Madh. Bh. 262.

Where the co-accused turned an approver after about 20 months from the date of occurrence and his statements made before the Police were recorded four months after the occurrence, copies of which were not made available to the defence, *held*, no reliance could be placed on his evidence: A.I.R. 1984 S.C. 226: 1984 Cr.L.J. 164: (1984) 1 S.C.C. 686.

Where an approver's testimony recorded 7 or 8 years after the event implicated a new person and was not corroborated, *held*, the rule of caution required its rejection: 1984 Cr.L.R. 266 (Guj.).

32. Antecedents of approver—Effect.—This rule is not rendered inapplicable by the personal conduct and antecedents of the approver or by the absence of motive on his part or on the part of the investigating agency to implicate individual accused: 148 I.C. 745: A.I.R. 1934 Lah. 583.

Approver—Evidence of—Value of—Corroboration—Necessity—Duty of Court—Antecedents of approver how far affects value of his evidence: 1966 Cr.L.J. 949: A.I.R. 1966 S.C. 1273.

Where the approver gave a correct picture of the case and his statement was corroborated by other evidence which was on record of the case, *held*, he was a reliable witness. Merely because some other criminal cases were pending against him would not make his conduct unbelievable: 1985 Raj.L.W. 658.

33. Retracted statement is admissible.—A retracted statement of an approver is admissible as evidence against an accused person: 61 I.C. 528: 12 Mad.L.W. 1385. A resiled statement of an accomplice naturally must be subjected to greater scrutiny. It is no doubt open to the Sessions Judge to admit in evidence such a resiled statement and treat it as substantive evidence but, in order to act upon the same, great caution and care is highly essential: 1957 M.L.J. (Cr.) 455: (1957) 2 An.W.R. 182. May be sufficient corroboration of the approver's story as against himself but not against a co-accused: 20 Cr.L.J. 188: 49 I.C. 604. If there is no other reliable evidence in corroboration, the evidence of the approver coupled with the retracted confession of a co-accused is not sufficient for conviction: I.L.R. 55 All. 91: A.I.R. 1933 All. 31: 1932 All.L.J. 1125.

34. Evidence of accomplice who was not granted pardon.—Where a person was not granted a formal pardon but was examined under S. 10, Gambling Act, he is not an approver and therefore, his evidence can be accepted without corroboration: L.R. 1 All. (Cr.) 101.

Retaining accomplices without judicial pardon—Whether objectionable: 1968 Cr.L.J. 493: A.I.R. 1968 Mad. 117.

Person accused along with others not tendered pardon for purpose of examining him as a witness—If can be examined as an accomplice or approver: 1978 M.P.L.J. 547.

Where the tender of pardon was made by a Magistrate without complying with the provisions of S. 337, Cr.P.Code, the tender of pardon was illegal, and therefore, the approver's evidence must be excluded: I.L.R. (1957) Andh. Pra. 742: 1958 M.L.J. (Cr.) 31: A.I.R. 1958 Andh. Pra. 165: 1958 Cr.L.J. 343.

Withdrawal of pardon granted to a person—Competency as witness against other accused—Refusal of prosecution to examine—No bar to his examination at fresh trial necessitated by retirement of Sessions Judge: 1961 Raj.L.W. 188: A.I.R. 1961 Raj. 274.

35. Evidence of co-accused against whom charge was unconditionally withdrawn.—The co-accused against whom a charge has been unconditionally withdrawn is a more reliable witness than the accomplice who is examined under conditional pardon although proper corroboration is necessary in both cases: 144 I.C. 74: A.I.R. 1933 Cal. 148.

Evidence of person not charge-sheeted by Police—How far reliable: 1968 Cr.L.J. 1584: A.I.R. 1968 Bom. 400.

36. Evidence of convicted and sentenced accused.—The evidence of an accomplice who has been convicted and sentenced and has nothing to gain or lose deserves greater weight than that of an approver: 1952 Cr.L.J. 15: A.I.R. 1951 Him. Pra. 75. *See* also 14 I.C. 607.

Transport of rice without permit in lorry in contravention of Orissa Food Grains Control Order—Lorry stopped by Police and rice seized before crossing Orissa border—Conviction of driver separately for offence—Trial of person who arranged for transport—Driver—Evidence of—Admissibility against person for whom he drove lorry—Corroboration. *See* A.I.R. 1952 Ori. 164: 17 Cut.L.T. 154.

37. Punter — Value of evidence.—A punter cannot be considered to be an independent witness. Such a witness being sent by the Police is obviously a witness under their influence. Hence, the evidence of such a witness required corroboration in order to base a conviction thereon: A.I.R. 1954 Madh. Bh. 145: 1954 Cr.L.J. 1347. It is not correct to say that the evidence of the punter should be accepted with caution. If the punter's evidence is corroborated by other evidence on record, it can be safely used to convict an accused person: 1957 Cr.L.J. 510: A.I.R. 1957 Madh. Pra. 17.

The punter is not in the same position as that of an accomplice. He is certainly entitled to great credit and his evidence is entitled to great value than that of accomplice.

The principles applicable to cases under the Gambling Act would not be applicable to cases relating to the evidence of an accomplice. Even in the case of an accomplice's evidence, corroboration is not necessary in law, but in practice it is necessary at least in one material particular. There is a presumption under S. 114, *Illus.* (*b*) that an accomplice is unworthy of credit, unless he is corroborated in material particulars. The same rule would apply to every witness, who is unworthy of credit. For the same reasons, the evidence of a punter and of Police Investigating Officer who are interested in securing conviction, is unworthy of credit, and there is no reason why the principles applicable to one type of witness who is unworthy of credit, *viz.*, an accomplice, should not apply to another type of witness who is unworthy of credit for different reasons. But as to the extent of corroboration, it is not necessary that there should be independent corroboration in all material particulars: (1963) 4 Guj.L.R. 253: (1963) 2 Cr.L.J. 141: A.I.R. 1963 Guj. 188.

Conviction of an accused on a charge of gambling (in this case under S. 13, Rajasthan Public Gambling Ordinance, 1949) should not be founded merely on the evidence of a punter, such evidence being tainted and the Courts should always require independent corroboration of his evidence before a conviction can be safely founded on it. Finding of a marked or a signed currency note in cases of this type is by itself entirely insufficient to justify a conviction: I.L.R. (1960) 10 Raj. 842: 1960 Raj.L.W. 528.

A conviction cannot be sustained on the uncorroborated evidence of a decoy punter: (1959) 61 Punj.L.R. 439: 1960 Cr.L.J. 275(1): A.I.R. 1960 Punj. 72.

It is not necessary in law to have corroboration to the evidence of the P.S.I. and the Panch witnesses in a prosecution under S. 12 of the Gambling Act. Of course, the evidence of a Panch in cases under S. 12 of the Gambling Act has to be appreciated in the ordinary manner and after giving good reasons it is open to a Magistrate or a Sessions Judge to reject the evidence of the punter. But where the Magistrate has accepted the evidence of the punter giving detailed reasons, the High Court will not interfere with the finding in revision: (1963) 2 Cr.L.J. 87: (1963) 4 Guj.L.R. 733.

38. Confession—Value of.—S. 30 of the Act, does not compel a Court to accept the confession of a co-accused as corroboration of the approver's evidence. It only empowers the Court to take into consideration such confession as against the person jointly tried with him or against the person who makes such a confession. Though an accomplice's evidence is legal evidence and not excluded by any of the provisions of the Evidence Act, it has been held as a rule of practice that such evidence should not be accepted as corroborative evidence. The same principle should apply in the case of a confessional statement: (1949) 2 M.L.J. 428; 76 I.A. 147. *See* also (1948-49) 53 Cal.W.N. 609: A.I.R. 1949 P.C. 257: (1949) 2 M.L.J. 194 (P.C.).

Confession of co-accused—Value of: A.I.R. 1957 Ori. 172: 1957 Cr.L.J. 902.

Where there is a single retracted confession corroborating other accomplice evidence, the caution must necessarily be still greater and the probative value smaller. Even if there are more than one such confession and they are proved to be given

independently and without an opportunity for a prior concert, the probative value may increase but the need for caution remains because a number of suspects may be promoted by the same or different motives to embroil a particular individual. It is only when false implication is excluded after close scrutiny that confession of a co-accused can be used to lend assurance to other evidence. [A.I.R. 1952 S.C. 54, Foll.]: (1968) 2 S.C.R. 641: 1968 Cr.L.J. 1017: A.I.R. 1968 S.C. 832.

Courts must exercise great caution if there are circumstances which indicate inducement or pressure which is not recognised by law: 148 I.C. 745: A.I.R. 1934 Lah. 583. *See* also (1932) 34 Punj.L.R. 2. Confession of one accused cannot be said to be corroborated by the confession of another as against a third accused who has not confessed at all. But between the first two the confession of one may be said to be corroborated by the confession of the second and *vice versa*: 60 I.C. 786: 22 Cr.L.J. 290(L.).

Where there is nothing against an accused person but a confession made by a co-accused from the dock at the trial, a conviction cannot be supported: 118 I.C. 512: A.I.R. 1929 Mad. 285.

The confession of an accomplice should be subjected to the most anxious scrutiny in so far as it incriminates others, and received with caution as it is not sifted by cross-examination: 14 Cr.L.J. 179: 19 I.C. 179; 16 Cr.L.J. 233: 8 S.L.R. 203; 103 I.C. 49: A.I.R. 1927 Lah. 581; 24 All.L.J. 1050; 99 I.C. 929: A.I.R. 1927 Lah. 78.

Confession of co-accused if can be taken into account in considering evidence of accomplice: (1965) 67 Bom.L.R. 317: I.L.R. (1965) Bom. 648: A.I.R. 1965 Bom. 195.

An approver's evidence supported by the retracted confession of a co-accused behind the back of the accused is not sufficient to convict the accused. Such a retracted confession is not a corroboration of a high value: 18 I.C.672: 11 All.L.J. 73.

Extra-judicial confession—Corroboration by approver—Sufficiency: A.I.R. 1957 Him. Pra. 52: 1957 Cr.L.J. 1254.

Confession of co-accused, even if voluntary and free from any taint or infirmity cannot form basis of conviction of accused: (1966) 1 An. L.T. 209.

Retracted confession of accused—Confession voluntary and true—General corroboration sufficient to sustain conviction on such confession—Confession of co-accused implicating him and others—Corroboration in material particulars necessary—Differences in the confessions of one accused and the other—Effect: 32 Cut.L.T. 1140.

The confession of a co-accused cannot, however, be used as a substantive evidence in the sense that a conviction on that alone can stand. Under S. 30 of the Evidence Act, the Court may "take into consideration" the confession of a co-accused. The confession can be used only in support of other evidence and cannot be made the foundation of a conviction. If there is no other evidence, and if the other evidence in the case is insufficient to establish a *prima facie* case against the accused, the confession must be excluded from consideration. The confession cannot be used to supplement evidence otherwise insufficient and in no case, can it be used to fill a gap in the prosecution evidence: (1978) 46 Cut.L.T. 496.

Merely because the statement of the co-accused recorded under S. 108 of the Customs Act, 1961 is retracted subsequently by the co-accused, it cannot be said that it is no evidence. Conviction can be based by the Court even on the sole retracted statement of the co-accused recorded under S. 108 of that Act, provided that the Court is satisfied that said retracted statement of the co-accused is otherwise reliable and trustworthy, after considering the attending circumstances of the case. At the most it can be said that it would be risky to base conviction on the sole retracted statement of the co-accused; but it can never be said that no conviction can be based on the retracted statement of the co-accused: 1992 Cr.L.J. 2800 (Guj.).

Where in a case there are confessions of co-accused and approvers, Court has to ask itself whether they are reliable, whether what they have stated is true or corroborated and whether the corroboration is sufficient to incriminate any or all of the other accused. Where the approver's evidence is corroborated almost in every particular by medical evidence, all that can be said is that his evidence would be sufficient to convict the accused if there is sufficient independent corroboration not only corroborating his

evidence but also corroborating implication of the other accused in the crime: I.L.R. (1979) Bom. 380 (D.B.).

Where in a joint trial, confession of co-accused inculpating the accused is admitted against the accused and the confessing co-accused does not testify, the accused's rights under confrontation clause of the Sixth Amendment of the American Constitution are violated, notwithstanding instructions to the jury to consider the confession as evidence only against the co-accused.

But where there is other overwhelming evidence of accused's guilt, and where the evidence supplied through confession is only cumulative, the constitutional error of violation of confrontation clause is harmless beyond a reasonable doubt so as not to warrant reversal of accused's conviction: (1969) 23 Law Ed. 2nd 284: A.I.R. 1970 U.S.S.C. 15.

Confession of an accused cannot be used to corroborate the evidence of an approver because such a confession is a tainted piece of evidence and cannot be placed on a higher footing than the evidence of the approver itself but the retracted confession of the accused may be relied upon against himself along with other evidence to prove his guilt: 1977 W.L.N. 379.

Examination of self-confessed criminal in conspiracy as witness—Propriety and legality—Objection to admissibility of testimony: 1968 Cr.L.J. 1124: A.I.R. 1968 S.C. 938.

Accomplice evidence—Taking accomplice evidence outside S. 337, Cr.P.Code, by using S. 494 or otherwise—Power to tender self-confessed criminal as witness instead of trying him as accused—No violation of Arts. 14 and 20: 1968 Cr.L.J. 1124: A.I.R. 1968 S.C. 938.

A retracted confession is in itself a tainted piece of evidence and stands in need of corroboration and it is absolutely unsafe to seek corroboration of the accomplice evidence by retracted confession: 1952 Cr.L.J. 1979: A.I.R. 1952 J.&K. 36.

Retracted confession of accused—Corroboration required—Difference between evidence of accomplice and confession of accused: (1958) 1 M.L.J. (S.C.) 130: A.I.R. 1958 S.C. 66. Validity of retrial on the basis of confessional statement of a co-accused turned approver. *See* A.I.R. 1987 S.C. 877 1987 Cr.L.J. 793: (1987) 1 S.C.C. 288.

Confession of co-accused retracted later—Use of as corroborative evidence against other accused and against himself: (1964) 1 Cr.L.J. 680: A.I.R. 1964 Ori.144.

39. Miscellaneous.—Witness neither accomplice nor anything analogous to an accomplice but an ordinary witness—As a general rule, Court may act on testimony of such solitary witness without corroboration unless circumstances of a particular case necessitated corroboration: A.I.R. 1962 S.C. 424.

Examination of approver as witness after other witnesses—Propriety: 1968 Cr.L.J. 514: A.I.R. 1968 Manipur 34.

Corroboration evidence is a question of law: (1927-28) 32 Cal.W.N. 945.

Where the accused sought to impeach the testimony of a witness as that of an accomplice, *held*, the burden lies on the accused to convince the Court by his own testimony or some other material on record that the witness could aptly be described as an accomplice: A.I.R. 1971 Tripura 26: 1971 Cr.L.J. 786.

Accomplice whether to be joined as accused: 1968 Cr.L.J. 1584: A.I.R. 1968 Bom. 400.

Classification is permissible if there is nexus between classification and purpose to be achieved—Accused cannot be put in the same position as that of witnesses by acquitting him: 1968 Cr.L.J. 1584: A.I.R. 1968 Bom. 400.

It is mainly the duty of the prosecution to bring the accomplice character of the evidence to the notice of the Court and then invite it to believe it by reference to the corroborative evidence on record. An accused is under no legal obligation to do so: A.I.R. 1929 Nag. 215 *See* also I.L.R. 17 Luck. 516: A.I.R. 1942 Oudh 221. Where the evidence of an accomplice is corroborated only as regards some accused conviction of others is bad: A.I.R. 1929 Nag. 222. *See* also 146 I.C. 934: A.I.R. 1933 Pat. 122.

Where the two witnesses who though regarded as independent, did not in fact corroborate anything that the accomplice witnesses had said, *held*, a finding that is recorded by the Courts below about the guilt of the accused, must be deemed to be a finding based upon no legal evidence: 1979 Bom.C.R. 30.

134. Number of witnesses.—No particular number of witnesses shall in any case be required for the proof of any fact.

Innocent purchasers of smuggled gold—Evidence of—Corroboration not necessary: (1960) 62 Bom.L.R. 634: (1961) 1 Cr.L.J. 229: A.I.R. 1961 Bom. 48.

Approver's evidence and corroborating piece of evidence cannot be treated separately: A.I.R. 1961 S.C. 1762.

Where a charge of conspiracy depends upon the evidence of an approver, the Judge should make up his mind whether he is going to believe the approver and if he thinks that the approver's evidence is unsatisfactory and suspicious, he could disbelieve it altogether. If on the contrary, he comes to the conclusion that inasmuch as there is corroborative evidence, it does not matter much whether the approver is telling the truth or not, he would be approaching the case from a wrong point of view: 66 Cal.L.J. 575. *See* also I.L.R. 22 Pat. 681: A.I.R. 1944 Pat. 67; I.L.R. 13 Luck. 115: A.I.R. 1937 Oudh 259; I.L.R. 12 Luck. 415: A.I.R. 1936 Oudh 413 (accessory after crime); A.I.R. 1937 Rang. 513.

Where the entire case of murder and rape depended on the approver's testimony which found no corroboration and did not inspire the Court's confidence, *held*, the accused, in the spirit of the high traditions of the country's criminal jurisprudence, cannot be sent to the gallows even if there is a lurking doubt in the Court's mind about the guilt of some of them: 1991 Cr.L.J. 859 (Mad.) (D.B.).

Conviction of an accused under S. 201, I.P.Code based on the uncorroborated testimony of accomplices cannot be sustained when it appears that these accomplices have not given any clear evidence connecting the accused with the crime and the Sessions Judge has not indicated in his judgment any reason as to why he believed the uncorroborated testimony of these accomplices: 26 Cut.L.T. 638.

Where the finding of the High Court on the essential part of the prosecution story in respect of the charge under S. 467, I.P.Code, really rested on the evidence of the accomplice uncorroborated by any other evidence. *Held*, that the High Court erred in law in making a finding against the appellant in respect of the charge under S. 467 and the conviction should be set aside: I.L.R. (1962) 2 All. 904: (1963) 2 S.C.R. 121: A.I.R. 1962 S.C. 1573.

Section 134—Synopsis.

1. Scope and principle of section.
2. Matrimonial matters.
3. Departmental enquiry.
4. Motor accident claim case.
5. Criminal cases—General.
(*a*) Victim/complainant as sole witness.
(*b*) Murder cases.
(*c*) Dacoity and theft cases.
(*d*) Others.

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1. Scope and principle of section.—Under S. 134 no minimun number of witnesses is prescribed by law to prove a fact. At the same time the law does not lay down that the statement of witnesses must necessarily be accepted as true unless the opposite party produces evidence of its own to contradict them: 1942 All.W.R. (Rev.) 277(1): 1942 R.D. 486(2). *See* also 10 W.R. 236: (1917-18) 22 Cal.W.N. 408.

A single witness, if believed is sufficient to prove the facts alleged: (1953-54) 58 Cal.W.N. 696: A.I.R. 1955 Cal. 226; I.L.R. (1952) Nag. 700: A.I.R. 1953 Nag. 154. Court is concerned with quality and not quantity of evidence; section is based on the maxim that evidence is to be "weighed" and not "counted": (1988) 2 Karn.L.J. 69: I.L.R. (1988) Karn. 1805 (D.B.).

Under S. 134 no particular number of witnesses would be required in any case to prove any fact. The testimony of a single witness, if believed is sufficient to establish any fact. It is not the number of witnesses who matter but the quality of evidence led: 1966 Cr.L.J. 522: A.I.R. 1966 Cal. 194.

Per *Das, C.J.*—There is no rule of law that the uncorroborated testimony of one witness cannot be accepted. If there is any such rule, it is a rule of prudence, and whether that rule should be adopted or not will depend on the circumstances of each case: A.I.R. 1956 Pat. 384.

As a general rule, a Court can and may act on the testimony of a single witness though

uncorroborated. Unless corroboration was insisted upon by statute, the Court should not insist on corroboration except in cases where the nature of testimony of the single witness itself required the same as a rule of prudence. The question of corroboration arises only in regard to a witness who is neither wholly reliable nor wholly unreliable in which the Court should be circumspect. [A.I.R. 1957 S.C. 614, Foll.]: (1970) 72 Bom.L.R. 405: 1970 Mah.L.J. 634: A.I.R. 1970 Bom. 438 (D.B.).

The law does not provide number of witnesses to be examined in a particular case. One witness, if he is reliable, is sufficient to prove any fact. It is the quality that matters, not the quantity: 1968 Jab.L.J. 737: 1968 M.P.L.J. 745.

O. 16, R. 1 of the Code of Civil Procedure not having laid down the number of witnesses which a party can produce, the field is clearly left open by the Legislature for the trial Court. The first duty cast upon the Courts is to control the proceedings and do substantial justice, and it being not the legislative interest to allow any number of witnesses which party may wish to summon, the Courts must apply their mind in the context of the nature of the litigation, the number and nature of the issues, the party on which the onus is placed and the specified purpose for which a witness is summoned and determine as to the witnesses required in the case; it cannot be left to the whims and fancies of the party summoning them: A.I.R. 1995 J.&K. 32.

2. Matrimonial matters.—S. 134, embodies the principle that sufficiency of evidence is not a matter of number or quantity but of quality, the need for corroboration arises not because the evidence is of an interested person but because the evidence of the party is such as does not inspire confidence. The rules of evidence are not different in divorce cases under the Indian Divorce Act than elsewhere and there is no minimum standard of proof necessary: (1994-1) 113 Mad.L.W. 544.

Husband's petition for dissolution of marriage—Grounds of wife's adultery and desertion—Both respondents remaining *ex parte*—Petitioner examining himself alone—No corroboration—His evidence held sufficient for relief sought for: A.I.R. 1970 Mad. 91: (1969) 2 M.L.J. 457 (S.B.).

Wife's petition for nullity of marriage on ground of husband's incapacity—Testimony only of wife available—Corroboration not essential if evidence is reliable—Standard of proof required: A.I.R. 1970 Guj. 43: (1969) 10 Guj.L.R. 661.

Petition for judicial separation—Number of witnesses—Test is qualitative and not quantitative—Corroboration is not matter of law but a matter of precaution: (1968-69) 73 Cal.W.N. 502.

Issue of paternity of child—Evidence of mother alone—Sufficiency: 1969 Mad.L.W. (Cr.) 67.

3. Departmental enquiry.—Misconduct by worker—Enquiry by management—Principles of natural justice—Requirements as to—Charge against workman of participation in assault on officers—Enquiry by assaulted officers themselves—Enquiry consisting merely of putting questions to each workman in turn—There is travesty of principles of natural justice—Enquiry vitiated—*De novo* enquiry by Tribunal—Insistence on corroboration before accepting evidence of a single witness—Procedure held not erroneous as contravening S. 134, Evidence Act: A.I.R. 1963 S.C. 1713: (1964) 2 S.C.R. 165.

4. Motor accident claim case.—It is well known that if there are a large number of witnesses who witnessed the accident, a selection may be made by the claimants. Thus, where in a motor accident claim case, eye-witnesses as well as the doctor who conducted post-mortem had been produced, *held*, non-production of any other witness such as the shop-keepers of the area where the accident occurred or the Investigating Officer, could not cause any adverse inference to the claimants' case: A.I.R. 1986 Del. 94: (1986) 29 Del.L.T. 223: 1986 Rajdhani L.R. 102.

5. Criminal cases—General.—In criminal cases it is the weight of the evidence and not the number of witnesses which the Court has to consider and one credible witness outweighs the testimony of a number of witnesses of indifferent character and unless corroboration is insisted upon by statutes, Courts should not insist on corroboration except in cases where the nature of the testimony of single witness itself requires it as a rule of prudence. It can by no means be laid down as a general maxim that the assertion of the witnesses is more convincing to the mind than the assertion of one witness. An accused can be convicted even on the basis of the evidence of a single eye-witness; but such a witness must be a man or woman of worth. There is no law which requires the Sub-Inspector's evidence like that of an accomplice, to be corroborated in material particulars before it can be acted upon. The evidence

of the Sub-Inspector will succeed or fail exactly like that of any other material witness: (1957) 70 Mad.L.W. 1012.

The general rule recognised in S. 134, which by laying down that "no particular number of witnesses shall, in any case, be required for the proof of any fact" has enshrined the well-recognised maxim that "Evidence has to be weighed and not counted". It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the Presiding Judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the Court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forth coming to testify to the truth of the case for the prosecution. Generally speaking, oral testimony in this context may be classified into three categories, namely (*1*) wholly reliable, (2) wholly unreliable, (3) neither wholly reliable nor wholly unreliable. In the first category of proof, the Court should have no difficulty in coming to its conclusion either way—it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subordination. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if Courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subordination of witnesses. Situation may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The Court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. There are exceptions to this rule, for example, in cases of sexual offences, these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the Court to convict, if it is satisfied that the testimony of a single witness is entirely reliable: A.I.R. 1957 S.C. 614.

The *unus nullus* rule of English law that one is equal to none has been done away within S. 134 of the Evidence Act which lays down the general rule applicable to all cases that no particular number of witnesses shall in any case be required for the proof of any fact. Even in England the said rule applies only in certain classes of cases. Cases of bribery do not fall under any of those classes. Inspite of the universal nature of the provisions of S. 134, the English rule has been followed by Courts in India as a rule of caution and prudence, for example, in cases of perjury and in sexual cases. It has not been applied to cases of bribery: 1952 Cr.L.J. 107: A.I.R. 1952 H.P. 1. Per *Das C.J.*—There is no rule of law that the uncorroborated testimony of one witness cannot be accepted. If there is any such rule, it is a rule of prudence, and whether that rule should be adopted or not will depend on the circumstances of each case: A.I.R. 1956 Pat. 384. *See* also A.I.R. 1958 Punj. 164; 1957 B.L.J.R. 149; 1959 M.P.L.J. 98: A.I.R. 1960 Madh. Pra. 31.

S. 134 merely follows the maxim that evidence is to be weighed and not counted. In any case the testimony of a single witness, if believed, is sufficient to establish any fact. As a rule of prudence, however, a Judge should seek for corroboration to fortify himself about the guilt of the accused if there is a speck of doubt in his mind relating to the testimony of that particular witness: 1955 B.L.J.R. 428: A.I.R. 1956 Pat. 39.

As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character. Unless corroboration is insisted upon by statute, Courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example, in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an

analogous character. Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes: A.I.R. 1961 Guj. 20: (1961) 1 Cr.L.J. 255.

The facts that the single witness is only a soda vendor and had been convicted for some petty offences are not by themselves sufficient grounds to reject his testimony. *Held*, that the version given by this witness was consistent with probabilities and that it was generally a true version of the occurrence: 1968 Cr.L.J. 1362: I.L.R. (1968) 2 Ker. 303.

Conviction can be based on evidence of single witness if he is reliable—If witness is not wholly reliable, corroboration may be sought in material particulars: (1969) 35 Cut.L.T. 175.

There is no law that conviction cannot be based on the evidence of a solitary witness. It is only a rule of prudence rather than of law. If the evidence of the only witness is found reliable and free from any doubt, it can be well acted upon: I.L.R. 42 Pat. 454.

Under S. 134, no particular number of witnesses is required to prove a certain fact. It is the quality of the evidence and not the quantity which matters and if the statement of a solitary witness is consistent throughout and there are no major contradictions in his statements and the same inspires confidence in the Court, then the conviction can be based on the testimony of a solitary witness: 1981 Cr.L.R. 506 (Raj.).

Under S. 134 there is no restriction or limitation as to the number of witnesses which can be produced. Convincing and consistent evidence of a solitary witness, against whose veracity no attack can be levelled can constitute the basis of conviction for murder: 1969 Cr.L.J. 94 (Punj.).

As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of doubtful veracity. It is left to the discretion of the Judge in each case to scan the evidence with great care and caution and find out whether it is wholly reliable. If such a testimony is found by the Court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. The Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. *Held*, on scanning the evidence that it was extremely difficult to rely on the testimony of the witness in the instant case to find the accused guilty: 1963 Ker.L.J. 112: 1963 Ker.L.T. 325; 1979 Cr.L.R. 614: I.L.R. (1979) 29 Raj. 953: 1979 W.L.N. 501.

It is true that under the Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. But where a criminal Court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it cannot be treated as irrational or unreasonable. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give evidence. But sometimes it is useful to adopt a mechanical test: I.L.R. (1964) 2 All. 694: (1964) 8 S.C.R. 133: A.I.R. 1965 S.C. 202.

Generally speaking, oral testimony may be classified into three categories: (*1*) wholly reliable, (2) wholly unreliable, and (3) neither of the two. In the first category, the Court has no difficulty in coming to the conclusion either way; it may convict or acquit on the testimony of the single witness, if his testimony is found to be above reapproach or suspicion of interestedness, incompetence or subordination. The Court has no difficulty in the second category either, but in the third category, the Court has to be circumspect and look for corroboration in material particulars by reliable testimony, direct or circumstantial which may not be possible in cases where only a single person is available to give evidence; in such a situation the Court has to weigh carefully and if satisfied that the evidence is reliable and free from all taints which tend to render the testimony open to suspicion, it becomes its duty to act upon the same. [A.I.R. 1957 S.C. 614, Foll.]: (1994) 4 S.C.C. 549: 1994 S.C.C. (Cr.) 1294.

Testimony of one witness—Conviction based on—Legality: 1957 B.L.J.R. 149. *See* also A.I.R. 1958 Punj 164; A.I.R. 1961 Ker. 8 (F.B.); (1970) 1 M.L.J. 402. *See* also (1978) 2 M.P.W.N. 165.

Sole eye-witness in order to be acted upon, should be absolutely independent and not interested: (1981) 2 M.P.W.N. 195.

A conviction can be based on the testimony of a single witness if wholly reliable and his evidence establishes the prosecution's case. Under S. 134, Evidence Act no particular number of witnesses is required for proof of any fact: 1958 Cr.L.J. 1266: A.I.R. 1958 All. 746. Where testimony of sole eye-witness was consistent and was corroborated by medical evidence, *held*, it can be relied on: (1980) 1 M.P.W.N. 152; (1979) 2 M.P.W.N. 50; (1981) 1 M.P.W.N. 28 [Where testimony of sole eye-witness was corroborated by other evidence and F.I.R. had been lodged without delay and incident was immediately narrated to other and he himself had received injury in the same incident, *held*, his testimony was reliable.]

Conviction on evidence of single witness—Factors to be considered—*Bhutt, J.*—A person can legally be convicted on the evidence of a solitary witness. But the question is whether in the particular circumstances of the case it is safe to do so.

Krishnan, J.—The law in India does not prescribe the minimum number of witnesses for the conviction of any person; the uncorroborated evidence of a single witness is not on that ground alone insufficient to sustain a conviction; that would depend on the facts and the circumstances of each case. Certainly, the spontaneous and independent observations of two or more honest witnesses to the same effect, would carry more conviction than the observation of an equally honest single witness even in good faith, because the factors of honest error partly cancel out. Surely, the criteria for the assessment of evidence are just the same, whether the offence is a slight one, or one that would call for a capital sentence; but in practice Courts considering a capital case, feel a heavier load on their conscience and automatically begin to apply the same principles with more caution than in less serious ones: A.I.R. 1960 Madh. Pra. 31: 1960 Cr.L.J. 230.

It is not necessary that independent evidence must be examined but where there is evidence that a large number of independent witnesses could have deposed about the incident, their absence from the list of witnesses and the presence of only partisan witnesses does create a doubt whether the version, which is being given by them, is to be believed: A.I.R. 1955 All. 189: 1955 Cr.L.J. 473.

Witness neither accomplice nor anything analogous to an accomplice but an ordinary witness—As a general rule Court may act on testimony of such solitary witness without corroboration unless circumstances of a particular case necessitated corroboration: (1962) 3 S.C.R. 590: A.I.R. 1962 S.C. 424; (1984) 58 Cut.L.T. 211; (1979) 2 M.P.W.N. 110.

As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated. One credible witness may outweigh the testimony of a number of other witnesses of indifferent character. In order to sustain an order of conviction on the basis of the testimony of a solitary witness, such evidence must be clear, cogent and convincing and should be of an unimpeachable character. [1957 Cr.L.J. 1000 (S.C.) and (1962) 1 Cr.L.J. 473 (S.C.), Rel. on]: (1981) 52 Cut.L.T. 512: 1982 Cr.L.J. 500.

Some corroboration should be sought from the other prosecution evidence in support of the testimony of a solitary witness particularly where such witness also happens to be closely related to the deceased. [A.I.R. 1983 S.C. 810, Foll.]: (1984) 58 Cut.L.T. 211. *See* also (1979) 1 M.P.W.N. 16.

Testimony of even a single witness, if believed, is sufficient to establish any fact. S. 134 follows the maxim that evidence is to be weighed and not counted. Any hard and fast rule that a particular number of witnesses should be required to prove a particular offence would hamper the administration of justice, as in many cases it may not be practicable to get more than one witness: 1993 Cr.L.J. 2812 (Ori.) (D.B.); A.I.R. 1989 S.C. 236: 1989 Cr.L.J. 799; (1981) 2 M.P.W.N. 218 [Sole testimony of Police Officer, when liable to be rejected.]

Plurality of evidence is not at all required for the bringing home the guilt of the accused; it is the quality of the evidence and not the plurality of witnesses which is important in the appraisal of evidence. Even single witness testimony can be sufficient to prove the guilt of the accused if found entirely reliable. Evidence has to be weighed and not counted: 1993 Cr.L.J. 2954 (All.) (D.B.); 1987 Cr.L.J. 442 (All.); 1983 All.Cr.R. 377: 1983 Cr. L.J. (N.O.C.) 86; (1982) 53 Cut.L.T. 368; (1978) 2 M.P.W.N. 47; 1973 Mah.L.J. (Note) 23.

It is not the number of witnesses examined nor the quantity of evidence adduced by the prosecution but the quality that counts: A.I.R. 1983 S.C. 126: 1982 All.L.J. 1524: 1983 Cr.L.J. 218: (1983) 1 S.C.C. 218; 1990 Cr.L.J. (N.O.C.) 136 (Ori.) (D.B.).

Witnesses have to be weighed, not counted; in human affairs, quality matters more than the quantity; an accused may justly be convicted even on the evidence of a single eye-witness provided it is convincing and appears to be truthful: 1976 Kash.L.J.

253: 1976 Cr.L.J. 1310; 1973 Cr.L.J. 418. Where the sole eye-witness was partly disbelieved, *held*, corroboration was necessary: 1982 M.P.W.N. 396. The mere fact that a part of the evidence of sole eye-witness is rejected is no ground to disbelieve the other part which inspires confidence: 1993 Cr.L.J. 1998 (Andh. Pra.) (D.B.).

Mere non-examining of some more witnesses to the occurrence cannot be fatal to the prosecution case. [1973 Cr.L.J. 1807 (S.C.), Rel. on; A.I.R. 1988 S.C. 1158; 1979 Cr.L.J. 236, Disting.]: 1990 Cr.L.J. (N.O.C.) 64 (Ori.).

Acceptability of evidence, and not numerological sufficiency of witnesses, is material. The evidence has to be weighed; number of witnesses is not to be counted. A conviction can be maintained on the basis of the evidence of sole witness. Therefore, mere non-examination of some persons does not affect the credibility of the prosecution case: 1993 Cr.L.J. 378 (Ori.) (D.B.).

S. 134, recognises the golden rule that what is required is only the quality of evidence and not the quantity. Even a solitary testimony of a witness without suffering from any of the infirmities, is enough to prove the case of the prosecution for the purpose of mulcting or fastening criminal liability upon a person accused of an offence: 1992 Cr.L.J. 661 (Mad.). But such evidence must be clear, cogent and consistent and should be above reproach and of an unimpeachable character: (1984) 58 Cut.L.T. 155; 1985 Cr.L.J. (N.O.C.) 26: (1984) 58 Cut.L.T. 42; (1984) 58 Cut.L.T. 211; A.I.R. 1993 S.C. 1193: 1993 Cr.L.J. 187. However, each and every type of infirmity or minor discrepancies will not render the evidence of such witness unreliable: A.I.R. 1991 S.C. 1735: 1991 Cr.L.J. 2192.

The prosecution is not bound to produce all the witnesses. Material witness considered necessary by the prosecution for unfolding the prosecution story alone need be produced without unnecessary and redundant multiplication of witnesses. In view of the examination of the injured and the person to whom the injured narrated the incident at the earliest opportunity and the medical evidence, non-production of persons of the locality could not injuriously affect the account given of the incident: 1973 Cr.L.J. 481.

Prosecution has the right to pick and choose witnesses. All occurrence witnesses need not be examined: 1989 Cr.L.J. 2106 (Ker.) (D.B.).

When there are a large number of eye-witnesses, it is not the bounden duty of the prosecution to examine all of them. It is open to it to pick and choose provided that such picking and choosing was fair: (1976) 42 Cut.L.T 667 (D.B.).

Withholding of material prosecution witness may lead to inference that false implication of accused may be probable: (1981) 2 M.P.W.N. 195.

Whether sole-testimony of eye-witness can be said to be reliable in absence of corroboration. *See* (1979) 1 M.P.W.N . 185; (1981) 1 M.P.W.N. 20. Value of sole tainted witness. *See* (1979) 1 M.P.W.N. 24.

It is elementary that the evidence of an infirm witness does not become reliable merely because it has been corroborated by a number of witnesses of the same brand; for evidence is to be weighed, not counted: A.I.R. 1976 S.C. 989: 1975 U.J. (S.C.) 692: (1976) 1 S.C.C. 37. Solitary testimony of interested witness, when held to be not reliable. *See* (1981) 1 M.P.W.N. 287; (1978) 2 M.P.W.N. 58; (1978) 2 M.P.W.N. 204; (1978) 2 M.P.W.N. 106 [Where relations between the solitary eye-witness and the accused were strained, *held*, when his testimony is otherwise doubtful, it is not safe to act upon it]; (1978) 2 M.P.W.N. 146; (1978) 2 M.P.W.N. 62 [Where testimony of sole partisan witness was held to be not reliable.]

Court may believe one witness in preference to a large number of the other side: 24 W.R. 18 (Cr.) Evidence in case of perjury—Necessity for more than one witness: 5 W.R. (Cr.) 23; B.L.R. (Supp.) Vol. (F.B.) 459. Estate of dead person sought to be made liable—Uncorroborated testimony of claimant—Court's duty: A.I.R. 1960 Cal. 351.

Where eye-witness implicated one of the accused whose *alibi* was accepted, *held*, it was not safe to convict the accused on the lone testimony of eye-witness particularly when his name was not mentioned either in the earliest report or during the inquest: A.I.R. 1993 S.C. 1175: 1993 Cr.L.J. 408.

Where two out of three injured witnesses had been examined, *held*, in view of the fact that examination of the third injured would have only repeated the evidence of the two examined witnesses, no doubt could be cast on the prosecution for his non-examination. [A.I.R. 1980 S.C. 184, Rel. on]: 1991 Cr.L.J. 2226 (Guj.) (D.B.).

Where the sole witness disclosed the incident only after about six months, and before the committing Court, the witness was declared hostile by the prosecution and in the Sessions Court he was not examined as a witness but was later called as a Court witness,

held, it was wholly unsafe to found the conviction of the accused on the single testimony of such witness: A.I.R. 1980 S.C. 102: 1979 U.J. (S.C.) 660: 1980 Cr.L.J. 199: (1980) 1 S.C.C. 490. *See* also 1983 M.P.W.N. 240 [Where the sole eye-witness did not reveal the incident to anyone nor F.I.R. was lodged, *held*, he was not a reliable witness.]

Where the witness was removed from the scene of occurrence in an unconscious state and his evidence regarding the complicity of the appellants was corroborated by the statement made by him to the Magistrate soon after he regained consciousness in the hospital and his statement was recorded by the Magistrate before he could possibly be contacted by anyone and further he confined himself to the questions put to him and gave brief and direct answers, *held*, very great weight was necessarily to be attached to his statement and his failure to mention overt acts attributable to assailants did not detract from his credibility: A.I.R. 1981 S.C. 648: 1981 Cr.L.J. 166: 1980 (Supp.) S.C.C. 360.

An accused can be punished on the sole uncorroborated testimony of an independent eye-witness, if the witness is held by the Court to be a witness of sterling worth and if the witness is not held to be of sterling worth then in such a situation it requires corroboration. Where a question arose as to whether accused could be convicted on oral testimony of only one eye-witness when other three eye-witnesses had been declared hostile by prosecution and it was found that testimony of sole eye-witness was corroborated by medical evidence, ballistic expert opinion and other circumstantial evidence, *held*, conviction of accused could be based on sole testimony of eye-witness: 1995 Cr.L.J. 1466 (Raj.) (D.B.).

(*a*). Victim/complainant as sole witness.—When sole-testimony of the victim is duly corroborated by the First Information Report and the medical evidence, *held*, it may be relied upon: (1978) 2 M.P.W.N. 76.

Where in her dying declaration, the only survived victim had not mentioned the names of two of the accused persons but in her deposition in the Court, she implicated them also and the prosecution had not supplied the copy of said declaration to the accused so that she could not be confronted by the defence, *held*, that by itself was not a ground to give the benefit to the other accused persons on the basis of the contents of said declaration particularly when the case rested on the sole testimony of that survived victim. However, the said two accused persons not named in the dying declaration were entitled to benefit of doubt: 1993 Cr.L.J. 3251 (S.C.).

Where the victim-sole witness knew the accused even before the occurrence of the incident and, thus, was in a sound position to identify him as her assailant and her testimony was found to be worthy of credence and there was no reason for falsely implicating the accused, *held*, accused could be convicted on her sole testimony: 1983 Raj.L.W. 611.

Where complainant was the sole witness to prove involvement of the accused in the offence but his evidence was infirm in certain respects and there were discrepancies as to the integral part of the case, *held*, sole testimony of complainant could not be acted upon: 1992 Cr.L.J. 1136 (Cal.) (D.B.). *See* also (1980) 1 M.P.W.N. 330.

In cases of sexual offences.—The lone testimony of a victim of rape can be made the sole basis for conviction and no corroboration is necessary in case the same is accepted as true and free from suspicion: 1993 Cr.L.J. 2784 (Ori.); (1978) 45 Cut.L.T. 317.

Where the evidence given by the prosecutrix herself was self corroborative and was also sufficiently corroborated by circumstantial evidence, *held*, the mere fact that prosecution failed to examine a witness due to his non-availability could not invalidate the conviction: 1992 Cr.L.J. 2657 (Bom.) (D.B.); (1978) 2 M.P.W.N. 99 [Prosecutrix's statement corroborated by First Information Report, medical evidence and reports of chemical examiner and serologist.]

See also (1978) 2 M.P.W.N. 212 [Need and extent of corroboration]; (1979) 2 M.P.W.N. 101; (1978) 2 M.P.W.N. 27 [Value of uncorroborated testimony.]

(*b*). Murder cases.—Although it is permissible to base a conviction on the testimony of a solitary witness and there are instances of such convictions even for capital offences, such instances are rare and found to be of exceptional circumstances. A case cannot be considered to be one of that type when the spot of murder is surrounded by houses in the village and close to the Bhajanemane where people congregate and the time is evening when people usually return home. It is difficult to assume that none but a single person could have witnessed the commission of the crime or that better material could not have been placed before the Court: I.L.R. (1953) Mys. 625: A.I.R. 1954 Mys. 81. *Held*, that the testimony of only one witness was quite insufficient in a murder case where the

occurrence took place in broad day light and was seen by a large number of persons: 1957 All.W.R. (H.C.) 48.

Since under the Evidence Act, no particular number of witnesses are required for the proof of any fact, it is a sound and well-established rule of law that quality and not quantity of evidence matters. In each case the Court has to consider whether it can be reasonably satisfied to act even upon the testimony of a single witness for the purpose of convicting a person. [A.I.R. 1957 S.C. 614, Rel. on]. If a witness, who is the only witness against the accused to prove a serious charge of murder, can modulate his evidence to suit a particular prosecution theory for the deliberate purpose of securing a conviction, such a witness cannot be considered as a reliable person and no conviction can be based on his sole testimony: A.I.R. 1976 S.C. 560: (1976) 1 S.C.C. 442: (1976) 2 S.C.R. 339: 1975 U.J. (S.C.) 940. *See* also 1983 Cr.L.J. 694 (Raj.).

The evidence of a single eye-witness, especially when corroborated by medical evidence of autopsy and other witnesses who had actually come to the spot soon after the deceased was stabbed cannot be rejected as unreliable; his evidence can neither be considered wholly unacceptable nor wholly impeachable, it has to be considered in the light of the features of the case which should put the Court on its guard; though it is not the principle of law that a conviction cannot be based on the testimony of a single witness, yet it is a well known principle of criminal jurisprudence that, before convicting the accused on the testimony of a single witness, the Court must have implicit faith and reliance on his testimony; but where a single witness, not an eye-witness, was interested, hostile, unreliable, infirm and discrepant, the accused is entitled to the benefit of doubt and acquittal: 1981 Mad.L.W. (Cr.) 237: 1981 Cr.L.J. (N.O.C.) 210. *See* also 1978 M.P.L.J. 599: 1978 Cr.L.J. 1149.

Plurality of evidence is not a necessity of law in order to prove the prosecution case. What is scrutible is whether the single testimony of the witness radiates confidence or not and the Courts can very well base conviction believing prosecution version on the single testimony of a witness. The prime consideration worth bearing in mind is that whether it will be safe to place implicit reliance on the testimony of solitary witness in the case. Where testimony of solitary witness in a murder trial was not thoroughly free from doubt in view of enmity between accused and brother of the witness and further there was also absence of independent corroboration, *held*, testimony of said witness could not be relied upon for conviction of the accused: 1988 Cr.L.J. 960 (All.) (D.B.).

The principle that a conviction is possible on the testimony of a sole eye-witness cannot be applied to a case where the evidence of that sole witness is not such as can compel acceptance.

Where, therefore, the evidence is that besides the solitary witness, there were 14 or 15 persons who rushed to the scene of occurrence, amongst whom were independent persons not connected with the deceased or accused, it cannot be held that the prosecution sought a conviction on the sole testimony of that witness who was not free from flaw.

Held, a conviction cannot be based on the testimony of the sole eye-witness in the circumstances of the case: 1976 Cr.L.J. 1921 (Gau.) (D.B.).

Even where there is only a sole eye-witness of a crime, a conviction may be recorded against the accused concerned provided the Court which hears such witness regards him as honest and truthful. But prudence requires that some corroboration should be sought from the other prosecution evidence in support of the testimony of a solitary witness particularly where such witness also happens to be closely related to the deceased and the accused are those against whom some motive or ill-will is suggested. Thus, where there was inordinate delay in giving the first information to the Police and there were other inherent inconsistencies in the evidence of the sole eye-witness, *i.e.*, wife of the deceased, *held*, accused could not be convicted on testimony of such a witness without corroboration from other prosecution evidence: A.I.R. 1983 S.C. 810: (1983) 3 S.C.C. 629: (1983) 2 Rec.Cr.R. 216.

Though it is not necessary in law that more than one witness should be examined to prove a fact but unless the witness is very reliable, the Court would ordinarily look for corroboration. Thus, where the solitary witness produced by the prosecution in a murder case and who was related to the deceased claimed that he knew the accused but, it was transpired from his evidence that he did not know the accused, *held*, conviction could not be based on his testimony: A.I.R. 1986 S.C. 313: 1985 Cr.L.J. 1921. *See* also 1984 Cr.L.J. 559 (Cal.).

It is the quality of the evidence adduced which matters and not the number of the

witnesses examined. Thus, where in a murder case, the evidence of the wife of accused was found to be of unimpeachable quality and was corroborated by the circumstances and the first information report lodged, *held*, her evidence was sufficient to convict the accused: 1995 Cr.L.J. 564 (Bom.) (D.B.). *See* also 1984 Cr.L.J. (N.O.C.) 67 (Ori.).

A person may be convicted even on the statement of a solitary witness but such a solitary witness should be wholly reliable. Thus, where in a murder case, the evidence of a solitary witness who was the son of the deceased was not found to be reliable, *held*, no reliance could be placed thereon: 1992 Cr.L.J. 3107: 1992 All.L.J. 950 (D.B.); 1985 Cr.L.J. 1872 (Ori.).

Where in the first information report, the alleged sole eye-witness had merely stated that at the dead of night on hearing the barking of the dogs, he was woken up and on coming out on to the balcony saw that his brother, the deceased, had come out to see why the dogs were barking and that after some time he heard the cries of the deceased and saw the accused running in different directions but the manner of the assault or the occurrence relating to pushing the deceased in the well was absent in the F.I.R. and that apart, it was clear from the evidence of the other prosecution witnesses who also reached at the well after hearing the cries of the deceased that the said eye-witness had enquired from the deceased as to how he fell in the well, *held*, an eye-witness would not have made such an enquiry; therefore, it was clear that he had not seen the occurrence and was falsely introduced as an occular witness in the case: A.I.R. 1993 S.C. 2457: 1993 Cr.L.J. 2598. *See* also (1983) 55 Cut.L.T. 275 (D.B.); (1980) 1 M.P.W.N. 167.

Where the deceased was having a premarital affair with the accused's newly weded wife and in the trial of the accused for the murder of the deceased, she was the only prosecution witness examined and two other material witnesses were not examined by the prosecution and further her testimony was tainted with several infirmities like (*1*) recording of her statement in Police custody 3 or 4 days after her interrogation, (*2*) recording of her statement by the Magistrate under S. 164 of the Cr.P.Code straight from the Police custody thereby tying her up to that version; (*3*) her version of assault on the deceased being irreconcilable with medical evidence, (*4*) inconsistency between her version and the Investigating Officer as to the recovery of the accused's blood-stained clothes, *held*, no conviction could be based on her solitary evidence: 1981 Cr.L.J. 276 (Sikkim) (D.B.).

Where terror was created in the minds of the people living in the locality due to attack and counter attack between two political factions due to which there was reluctance on the part of some of witnesses to identify the accused though they witnessed the occurrence, *held*, in such a case the prosecution version could not be rejected for the failure to examine the witnesses in the locality: 1989 Cr.L.J. 2362 (Ker.) (D.B.). *See* also 1994 (Supp.) 1 S.C.C. 74: (1993) 1 Crimes 997: 1993 Cr.L.R. 295.

Where a child witness of 15 years deposed that her father murdered her mother and his four children by pouring petrol in car in which they travelled but he miraculously escaped and he withstood lengthy, gruelling and torturing cross-examination, *held*, he could not be branded as not a witness of truth: 1985 Cr.L.J. 602 (Raj.). *See* also 1983 Cr.L.J. 1515 (Gau.).

(*c*). Dacoity and theft cases.—Where in a trial for offence of dacoity none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks, *viz.*, stature of the accused or whether they were fat or thin or of a fair colour or of black colour, *held*, in absence of any such description, it will be impossible to convict any accused on the basis of a single identification, which was made about three and a half months after the dacoity. [1977 Cr.L.J. (N.O.C.) 80 (Pat.), Reversed]: A.I.R. 1981 S.C. 1392.

Dacoity—Conviction of accused as one of the culprits on basis of evidence of solitary witness—His testimony not corroborated—Conviction of accused, *held*, wrong: 1984 Cr.L.J. 769 (Ori.).

House-breaking and dacoity—Conviction on sole testimony of solitary witness—Justified only when evidence is clear, cogent and convincing: 1983 Cr.L.J. (N.O.C.) 47 (Ori.).

Theft—Conviction on basis of solitary witness, *i.e.*, victim—On facts, *held*, conviction could not be sustained: 1982 Cr.L.J. (N.O.C.) 136 (Ori.).

(*d*). Others.—There is no rule of evidence that requires a certain number of witnesses to prove a fact. Where the evidence of the complainant alone is sufficient to prove a charge under S. 506, Indian Penal Code, conviction of the accused based on such

CHAPTER X

OF THE EXAMINATION OF WITNESS

135. Order of production and examination of witnesses.—The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

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evidence is not bad for want of evidence by other witnesses: 1961 Nag.L.J. (Notes) 21.

In cases of rioting it would be extremely hazardous to convict on the testimony of a single eye-witness. In such cases, the rule of prudence requires that Courts should insist on plurality of eye-witness account. [(1965) 1 Cr.L.J. 226 (S.C.), Foll.]: 1995 Cr.L.J. 2355 (Bom.).

Where the Court under S. 319(1) of the Code of Criminal Procedure has to form its opinion whether grounds exist for proceeding against a person not then accused, *held*, even the statement of one witness is sufficient; the Court's opinion formed under this section is akin to the opinion formed under S. 200 or S. 202 of the Code. [1983 Cr.L.J. 433 (S.C.), Rel. on; 1952 Cr.L.J. 582 (Cal.); 1973 Cr.L.J. 1722 (Ker.), Disting.]: 1989 Cr.L.J. (N.O.C.) 8: (1987) 1 Ker.L.T. 871.

Penal Code, 1890, S. 452—Evidence and proof—To insist on a uniform rule of at least two witnesses to speak to the identity of rioters is not safe when the injured and assailants are known to each other very well: 1969 Mad.L.W. (Cr.) 124.

Where three examined witnesses had testified and proved the facts but two other witnesses, who could prove some of those facts, were not examined in the case of a raid under S. 21 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, *held*, for non-examination of the two witnesses, no adverse inference could be raised against the prosecution: 1991 Cr.L.J. 134 (Del.).

Where a raid under S. 21 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 had been organised within two hours of the receipt of the secret information and some of the public witnesses asked to join had refused to do so and there could possibly be some commotion if more persons were asked to join resulting in the culprits becoming suspicious and disappearing from the spot, *held*, non-joining of public witnesses would have no effect on the evidence of raid if it was otherwise reliable and beyond reasonable doubt; the only effect of not joining the public witnesses in such cases is that the Court should appraise the evidence with a bit more care and caution: 1991 Cr.L.J. 134 (Del.).

Conviction under S. 3, Railway Property (Unlawful Possession) Act, 1966, if can be based on sole evidence of Sub-Inspector of R.P.F. *See* 1983 Cr.L.J. (N.O.C.) 178: 1983 Mad.L.W. (Cr.) 59.

Section 135—Notes.

Neither the Evidence Act nor the Codes of Civil and Criminal Procedure contain any section or rule for ordering witnesses out of Court although it is generally done by the Courts as a matter of practice. It is clear that the Court has power to order unexamined witnesses out of Court at any time during the trial on the application of either party. It is undoubtedly true that a party to a litigation has got the right to remain in Court while the trial of the suit is going on and it is equally well established that the Court has got inherent power to order any person who has to give evidence out of Court-hall when other witnesses are being examined until that person is called to give evidence. Since under S. 135 of the Evidence Act, the Court has the power to prescribe the order in which witnesses are to be examined, where a party is also a witness, the Court can require him to give evidence before he examines his other witnesses. If he is not willing to do so, the Court can order him out of the Court-hall when his other witnesses are giving evidence. When a party himself is conducting a case without the aid of the Counsel, he can examine himself first and then examine his other witnesses. The Court has to consider whether the claim made by one party to exclude the other party from the Court-hall is well-founded and also to consider the objections of the other party: A.I.R. 1961 Andh. Pra. 420; 1987 Ker.L.J. 990: (1987) 2 Ker.L.T. 263.

If a witness is found to have been present when the evidence of other witnesses was being recorded, as his presence was not noticed, *held*, the Court should examine him and record his statement with a note that he was present in Court when other witnesses were being examined: A.I.R. 1955 Madh. Bh. 78: 1955 Cr.L.J. 814.

S. 135 lays down that the order in which witnesses are produced or examined shall be regulated by the law and practice in force and in absence of law, by the Court's discretion; O. 18, R. 3-A of the Code of Civil Procedure as inserted by amendment in 1976 requiring the party to examine himself as his own witness before examining other witnesses is such law enacted to prevent the "persisting notorious malpractice indulged in by litigants bordering on dishonesty" whereunder they would last examine themselves to fill up the lacunae left by other witnesses; even though R. 3-A is directory, it would not mean that it could be transgressed indiscriminately in an unbridled manner.

A duty is cast on the Court to record reasons, which means that valid and compulsive grounds must be made out by the party seeking to postpone its own examination as a witness; the party should seek prior permission from the Court; since grant or withholding of permission is subject to revision, the Court's order has to be in writing and not oral: (1985) 2 M.L.J. 35: A.I.R. 1985 Mad. 183; (1984) 97 Mad.L.W. 617.

S. 135 has two conditions for its application: (*1*) evidence is to be regulated as per law and practice for the time being in force; but (2) in the absence of any law to the contrary. As a general practice witnesses are examined in the criminal Courts in the order in which the prosecution examines them; the Courts seldom interfere for the burden of proving its case lies on the prosecution and it is for the prosecution to chose and devise the ways and means to establish its case beyond reasonable doubt. The Court's interference in this regard may seriously prejudice the prosecution and occasion miscarriage of justice: 1975 Cr.L.J. 216: 1975 Kash.L.J. 56 (F.B.).

There is no law which governs the order in which two contesting parties are entitled to cross-examine a witness of the opposite party; S. 141 deals with leading questions, S. 143 with questions lawful in cross-examination, S. 147 with the circumstances where-in a witness shall be compelled to answer questions and S. 148 empowers the Court to decide as to when a question may be asked and the witness be compelled to answer it: (1976) 17 Guj.L.R. 1007.

The order in which the two contesting parties are entitled to cross-examine a witness of the opposite party is not a question of right but lies within the domain of the Court's powers to conduct proceedings before it in a regular manner. Thus, any decision made by the Court in this behalf is not a case decided; it is not subject to the Court's revisional jurisdiction under S. 115 of the Code of Civil Procedure: (1976) 17 Guj.L.R. 1007.

Domestic enquiry—No rule prescribed for order in which witnesses should be examined—Persons proceeded against should be given opportunity to rebut evidence: (1965) 2 M.L.J. 364: (1965) 1 L.L.J. 88.

The rules of Evidence Act have no application to the departmental proceedings and the examination of witnesses need not be in the order as laid down in the said Act.

Thus, where in departmental proceedings before the enquiry officer, accused was examined first and other witnesses were examined after him and subsequently the accused pleaded that adopting of said procedure was violative of rules of natural justice though no such objection was taken by him before the enquiry officer, *held*, as there was nothing to show on the part of the accused that he was prejudiced in any way, the procedure adopted could not amount to any failure of the rules of natural justice: A.I.R. 1971 Cal. 336.

It may be that a witness can request the Court not to be required to answer certain questions. But the request from the witness that he should be dropped altogether is a strange request. Where a witness requested the Court that she should be dropped from the array of the witnesses, *held*, such a request was liable to be rejected: (1986) 1 Bom.C.R. 511.

It is well established rule of evidence that a party should put to each of his opponent's witness so much of his case as concerns that particular witness. If no such questions are put, the Courts presume that the witness's account has been accepted. If it is intended to suggest that a witness was not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination so that he may have an opportunity of giving an explanation. [A.I.R. 1958 Punj. 440, Foll.]: (1992) 1 Rev.L.R. 78 (D.B.).

Power of Court to regulate order of examining witnesses: I.L.R. 39 Cal. 245: (1911-12) 16 Cal.W.N. 265; (1946) 36 Trav.L.J. 19 (F.B.).

Order of examination of witness generally left to discretion of Counsel: (1900-01) 5 Cal.W.N. 15. Where at the trial, the prosecution witnesses who had been summoned were present in the Court as also the complainant and though the accused for certain

136. Judge to decide as to admissibility of evidence.—When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

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reasons of his own wanted to cross-examine the witnesses before the complainant, the Court insisted on the complainant being examined first on the ground that his state of health necessitated that course. *Held*, that the Magistrate should have acceded to the request of the pleader of the accused and directed the cross-examination of the witnesses before the complainant: (1932-33) 37 Cal.W.N. 288: A.I.R. 1933 Cal. 189.

Where even before the plaintiff's case was opened or the evidence of his witnesses was given, the principal defendant was examined, *held*, the procedure adopted was most unsatisfactory: A.I.R. 1923 P.C. 73.

Where a party to a suit was present in Court when his witnesses were examined and later on claimed to be examined as a witness in support of a contention put forward by him, and it was disallowed, it was *held* that there was no doubt a practice to refuse to allow such a person to give evidence but that there was no rule of the Court to that effect, nor was there any provision of law in the C.P.Code or in any other statute; S. 135 did not authorise a Court of law to refuse the examination of a witness who might have done something which was not very desirable. [A.I.R. 1934 All. 840, Overruled]: 1941 All.L.J. 345: A.I.R. 1941 All. 314: I.L.R. (1941) All. 612.

Where the witnesses are not summoned at the instance of the accused for cross-examination, but are summoned for examination in a *de novo* trial, the order in which these witnesses are to be examined-in-chief rests at the discretion of the prosecution: 152 I.C. 236: A.I.R. 1934 Nag. 209.

Criminal trial—Practice—Unexamined witnesses—Power to disallow their presence till actually examined—Court has inherent power to make such order: 1966 Cr.L.J. 1445: A.I.R. 1966 Ker. 316.

The object with which a Counsel for the accused cross-examines a prosecution witness is not only to test his veracity but also to elicit such facts as help the accused in his defence; he may even try to demolish the prosecution's whole version. Merely because a question asked in cross-examination is of a roving nature, it does not, and cannot amount to a confession or a statement made on behalf of the accused; no conviction can be made thereupon: 1986 All.W.C. 831.

Though it is prosecutor's choice to examine a witness, such choice is neither arbitrary nor capricious; all those witnesses necessary for unfolding the prosecution story should be examined; a public prosecutor is not a mouth piece of the Police; he must be fair to the accused as well: 1989 M.P.L.J. 223: 1989 Cr.L.J. (N.O.C.) 206.

Effect of Judge's suggestion that further evidence need not be given: (1904) 6 Bom. L.R. 636. "No matter how often the same case comes before Court, if the accused persons be different on each occasion, the witnesses for the prosecution must be examined *de novo*". *See* W.R. 1864 (Cr.) 38(2); *ibid* 1(2); 13(1); 1 B.L.R. (O. Cr.) 37; I.L.R. 9 Mad. 83.

Omission to do this though illegal yet if it has not occasioned a failure of justice, a new trial need not be ordered: I.L.R. 9 Mad. 83. Fresh evidence after closing of case—Permissibility. *See* A.I.R. 1958 All. 67.

Material witnesses are to be examined unless allegations are made that they will not speak truth. Thus, where in a murder case, according to prosecution story, a villager who came on murder spot hearing cries was not examined in view of evidence of son of deceased that he had joined hands with the accused persons and had taken oath not to depose against them, *held*, failure to examine him would not vitiate prosecution. 1994 Cr.L.J. (N.O.C.) 246 (Ori.) (D.B.).

Section 136—Notes.

Where a Judge is in doubt as to the admissibility of a particular piece of evidence, he should declare in favour of admissibility rather than of non-admissibility: I.L.R. 12 All. 1 (F.B.). The Court must confine itself strictly to the provisions of the Act and come to a conclusion as to the relevancy of a fact on the interpretation of the relevant provisions of the Act only: A.I.R. 1945 Lah. 23 (F.B.).

Where in cross-examining a witness for the prosecution, questions are disallowed by the Court on the ground of irrelevancy or other grounds, the evidence should show what the questions are and the reason for disallowing them: 55 I.C. 593: 1 Pat.L.T. 632.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(*a*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(*b*) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(*c*) *A* is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(*d*) It is proposed to prove a fact (*A*) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (*B*, *C* and *D*) which must be shown to exist before the fact (*A*) can be regarded as the cause or effect of the fact in issue. The Court may either permit *A* to be proved before *B*, *C* or *D* is proved, or may require proof of *B*, *C* and *D* before permitting proof of *A*.

See also (1989) 1 Cal.L.J. 261 (D.B.) [Recorded evidence of a witness in examination-in-chief running into several pages—Before cross-examination was ordered, the trial Judge ordered a *de novo* hearing on the ground that the evidence contains irrelevant details—*Held*, improper as such a conclusion can be drawn only after the conclusion of the evidence and not at the cross-examination stage.]

If there is anything in a witness's statement which is disputed and the opponent avoids asking questions on those matters in cross-examination, the evidence in-chief examination must be accepted unless of course there are inherent improbabilities: 1959 An.L.T. 100: (1959) 1 An.W.R. 98: A.I.R. 1959 Andh. Pra. 272.

Non-recording of reasons makes search illegal—But evidence of such search is not inadmissible: 31 Cut.L.T. 172: (1965) 2 Cr.L.J. 112: A.I.R. 1965 Ori. 136.

Taking down of combined statement of the witness would not be in conformity with the well recognised rules of recording evidence: (1978) 2 Karn.L.J. 26.

In proceedings for allotment of route permits under S. 68-D of the Motor Vehicles Act, 1939, the competent authority disallowed an objector from asking its own witness the question whether it was in public interest to allow the State Transport Undertaking to operate exclusively the route to the total exclusion of private operators, *held*, the question had rightly been disallowed; it was not intended to elicit any fact or information but only the opinion of the witness: A.I.R. 1972 All. 308: 1972 All.L.J. 61 (D.B.).

Oral evidence—Order as to admissibility is interlocutory order: 1979 Cr.L.J. (N.O.C.) 129 (Cal.).

No doubt the proper time to take an objection as to the admissibility of a document is when the document is tendered in evidence, but the omission to object to a document which is not in itself admissible will not make such document evidence. It is the duty of the Court to exclude all irrelevant evidence, even if no objection is taken. The question of relevancy of a document is a question of law and can be raised at any stage: (1944-45) 49 Cal.W.N. 791: A.I.R. 1945 Cal. 492.

137. Examination-in-chief.—The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.—The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.—The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

138. Order of examinations.—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if, new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Whenever objection is raised to a document's admissibility or on any other ground, the Court must decide the same before admitting it in evidence and proceeding further with the trial: (1988) 2 Hindu L.R. 376 (Karn.) (D.B.).

Where documents, even if relevant, are not sufficient to establish the necessary facts, *held*, their admissibility need not be gone into: (1973) 86 Mad.L.W. 815.

Issue or not to issue process under S. 244, Cr.P.Code to compel the attendance of any witness is in the Court's discretion. *See* I.L.R. (1954) Hyd. 544 (D.B.).

Sections 137-138—Synopsis.

1. Scope and applicability.
2. Examination-in-chief.
3. Cross-examination to follow examination-in-chief.
4. Cross-examination—Scope, object and purpose of.
5. Cross-examination—Extent and limits of.
6. Who is entitled to cross-examine.
7. Failure to cross-examine.
8. Failure of party to put his essential and material case in cross-examination.
9. Suggestion in cross-examination—Evidentiary value of.
10. Tendering of witness for cross-examination.
11. Effect of not giving opportunity to cross-examine.
12. Power of Court in matter of controlling cross-examination.
13. Unfinished testimony—Admissibility of.
14. Court's power to put questions.
15. Re-examination.
16. Miscellaneous.

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1. Scope and applicability.—The examination of a witness means as laid down in S. 137, his examination-in-chief, his cross-examination and his re-examination. No examination of a witness can be complete, if the adverse party is illegally refused permission to cross-examine him or the party calling him has refused permission to re-examine him. It is not necessary for the Legislature to provide expressly for the cross-examination or the re-examination of a witness; it is enough if it lays down that witness shall be examined. Of course, the Legislature is not debarred from enacting a special provision for the cross-examination of a witness if it considers it necessary in order to remove a possible doubt or by way of abundant precaution. A witness must be discharged after his examination is over and if the Legislature desires to give a further right of cross-examination to the adverse party after the discharge, it has to enact a special provision to that effect. But because such a provision is enacted, it should not be thought that when there is no special provision for the cross-examination of a witness, the adverse party has no right to cross-examine him. The Evidence Act deals with the rights of parties in the matter of evidence, it is the Code of Criminal Procedure, which lays down the procedure. Whether a party has a right to cross-examine the adverse party's witnesses or not has to be ascertainted from the Evidence Act which is known to be exhaustive on the subject and not from the Code of Criminal Procedure, which deals with the subject of evidence only

incidentally. Of course, S. 138 also regulates the orders in which a witness can be examined-in-chief, cross-examined and re-examined, but this is because the rights of parties to examination-in-chief, cross-examination and re-examination a witness accrue in certain order and a provision conferring the rights must at the same time regulate the order in which they are to be exercised: 1956 Cr.L.J. 841: A.I.R. 1956 All. 385. But *see* A.I.R. 1929 Cal. 822 [S. 138 deals with order of proceedings and not with rights of parties.]

S. 138 provides that the cross-examination must be on relevant facts. The words "relevant facts" in S. 138 must have a wider meaning than the term applied to examination-in-chief: A.I.R. 1982 Del. 240: (1982) 1 D.M.C. 31.

By the force of O. 18 of the C.P.Code, 1908, S. 138 of the Evidence Act will be attracted to the examination of witnesses by the Commissioner appointed by the Court as per O. 26 of the C.P.Code: (1989-1) 103 Mad.L.W. 489 (D.B.).

The examination of an approver as a witness should be done in the manner provided in S. 138, Evidence Act. *See* 1986 Cr.L.J. 2104 (Andh. Pra.).

Certainly it is open to the Court to direct the Commissioner to append the certificate as required under Rr. 5 and 6 after reading over the evidence and interpreting the same to the witness. The observation in A.I.R. 1934 Cal. 737 that Rr. 5 and 6 of O. 18, C.P.Code is applicable to the evidence recorded by a Commissioner was an *obiter* and not the *ratio* of that judgment. Where there was challenge as to the correctness of the statement recorded by the Commissioner and the only contention was regarding the reading over and explaining the evidence in the language known to the witness and said statement was also not sought to be relied on in a criminal proceeding against the witness, *held*, there was no illegality in the Courts below relying on the evidence of said witness: (1973) 86 Mad.L.W. 337.

Where a witness is sought to be examined by a party on commission by written interrogatories, the other side has a choice before it, either to file written interrogatories or to insist upon an opportunity being given to him to cross-examine the witness orally. But the oral examination of a witness is not permissible after his examination and cross-examination is complete on written interrogatories. [A.I.R. 1934 Pat. 60, Rel. on]: A.I.R. 1983 J.&K. 54: 1982 Kash.L.J. 462.

Provisions of Ss. 137 and 138 are applicable to proceedings under S.145, Cr.P.Code in absence of any provision to contrary: 1979 Chand. L.R. (Cr.) 12: 1979 Cr.L.J. 550 (J.&K.) (D.B.). Proceedings under S. 145, Cr.P.Code —Finding as to possession on basis of evidence not recorded and consequently not cross-examined—Order illegal. *See* 1984 Cr.L.J. (N.O.C.) 79 (Gau.).

S. 33 engrafts an extraordinary exception to the normal rule of examining witnesses embodied in S. 138; the Court must be greatly cautious when S. 33 is invoked; it must insist on direct proof of all the requisite conditions for admitting secondary evidence under the section: 1979 Sikkim L.J. 1: 1979 Cr.L.J. 610.

In a warrant case instituted otherwise than on a Police report, the accused has the statutory right to cross-examine the prosecution witness before the charge; the Magistrate cannot deny this right to the accused; it amounts to the right and opportunity of cross-examination envisaged in S. 33; whether or not the accused exercised that right or availed of that opportunity, the evidence of the witness before charge is admissible under that section: 1979 Sikkim L.J. 1: 1979 Cr.L.J. 610.

Where evidence of a deceased witness had already been recorded under S. 231 of the Cr.P.Code read with S. 137 of the Evidence Act during the Sessions trial and there was no subsequent stage for giving his evidence, *held*, there could be no occasion to resort to S. 33 for giving relevancy to the evidence already recorded: 1984 M.P.L.J. 492.

2. Examination-in-chief.—Testimony of witnesses includes examination-in-chief, cross-examination by the opposite party and re-examination by the party on whose behalf the witness appeared. Statement of witness, who is not tendered for cross-examination, is inadmissible in evidence: (1993) 1 Rec.Cr.R. 50 (Him. Pra.) (D.B.).

The examination of a witness means as laid down in S. 137, his examination-in-chief, his cross-examination and his re-examination. It follows that the provision that a witness shall be examined means not only that he should be examined-in-chief but also

that he should be permitted to be cross-examined and re-examined: A.I.R. 1956 All. 385 (D.B.).

Law does not bind the prosecution to call all the witnesses though it must produce all the material witnesses. Where a prosecution witness is said to have been won over, the prosecution need not examine him but should make him available so that the defence may know his name and particulars, so that the defence may examine him in defence. But when the defence choose not to examine him in defence when he was present in the Court, it cannot subsequently raise the grievance that he was not examined as a witness: (1977) 4 Cr.L.T. 161 (Punj.).

3. Cross-examination to follow examination-in-chief.—There cannot be a cross-examination of a witness unless he has been first examined-in-chief. Hence, where the Court directs the plaintiff to appear for his cross-examination by the defendant even though the plaintiff had not given any evidence in examination-in-chief on his behalf, the order is untenable. The fact that because the plaintiff did not enter the witness-box, the defendant was deprived of an opportunity of cross-examining him does not justify the order directing the plaintiff to appear for his cross-examination even though he had not given any evidence in examination-in-chief: 1960 M.P.L.J. (Notes) 17.

It is only when a witness has been called by a party that the other party as soon as the examination-in-chief is closed has a right to cross-examine him. The test, in order to determine whether a witness has been called by the prosecution, is whether he has been summoned and sworn and further whether he is a competent witness. Where a witness is manifestly a competent witness and has been "tendered" and put into the witness-box by the prosecution and oath has been administered to him, it is the prosecution which should technically be deemed to have called him although it did not put a single question to him and therefore, the Court cannot be said to act illegally in allowing him to be cross-examined under S. 154: 1958 Cr.L.J. 931: A.I.R. 1958 Pat. 422.

Witnesses not examined-in-chief cannot be tendered for cross-examination: A.I.R. 1954 Punj. 286: 1955 Cr.L.J. 86; A.I.R. 1942 Bom. 71 (F.B.); (1973) 75 Punj.L.R. 466: 1973 Cur.L.J. 291: 1974 Cr.L.J. 117.

Where the prosecution did not wish to examine a witness for having been won over and tenders him for cross-examination, *held*, it is not permissible in common-sense or by statute; as S. 138 contemplates cross-examination following examination-in-chief, there can be no cross-examination in the absence of examination-in-chief. Tendering an unexamined witness for cross-examination is unknown to law; it is impermissible: (1977) 4 Cr.L.T. 161 (Punj.).

4. Cross-examination — Scope, object and purpose of.—Cross-examination is as essential as examination-in-chief for eliciting from a witness material which is to constitute evidence: A.I.R. 1946 Nag. 173: 47 Cr.L.J. 851 (D.B.).

An accused is entitled in law to put further questions to a prosecution witness by way of cross-examination in respect of what he had stated in reply to questions put to him in cross-examination by the other co-accused. Each accused is entitled in law to test the evidence given against him by a prosecution witness by cross-examination and such cross-examination need not be limited only to what has been stated by him in examination-in-chief. Though Ss. 137 and 138 do not in words speak of a further round of cross-examination, there is neither in these sections nor anywhere else in the Evidence Act anything to bar the accused from exercising his right of cross-examination afresh if and when the prosecution witness makes a further statement of facts prejudicial to him: (1961) 1 Cr.L.J. 315: A.I.R. 1961 S.C. 175.

Use of cross-examination—*See* 6 W.R. 181: I.L.R. 21 Cal. 401; I.L.R. 6 Cal. 279. Object of examination: I.L.R. 30 Cal. 625. There is no hard and fast rule as to the right of a Counsel to demand in cross-examination the repetition of the whole story told in the examination-in-chief: 15 Cr.L.J. 148: 22 I.C. 724.

The very object of cross-examination is to ask questions regarding what the witness states in examination-in-chief; though the witness normally replies to the questions put by the advocate, but the replies are really those of the witness, particularly when he is also a party to the proceedings. Therefore, all questions asked in cross-examination to challenge the evidence-in-chief are permissible. No law says that cross-examination should be confined to what is volunteered by the witness and cannot be directed to

challenge or clarify the statement recorded in examination-in-chief; a party can always be asked the purpose behind his reliance on a particular incident even when it had come out in reply to question put to him by his advocate in his examination-in-chief: A.I.R. 1982 Bom. 498.

The accused has the valuable right to cross-examine the witnesses to elicit suppressed facts and expose discrepancies; its object is to impeach the credibility and general value of the evidence adduced. Though the accused has no right to seek postponement of the cross-examination which should follow the examination-in-chief, but where either the Counsel for the accused is not available for some unforeseen reason or is not ready to cross-examine the witnesses when the examination-in-chief is over, the trial Court may, in its discretion, defer the cross-examination of any such witness. Thus, where the deferred cross-examination of certain prosecutions witnesses on request by the accused's Counsel could not be completed due to non-presence of the Counsel, *held*, the accused could seek recall of the witnesses for cross-examination in the interest of justice: 1994 Cr.L.J. 3758 (Raj.).

In cross-examining a witness, the cross-examining lawyer not only tries to bring out contradictions in the evidence given in examination-in-chief, but he also tries to build up his case by establishing new facts: I.L.R. (1951) 1 Cal. 87. *See* also 1977 Raj.L.W. 212: 1978 Cr.L.J. (N.O.C.) 82 (D.B.).

Court should generally leave cross-examination to the parties. *See* 27 O.C. 246: A.I.R. 1924 Oudh 361. The right of cross-examination given by S. 138 is not fettered by the fact that there are Police papers which are not referred to by the prosecution; and the cross-examination can be made on all matters allowed by the Evidence Act. The cross-examination is not limited to matters raised in evidence else-where: 10 I.C. 917: 4 Bur.L.T. 113.

The questions put in cross-examination must be either relevant and pertinent to the matter in issue or calculated to elicit answers affecting the witness's title to credit: 6 Mys.L.J. 551 (F.B.); 1980 Bom.C.R. 675 (D.B.). Read in this connection the observations of Sir John Wallis in A.I.R. 1932 P.C. 69: 62 M.L.J. 457 (P.C.).

In cross-examination a party can ask questions on every issue to establish its case. There is no rule of procedure which deprives a party of its right to cross-examine a witness in respect of the whole case on the ground that evidence with regard to some issues has already been tendered. The questions, however, must be such as relate to the relevant facts: A.I.R. 1951 Madh. Bh. 86. Certain questions put in cross-examination by Counsel for accused—Inference against accused that he admits facts referred to therein cannot be drawn: 1953 Raj.L.W. 348.

Once a party, even by mistake, comes to the witness-box and swears and is examined about a document, he would become a witness and will be liable to be cross-examined by his opponent. Under S. 138, Evidence Act, cross-examination cannot be confined to the facts to which the witness testified in his examination-in-chief. He can be cross-examined as to the whole of the case: A.I.R. 1957 Madh. Bh. 135.

Cross-examination is not limited to matters upon which the witnesses had already been examined-in-chief but extends to the whole case. In cross-examination questions which relate to the relevant facts in suit or proceedings may be asked with the exception as provided under Ss. 146, 148, 149, 150, 151 and 152 of the Evidence Act: A.I.R. 1982 Del. 240: 1982 Hindu L.R. 226.

Generally speaking, S. 138 does provide a wide scope for cross-examination which it need not be confined to what is spoken to in the examination-in-chief. The opening part of the second half of the section clearly provides that examination and cross-examination must relate to relevant facts. But any deviation in respect of the relevancy of facts is permissible in cross-examination only to attack the reliability, character and such other things concerning the witness. However, such wider scope conferred for purposes of cross-examination cannot be used to establish the defendant's case which he is required to independently establish by producing relevant documentary or oral evidence to discharge the burden cast on him: (1988) 1 Karn.L.J. 588.

By virtue of Ss. 137 and 138, the examination of a witness will include his examination-in-chief, his cross-examination by the opposite party, if any, and his re-examination by the party calling him. The right of

cross-examination not only is referable to S. 138, Evidence Act itself but one of the principles of natural justice is that the evidence may not be read against a party if the same has not been subjected to cross-examination or at least an opportunity has not been given for cross-examination. S. 138 of the Evidence Act impliedly lays down that the statement of a witness would be read as evidence against a party only if it was tested on the anvil of cross-examination or opportunity was afforded for the purpose. All witnesses are subject to cross-examination. The right of cross-examination could not be curtailed or circumscribed on one pretext or the other or in one way or the other. There is nothing in S. 165 to suggest that the cross-examination of a witness called by Court is barred under all circumstances: 1979 Chand. L.R. (Cr.) 12: 1979 Cr.L.J. 550 (J.&K.) (D.B.).

Whether a party can cross-examine his own witness — Examination-in-chief, whether may be termed as cross-examination simply because some questions under S. 154 were put to the witness. *See* 1981 Jab.L.J. 143.

Where the trial in a warrant case was at the stage after recall of P.Ws for cross-examination, under S. 256 of Cr.P.Code, the witness cannot be further examined-in-chief.

However, where contingency arises due to any omission on the part of the prosecution to "fully" examine any of its witnesses due to remissness or inadvertence, the Court may act under S. 165 and if the Court examines him before cross-examination but after charge, it will not cause prejudice to the accused: (1973-74) 78 Cal.W.N. 973: 1975 Cr.L.J. 838.

5. Cross-examination—Extent and limits of.—It is certainly implied by S. 138 that the party should have an opportunity to cross-examine and does not mean that merely a right to cross-examine a witness without an opportunity being offered for cross-examination is sufficient compliance with the requirements of the law: 24 Cr.L.J. 595: A.I.R. 1923 Pat. 53.

See 2 Jur. N.S. 161: 9 W.R. 587; 12 M.I.A. 381; 3 B.L.R. (A.C.) 273. No time limit for cross-examination can be imposed. But Court should see that it does not go in rambling way or extend to inadmissible questions: 1979 Mah.L.J. 11.

It is open to any cross-examiner to put questions to the witnesses with a view to search out the real truth in regard to the accusation levelled against the accused persons, but while putting questions to the witnesses, the cross-examiner should keep certain standard of decency and decorum. *Held*, that without any proof or cogent reason, the cross-examiner was not justified in putting a suggestion to the daughter of the deceased that the deceased was having illicit intimacy with a person: 1979 Cr.L.R. 445: (1980) 21 Guj.L.R. 684 (D.B.).

Accused convicted for murder of wife—Witness, a relative and neighbour of accused—Question asked as to whether she told Police when her statement was recorded that daughter of accused called her and shouted that her father was assaulting her mother—No omission of that statement under S. 162, Cr.P.Code—Such question could not be permissible though answered in negative as it was misleading and unfair: 1984 Cr.L.J. 209.

Statement of witness to Police not made available for accused for cross-examination—Evidence of such witness—Admissibility. *See* 1946 Nag.L.J. 139.

Examination-in-chief revealing to accused specific accusation of giving fatal blows—Cross-examination normally conducted on basis of information in examination-in-chief—Accused cannot be said to be prejudiced by ignorance of accusations while proceeding with cross-examination: 1966 Cr.L.J. 223: (1965) 1 Law Rep. 714 (Mys.).

Where defendants resisted a possession suit filed by the plaintiff-auction purchaser of the disputed property who purchased it in a private sale, on the ground that the plaintiff was only a nominee of the mortgagee and, thus, private sale held in his favour was invalid but the defendants were refused cross-examination of the plaintiff regarding the question whether he was only a nominee of the mortgagee, *held*, order of the lower Court in disallowing questions in cross-examination regarding the plea taken by defendant was illegal: (1975) 88 Mad.L.W. 371.

Proceedings under S. 145, Cr.P.Code—Documents permitted to be proved by witness who has not filed an affidavit—Opposite party seeking to cross-examine the witness on merits—Magistrate refusing permission on the view that the witness could not have been examined-in-chief on merits—Order of Magistrate is contrary to law—The

witness having been allowed to prove documents, the opposite party is entitled to cross-examine the witness as to relevant matters, even if they are not covered by examination-in-chief—S. 138, Evidence Act is for the purpose of contradiction under S. 145 of the Evidence Act and does not constitute substantive evidence: 1968 All.Cr.R. 8: 33 Cut. L.T. 971.

Where after close of the case, the plaintiffs were permitted to adduce further evidence, *held*, the lower Court could not refuse the chance of adducing evidence in rebuttal by the defendants: A.I.R. 1982 Pat. 184: 1982 B.L.J.R. 359: 1982 Pat.L.J.R. 300: 1982 B.L.J. 450.

A defendant not appearing or not filing its written statement in a suit does not necessarily admit the plaintiff's claim; even after he has been proceeded *ex parte*, he can still join proceedings and participate in the suit prospectively; he is to be permitted to cross-examine the plaintiff's witness examined at that stage; if the Court disallows such a request of the defendant, that would amount to an error: 1990 Punj.L.J. 346: (1990) 2 Rev.L.R. 350: (1990-2) 98 Punj.L.R. 65.

The right to cross-examine a witness who is called by a Court arises not under the provision of S. 311 of the Cr.P.Code, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant. [A.I.R. 1968 S.C. 178; (1992) 5 C.C.R. 258 (Ori.); (1994) 7 C.C.R. 229 (Ori.), Rel. on]: 1995 Cr.L.J. 76 (Ori.).

6. Who is entitled to cross-examine.— Whether or not a party has a right to cross-examine the adverse party has to be ascertained from the Evidence Act and not from the Code of Criminal Procedure which deals with the subject of evidence only incidentally: A.I.R. 1956 All. 385 (D.B.).

Where the same witness is cross-examined on behalf of different parties and during the course of it he makes a statement damaging to the case of one of parties who had already cross-examined him, then, the latter party is entitled to cross-examine the witness with reference to the statement so made: 189 I.C. 757: A.I.R. 1940 All. 353. *See* also A.I.R. 1961 S.C. 175; I.L.R. 21 Cal. 401 (D.B.).

Right of cross-examination belongs to adverse party: A.I.R. 1917 Cal. 264 (S.B.)

The general rule is that a defendant may cross-examine his co-defendant who gives evidence, or any of his co-defendant's witness, if his co-defendant's interest is hostile to his own. It is only where the evidence of a co-defendant or a co-respondent is adverse to the defendant or the respondent that the defendant or respondent can claim right to cross-examine. Where the contentions of the defendant and the co-defendant are identical, there is no such right of cross-examination: (1946) 48 Bom.L.R. 36. Statement of witness to Police not made available to accused for cross-examination — Evidence of such witness — Admissibility. *See* I.L.R. (1946) Nag. 126: A.I.R. 1946 Nag. 193: 1946 Nag.L.J. 139.

S. 138 allows the right of cross-examination of a witness to an adverse party. Parties arrayed as defendants in a suit, having taken contradictory stands on a relevant and material issue, shall be adversary to each other and entitled to exercise their right of cross-examination against each other: A.I.R. 1978 P.&H. 319: 1979 Rev.L.R. 118: (1979) 81 Punj.L.R. 24: I.L.R. (1978) 2 Punj. 393.

A defendant supporting the plaintiff in the written statement cannot be said to have an interest in conflict with that of the plaintiff; he has, therefore, no right to cross-examine the plaintiff. Ss. 137 and 138 contemplate cross-examination of witnesses by the adverse party; it is obviously the adverse party whose interest is in conflict with the party which has produced the witness that can exercise the privilege of cross-examining that witness: (1985) 5 Guj.L.H. 934.

The defendants who are supporting the plaintiff's case should cross-examine the plaintiff first and it is then that the "contesting defendants", who are the real "adverse party", should be directed to cross-examine the plaintiff: 1986 Mah.L.J. 643; A.I.R. 1920 Pat. 94 (D.B.).

A party claiming to cross-examine a witness must show that it is an "adverse party"; merely because it is shown as a defendant, it cannot be styled as an adverse party unless it is further shown that it is a contesting party in the sense that it disputes the plaintiff's case put forth in the plaint. Thus, where the *pro forma* defendants in their written statement fully supported the plaintiff's case, *held*, they could not be adverse parties, and could not cross-examine the plaintiff's witnesses. [A.I.R. 1971 S.C. 2324; A.I.R. 1973 S.C. 76, Foll.]: A.I.R. 1981 Guj. 190: (1981) 1 Guj. L.H. 230.

The right to cross-examine a witness is a statutory right conferred on a party concerned only when its interest is adverse to that of the party proposed to be cross-examined. Thus, where the defendants requested the Court to decree the plaintiff's suit as prayed for in plaint and specifically admitted in their written statement that the plaintiff had properly maintained the accounts, *held*, the defendants, having no interest adverse to that of the plaintiff, could not be allowed to cross-examine the plaintiff; that would amount to avoidable harassment of the plaintiff: A.I.R. 1978 Andh. Pra. 193: (1977) 1 An.W.R. 417. But *see* A.I.R. 1975 Del. 109: (1975) 77 Punj.L.R. (Del.) 42 [Where in a suit for eviction, the Rent Controller refused to grant permission to petitioner sub-tenant to cross-examine witness produced by another sub-tenant on the ground that their defence was identical, *held*, denial of opportunity to the petitioner sub-tenant to cross-examine witness of another sub-tenant was illegal. [A.I.R. 1917 Cal. 264; A.I.R. 1928 Mad. 919; (1946) 48 Bom.L.R. 36, Disting.; A.I.R. 1966 Raj. 229 and 1894 Probate Division 248, Rel. on].]

Tenant's right to cross-examine the witness produced by the sub-tenant in an eviction suit on the ground of sub-tenancy. *See* (1987) 1 Ren.L.R. 257 (P.&H.).

Right of one to cross-examine other defendants—Evidence produced by partner-defendant found admissible against other co-defendant partner—Co-defendants have right to cross-examine deposing defendant: 1965 Raj.L.W. 346: A.I.R. 1966 Raj. 229.

7. Failure to cross-examine.—It is a well established rule of evidence that a party should put to each of his opponent's witnesses so much of his case as concerns that particular witness. If no such questions are put, the Courts may presume that the witness's account has been accepted. If it is intended to suggest that a witness was not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination so that he may have an opportunity of giving an explanation: A.I.R. 1958 Punj. 440: (1958) 60 Punj.L.R. 349; (1992) 1 Rev.L.R. 78 (D.B.); (1983) 23 Del.L.T. (S.N.) 44.

Failure to cross-examine witness on certain point—Amounts to acceptance of truth of his testimony thereon—Exception is when testimony itself contains inherent improbability and is of incredible and romancing character: (1968-69) 73 Cal.W.N. 751; A.I.R. 1966 Cal. 620.

Failure to question opponent's witness—Presumption is that his evidence is accepted A.I.R. 1967 Cal. 205: (1966-67) 71 Cal.W.N 458; 1976 Cr.L.J. 758 (Him. Pra.)

Failure to cross-examine a witness on a point stated in her evidence-in-chief will not amount to acceptance of her testimony thereon when such testimony is inherently incredible: A.I.R. 1970 Cal. 38: (1969-70) 74 Cal.W.N. 168 (D.B.). But *see* 1977 Cr.L.J. 410 (Del.).

When there has been no cross-examination on a point, the evidence in examination-in-chief must be accepted. [(1959) 1 An.W.R. 98; A.I.R. 1940 Pat. 683; A.I.R. 1954 Trav.-Co. 152, Rel. on]: (1966) 2 An.L.T. 280: (1966) 2 An.W.R. 218. *See* also I.L.R. (1963) Andh. Pra. 754.

Where the statements of the witnesses of the plaintiff were recorded on commission and the defendant, despite notice, did not appear before the Commissioner in person, or through pleader and consequently, these witnesses were not cross-examined, the result would be that the evidence of these witnesses must be accepted unless there are some inherent improbabilities: A.I.R. 1955 Him. Pra. 57. The trial of a cause is aimed at arriving at the truth of the conflicting cases that are presented before the Court. Every witness entering the box does so as a witness of truth. Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. The extent of its effectiveness no doubt depends upon the dexterity of the wielder of the weapon, but every cross-examiner should and can, if he is careful, indicate in cross-examination, whichever part of the evidence given in examination-in-chief is challenged, and an omission to do so would lead to the inference that the evidence is accepted subject of course to its being assailed as inherently improbable: 1953 Ker.L.T. 587: A.I.R. 1954 Trav.-Co. 152. Where the witnesses are not tested by cross-examination, their evidence may be accepted unless there are any inherent improbabilities: A.I.R. 1956 Him. Pra. 4. *See* also I.L.R. (1974) Him. Pra. 509; 1975 Chand.L.R. (Cr.) 157; 1977 B.L.J.R. 280; 1990 M.P.L.J. 228 (D.B.).

The rule of appreciation of evidence that the statement of a party on a fact in issue, if unchallenged in cross-examination, should normally be accepted by the Court, is applicable only where the statement is such that it can reasonably be acted upon and made basis of a finding by the Court. But where,

in cases, a statement falls short of such probative value, it would not acquire any sanctity because no cross-examination is made to challenge its correctness: (1979) 2 Ren.L.R. 273 (Punj.).

Absence of cross-examination of prosecution witness of certain facts, *held*, leads to inference of admission of that fact: 1990 M.P.L.J. 228 (D.B.).

Where cross-examination is not directed against the positive material assertion affecting the opposite party, it would amount to the affected party accepting the truthfulness of that assertion unless there is some exceptional proof to the contrary: (1976) 12 Del.L.T. 311; 1983 Cr.L.J. 1694: 1983 F.A.J. 311 (Him. Pra.).

Where no question was put to Investigation Officer or prosecution witness concerned as to the safe and proper custody of residue of chatni which was administered to the deceased, the necessary inference is that it was kept in safe and proper custody in regular course of business as required under the rules and that it was not accessible to external agency so that oleander poison could be introduced into it while it was in custody of the witness concerned or the Police: (1965) 1 Cr.L.J. 321: A.I.R. 1965 Ori. 38.

Where no question was put to the Investigation Officer as to how a constable accompanied the deceased to dispensary and that there was previous station diary entry of F.I.R. to that effect, it would be hazardous to go to the length of holding that there was another F.I.R. which has been suppressed. It might be that the Police constable accompanied the deceased on account of personal acquaintance. In the absence of clarification, no adverse inference can be drawn: (1965) 1 Cr.L.J. 321: A.I.R. 1965 Ori. 38.

Railway Authorities, in a case for damages, failing to cross-examine the plaintiff's witness, *held*, the Railway Authorities must be deemed to have accepted the plaintiff's case in its entirety: A.I.R. 1983 Cal. 337.

In a case filed against the accused for offence punishable under the provisions of the Food Adulteration Act, on a private complaint by the Food Inspector, *held*, no conviction could be based on the statement of the Food Inspector which was recorded before framing of the charge when he could not be cross-examined due to his accidental death, specially when panch witness did not support the statement of Food Inspector: 1995 Cr.L.J. 1270 (Madh. Pra.).

8. Failure of party to put his essential and material case in cross-examination.—When a party declines to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believes that the testimony given could not be disputed at all. This is the rule of essential justice: I.L.R. (1969) 19 Raj. 273: A.I.R. 1969 Raj. 219.

Where evidence of witness, not cross-examined in respect of material assertion, is allowed to go unchallenged with regard to any particular point, it may safely be accepted as true: (1987) 1 Rec.Cr.R. 71 (Del.).

It is a well established rule of evidence that a party should put to each of his opponent's witnesses so much of his case as concerned that particular witness and that if no such questions are put, the Court will presume that the witness's account has been accepted: (1968) 2 An.L.T. 124.

Impeaching credit of witness—Omission by opponent to put material and essential case in cross-examination—Veracity of opponent's version of the case ought to be taken into account—Omission to do so vitiates appreciation of evidence: 1968 Ker.L.J. 123.

9. Suggestion in cross-examination—Evidentiary value of.—Suggestion in cross-examination, which is denied by the witness, is no evidence at all: A.I.R. 1959 Cal. 213; A.I.R. 1963 Assam 151 (D.B.). As to the use which can be made of a statement made under S. 164, Cr.P.Code, *see* A.I.R. 1946 P.C. 45: (1946) 1 M.L.J. 211 (P.C.).

Suggestion in cross-examination can only be indicative of case put forward or stand taken by party on whose behalf cross-examination is being conducted—But to no extent whatsoever can it be a substitute for evidence if it is repudiated by witness to whom it is made: 1969 All.Cr.R. 240: 1969 All.W.R. (H.C.) 369.

The suggestions made in cross-examination form part of the evidence on record. Those suggestions can be taken into consideration while determining whether the reply given was believable or not: 1979 All.Cr.R. 185: 1979 Cr.L.J. (N.O.C.) 89 (D.B.).

10. Tendering of witness for cross-examination.—The practice of tendering a witness for cross-examination certainly should not be employed in the case of an important witness: (1941) 43 Bom.L.R. 946: A.I.R. 1942 Bom. 37: I.L.R. (1942) Bom. 115; I.L.R. (1942) Bom. 384: A.I.R. 1942 Bom. 71: (1942) 44 Bom.L.R. 27 (F.B.); A.I.R. 1954 Punj. 286: 56 Cr.L.J. 86. (1) The practice of tendering witnesses leads to considerable confusion and is to be deprecated. (2) A material witness

should not be merely tendered but should be sworn and asked to give evidence by the prosecution. Tendering if at all should be confined to witnesses of secondary importance. (3) Even in a case, where the prosecution has already got sufficient evidence on a particular point and does not want to waste time by examining a witness although material, who was examined in the lower Court on the same point, but at the same time does not want to deprive the defence of the right of cross-examination, it should ask the witness at least whether his evidence in the lower Court was true, and if he gave a general answer as to the truth of his evidence in the lower Court, he could be cross-examined on that: 1958 Cr.L.J. 931: A.I.R. 1958 Pat. 422.

Tendering witness for cross-examination tantamounts to giving up witness: I.L.R. (1963) 2 Punj. 328: (1964) 1 Cr.L.J. 350: A.I.R. 1964 Punj. 120.

S. 138 envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by the prosecution. There is no meaning in *tendering* a witness for cross-examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in chief. There is no procedure whereby the prosecution is permitted to tender a witness for cross-examination only, without there being any examination-in-chief in relation to which, such a witness can be cross-examined. The practice of tendering a witness for cross-examination has been consistently discouraged and even condemned by various High Courts. Thus, where eye-witnesses to the occurrences whose evidence was material for unfolding prosecution story, were tendered only for cross-examination, *held*, their non-examination seriously affected the credibility of the prosecution case and detracted materially from its reliability. [A.I.R. 1971 S.C. 1586, Disting.]: A.I.R. 1995 S.C. 1601.

Tendering of witness for cross-examination—Practice deprecated: 1967 Cr.L.J. 73: A.I.R. 1967 Ker. 16.

11. Effect of not giving opportunity to cross-examine.—Failure to give opportunity to cross-examine witness — His evidence must be excluded from consideration: (1965) 1 Mys.L.J. 442: A.I.R. 1966 Mys. 154; (1993) 3 Rec.Cr.R. 349 (Him. Pra.).

Effect of not giving opportunity to cross-examine—Date fixed for cross-examination of witness—Defendant praying for summoning of documents for cross-examination—Court allowing prayer subject to payment of heavy adjournment costs which defendant did not agree to pay—Case adjourned for cross-examination of that witness—On adjourned date defendant not allowed to cross-examine witness with reference to those documents which had been received in the meanwhile—Order abridging defendant's right to cross-examine plaintiff's principal witness held illegal and prejudiced case of defendant: I.L.R. (1960) 2 Punj. 506: (1960) 62 Punj.L.R. 624: A.I.R. 1960 Punj. 500.

Every party has to be given a fair deal as far as right of cross-examination is concerned. Where rent controlling authority did not give an opportunity to the appellant-tenant to cross-examine one witness, *held*, though witness was an old lady, instead of depriving the tenant of the right of cross-examination, the rent controlling authority could afford an opportunity to tenant by adjourning the case on payment of cost and expenses, which was sufficient for bringing the lady by a car or in higher class compartment of a train: A.I.R. 1994 Madh. Pra. 115.

Member of Force overstaying leave—Departmental enquiry under R. 27, Central Reserve Police Rules, 1955—Allegation of overstay not denied—Burden of showing that overstay was for reason beyond control, lies on delinquent member—Member not producing evidence to discharge burden but complaining that he was not given opportunity to cross-examine officer who had made report against him behind his back—Prejudice not shown to have been caused by non-cross-examination—Enquiry cannot be said to be vitiated for non-cross-examination: A.I.R. 1966 Raj. 140: 1965 Raj.L.W. 26.

Where the plaintiff had referred her right to lead evidence in rebuttal on an issue, the burden for which lay on the defendant for which the latter had to prove her right to possession of a schedule property but as the plaintiff had testified to the situation of the property, its probable rent and area, etc., *held*, the Court rightly disallowed the defendant to cross-examine the plaintiff on those points as he would have ample opportunity to do so when the plaintiff adduces evidence in rebuttal: (1988) 1 Karn.L.J. 588.

Omission to cross-examine—Accused declining to cross-examine witness—Having forgone his right to cross-examine he cannot subsequently make grievance about it: 1965 Raj.L.W. 26: I.L.R. (1965) 15 Raj. 44: A.I.R. 1965 Raj. 140.

Evidence and proof — Accused undefended — Prosecution amply establishing guilt — Accused cannot be acquitted merely on ground that prosecution witnesses were not cross-examined: (1964) 66 Punj.L.R. 1105.

Evidence of the prosecution witnesses who were not cross-examined, *held*, cannot be made basis of conviction: (1979) 2 M.P.W.N. 109.

Though the law provides (S. 246 (4), Cr.P.Code) for some time to intervene between the date on which the charge is framed and the date on which the accused is required to state as to whether he wishes to cross-examine any or all the witnesses examined by the prosecutrix before the framing of the charge, the failure to give such an opportunity to the accused is not an illegality which will vitiate the trial itself. However, having regard to prejudice that may be caused to the accused, it would be proper, in such cases to remit the case to the Court of Magistrate to proceed with the trial from the stage of S. 246 of the Cr.P.Code. [(1966) 2 Mys.L.J. 762, Rel. on]: 1992 Cr.L.J. 24 (Karn.) (D.B.).

Where out of three accused, two were represented by one Counsel and third by another Counsel and opportunity to cross-examine the prosecution witness was given to one Counsel and not to the other, *held*, statements of witnesses were not admissible in evidence; conviction set aside and case was remanded for fresh trial: (1993) 1 Rec.Cr.R. 50 (Him. Pra.) (D.B.).

12. Power of Court in matter of controlling cross-examination.—The Court has an undoubted control and a discretion in the matter of controlling the cross-examination of a party by Counsel of the opposite party. It is quite true that neither the Evidence Act nor the Code of Criminal Procedure, contains anything which would justify a Court of law in imposing a particular time limit. But if the Court has a discretion and has control over the proceedings, surely the Court must be presumed to have the power, apart from the Evidence Act or the Code of Criminal Procedure: A.I.R. 1955 Bom. 318: (1955) 57 Bom. L.R. 282: I.L.R. (1955) Bom. 675.

Cross-examination is one of the most important processes for the elucidation of the facts of a case and all reasonable latitude should be allowed but the Judge has always a discretion as to how far it may go or how long it may continue. A fair and reasonable exercise of his discretion by the Judge will not generally be questioned by an appellate Court: 1945 All.L.J. 34: A.I.R. 1945 P.C. 38 (P.C.).

Duty of Judge—Intervention and interruption in examination of witness—Extent of right: (1957) 2 All E.R. 155.

13. Unfinished testimony—Admissibility of.—Unfinished testimony, when admissible: 144 I.C. 331: A.I.R. 1933 Lah. 561.

Evidence given in examination-in-chief—Admissibility without cross-examination: 1959 Cr.L.J. 1310: A.I.R. 1959 Cal. 677. *See* also 1982 Chand.Cr.C. 16 (P.&H.).

Where a case under provisions of the Prevention of Food Adulteration Act, 1954 was instituted on complaint of a Food Inspector but the accused could not cross-examine Food Inspector as he was dead, *held*, accused could not be convicted on the evidence of Food Inspector who had not been cross-examined and when panch-witnesses had not supported his case: 1995 Cr.L.J. 1270 (Madh. Pra.).

It is apparent from a bare reading of S. 138 that the right of cross-examination is there, but it is there only when the adverse party desires to exercise it. But when the adverse party does not desire to cross-examine the witness, it cannot be said that the right of cross-examination has been denied to it or that the statement is not complete for want of cross-examination. Where an opportunity to cross-examine a witness was granted and the cross-examination did take place to some extent but could not be completed and was deferred for a later stage on the request of the adverse party, *held*, the prosecution or the trial Court cannot be saddled with responsibility for the cross-examination remaining incomplete and, therefore, such a statement could be used in evidence: 1984 Raj.L.W. 56.

Where the accused and the deceased in the murder case were closely related and the eye-witnesses examined-in-chief supported the prosecution version but could not be cross-examined because the defence Counsel was—as found by the Court—absent on design and the cross-examination could be effected rather late when the eye-witnesses turned hostile in their cross-examination, *held*, the Sessions Court rightly convicted the accused on the basis of their evidence as given in the examination-in-chief; the Court was justified in proceeding against them for perjury; such a course should be followed in similar situations to curb such manipulations: 1995 Cr.L.J. 1738 (Andh. Pra.) (D.B.).

Where the plaintiff failed to subject himself to cross-examination in spite of the order of the Court after the remand, *held*, it would not be safe to rely on the examination-in-chief recorded which was not subjected to

cross-examination before the remand was made. Therefore, the refusal of the plaintiff to submit to cross-examination had made the evidence in examination-in-chief *non est*: A.I.R. 1989 S.C. 1141: (1989) 3 S.C.C. 56.

Where in a divorce case, a witness, who was husband's uncle, was produced by the wife as her witness and his cross-examination could not be completed in order to enable him to bring reconciliation but his attempts were not successful and he could not be produced in the Court on subsequent dates, *held*, as the husband did not apply for summoning the witness by the process of the Court and for compelling his attendance for further cross-examination as he knew that the same will worsen his case, taking into account of evidence of said witness could not be objected to on the ground of his incomplete cross-examination: 1984 Hindu L.R. 12: A.I.R. 1984 N.O.C. 145 (All.).

Where a person, though his name was mentioned in the first information report, was not charge-sheeted but on the basis of evidence of two witnesses (whose cross-examination had been deferred), the trial Court summoned him under S. 319, Cr.P.Code, and his contention was that as the cross-examination of the said two witnesses stood deferred, these two statements could not be termed as the evidence within the meaning of S. 319 (1), *held*, the applicant became an "adverse party" only after he was summoned. Thus, his right of cross-examination would flow only after the witnesses are "reheard" since the proceedings have to commence "afresh" as against him; it, therefore, was of no consequence whether the statements of the two witnesses relied upon by the trial Judge for summoning the applicant were recorded after examination-in-chief or after cross-examination or re-examination. In any case the said statement was "evidence" which could have been used by the trial Judge. [1986 All.L.J. 1347, Disting.]: 1990 Cr.L.J. 460: 1989 All.L.J. 72.

Where the Court under S. 319(1) of the Code of Criminal Procedure has to form its opinion whether grounds exist for proceeding against a person not then accused, *held*, even the statement of witnesses not yet cross-examined is sufficient; the Court's opinion formed under this section is akin to the opinion formed under S. 200 or S. 202: 1989 Cr.L.J. (N.O.C.) 8: (1987) 1 Ker.L.T. 871.

14. Court's power to put questions.—Power of Judge to put questions to witnesses both when prosecution examined them and as well as when defence cross-examined them. *See* (1951) 1 M.L.J. 207: (1951) 64 Mad.L.W. 303: A.I.R. 1951 Mad. 772(1); A.I.R 1924 Oudh 371.

The Counsel calling a witness must be allowed to examine the witness in the way in which he wants and the cross-examining Counsel must be allowed to do so as he prefers. No doubt, it is true that the Court can put any question to the witness at any stage of the examination, but this power should not be carried to the extent of the Court itself examining the witness: (1957) 23 Cut.L.T. 499. *See* also I.L.R. (1977) 1 Cut. 111 (D.B.); (1970) 11 Guj.L.R. 846 (D.B.); A.I.R. 1937 All. 171.

For a criminal Court in order to become an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. It must, of course, not assume the role of a prosecutor in putting questions. The functions of the Counsel, particularly those of the public prosecutor, are not to be usurped by the Judge, by descending into the arena. Any question put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses. [(1957) 2 All E.R. 155, Rel. on]: A.I.R. 1981 S.C. 1036: 1981 Cr.L.J. 609; (1965) 6 Guj.L.R. 593 (D.B.).

15. Re-examination.—After the cross-examination of the witness on behalf of the accused, the re-examination would ordinarily be directed to the explanation of the matter referred to in the cross-examination: 3 Pat.L.T. 32: A.I.R. 1923 Pat. 116. *See* also 44 I.C. 343: 9 L.B.R. 109. Where the cross-examination of a witness begins on one day and is completed only the next day, the party calling the witness is entitled to re-examine the witness on the whole field covered by the witness and not merely on the matters arising in the cross-examination on the second day. The law does not contemplate the placing of any such restriction on the right of re-examination conferred by S. 138 and it is not open to the Court to take it away. If the matter elicited in re-examination gives rise to any suspicion that it has been the result of tutoring with regard to any matter covered on the last day of cross-examination, it would be open to the Judge to draw the attention of the jury to the fact that the lapse of time may have given an opportunity for preparation; but this would not be a ground for refusing to let questions in re-examination being put: 22 Pat.L.T. 327: A.I.R. 1941 Pat. 362.

139. Cross-examination of person called to produce a document.—A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

Re-examination of witness—Principle. *See* 1971 Mys.L.J. (S.N.) 311. *See* also 1971 Cr.L.J. 1335 (Del.); (1971) 2 M.L.J. 114.

A witness was cross-examined and re-examined. In re-examination fresh matter was introduced. The Counsel asked for cross-examination of the witness again. The Court granted only three minutes. *Held*, the object of re-examination was to clear ambiguities in cross-examination and that if new and important matter was allowed to be introduced in re-examination, the other party has a right to cross-examine the witness as regards the matter introduced. Therefore, the time of three minutes, given for cross-examination, was insufficient: 38 Cr.L.J. 416(2): A.I.R. 1937 All. 171.

Court can permit party calling a witness to put question in the nature of cross-examination at the stage of re-examination—Adverse party must be given further opportunity to cross-examine witness in such case: A.I.R. 1964 S.C. 1563: 1965 M.L.J. (Cr.) 773.

S. 138 provides that the re-examination shall be directed to the explanation of matters referred to in cross-examination and if new matter is by permission of the Court, noticed in further cross-examination, the adverse party may further cross-examine upon that matter. But even if fresh matter is allowed to be elicited in re-examination without any objection, the Court must be deemed to have permitted the said question: A.I.R. 1973 Del. 180 (D.B.). *See* also (1990) 69 Cut.L.T. 411.

16. Miscellaneous.—From the fact that there was no record made in the depositions of the witnesses that there was no cross-examination, it can be said that, in fact, there was no cross-examination, and not that the request of the party to cross-examine was disallowed: (1957) 13 F.J.R. 237: (S) A.I.R. 1957 S.C. 882: 1958 S.C.R. 499: I.L.R. (1958) Punj. 274.

Right of party to cross-examine hostile witnesses. *See* 1937 All.L.J. 1214: A.I.R. 1937 All. 754.

The Court is not bound to wait for any length of time and, thus, waste public time if the pleaders do not turn up in Court at the right moment to cross-examine the opposite party's witnesses. This cannot be made a ground of attack against the orders passed: 1954 Nag.L.J. 303: A.I.R. 1954 Nag. 252.

Recalling of witness by prosecution for cross-examination after one month of his discharge, *held*, is not proper: 1990 Cr.L.J. (N.O.C.) 165 (All.).

Defendant's Counsel failing to take part in framing issues—Defendant cannot be said to have abandoned issues merely on that ground—Right to cross-examine cannot be denied on ground of such failure: (1965) 2 Cr.L.J. 89: A.I.R. 1965 Cal. 368.

Where the trial Court, after taking note of certain questions asked in cross-examination which were relevant neither to the facts in issue nor under any other section of the Evidence Act, concluded that allegations put forth in the form of questions amounted to acts of cruelty and passed a decree of divorce though husband never pleaded said acts of cruelty, *held*, the trial Court ought not to have allowed said questions in cross-examination. In any case, if the trial Court had not exercised its power at the time when the questions were asked the same could not be made the basis for grant of relief to the husband: A.I.R. 1982 Del. 240: 1982 Hindu L.R. 226.

Conviction cannot be based on the testimony of witnesses whose examination-in-chief is materially contradicted, by their cross-examination: (1984) 2 Crimes 85 (Ori.).

Section 139—Notes.

See I.L.R. 12 Bom. 63.

S. 139 has nothing to do with the proper custody mentioned in S. 90. That section merely provides a machinery for the production of the documents summoned. It no way bears on the interpretation to be placed on S. 90. Under S. 90 the Court ought to act on the evidence adduced in deciding whether the documents have been produced from proper custody or not: (1962) 1 Cr.L.J. 441: A.I.R. 1962 Mys. 53.

Witness, who is—Accused producing document: (1963) 4 Guj.L.R. 638: A.I.R. 1963 Guj. 178.

140. Witnesses to character.—Witnesses to character may be cross-examined and re-examined.

141. Leading questions.—Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

142. When they must not be asked.—Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

A person to whom a summon is issued under S. 94 of the Code of Criminal Procedure, 1898 (S. 91 of the Cr.P.Code, 1974) for production of a document, does not thereby become a witness. Thus, where in reply to such summon, the witness stated that she did not know anything about the document sought to be proved, *held*, under no provision of the Code, the Court could record her statement on oath, on her inability to produce the document, or "put her a few questions for satisfying itself regarding the whereabouts of the document": A.I.R. 1977 S.C. 403: 1977 Cr.L.J. 245: (1977) 1 S.C.C. 169: (1977) 2 S.C.R. 160.

Where evidence of two employees cited as prosecution witnesses against the company was sought to be shut out as violative of Art. 20(3) of the Constitution of India on the ground that it would amount to self-incrimination on the part of the company, *held*, a body corporate, since it cannot take or make oath or affirmation, a necessity for witnesses other than children nor can it be deemed a dumb witness under S. 119 because of its incapacity to see or hear or perceive by sense nor can a person summoned to produce documents can become a witness under S. 139, is not contemplated as a person under Art. 20(3) of the Constitution; the company employees cannot be equated with the company; there is no bar against their examination as prosecution witnesses: 1991 Cr.L.J. 828 (Cal.) (D.B.).

Section 140—Notes.

Character evidence. *See* (1954) 2 M.L.J. (Andh.) 39: A.I.R. 1954 Andhra 39.

Character.—Meaning of: 1970 Cr.L.J. 83 (Andh. Pra.).

Section 141—Notes.

A leading question is one which indicates to the witness the real or supposed fact which the party examining him desires or expects him to confirm by the answer: A.I.R. 1993 S.C. 1892.

Leading questions in chief and re-examinations—Ban not absolute—Though objected to, Court may allow such questions under O. 18, R. 11 of the C.P.Code—Discretion largely rests with the trial Court and depend on the circumstances as demeanour of witnesses, the tenor of the preceding questions, etc: (1966) 12 Fac.L.R. 80: (1966) 2 L.L.J. 282 (Cal.).

Domestic enquiry — Leading questions asked to delinquent — Propriety: 1968 Lab. I.C. 212: A.I.R. 1968 S.C. 236; 1983 Lab.I.C. 624: (1983) 1 Cal.L.J. 8: (1983) 2 L.L.J. 122.

There is no law which governs the order in which two contesting parties are entitled to cross-examine a witness of the opposite party; S. 141 deals with leading questions, S. 143 with questions lawful in cross-examination, S. 147 with the circumstances wherein a witness shall be compelled to answer questions and S. 148 empowers the Court to decide as to when a question may be asked and the witness be compelled to answer it: (1976) 17 Guj.L.R. 1007.

Section 142—Notes.

A leading question cannot be allowed in the examination-in-chief: 1958 M.P.L.J. 833: A.I.R. 1959 Madh. Pra. 84.

A leading question to the prosecution witness by the prosecution cannot be allowed nor can the reply be used: I.L.R. 1 Pat. 630: 4 Pat.L.T. 76: A.I.R. 1 923 Pat. 582. On this section, *see* also 12 M.I.A. 380.

143. When they may be asked.—Leading questions may be asked in cross-examination.

Principles governing grant of permission to cross-examine one's witness—Circumstances under which leading questions may be allowed: 1969 Cr.L.J. 118: A.I.R. 1969 Mys. 12.

It is well settled that a party cannot normally be allowed to cross-examine its own witness and declare him hostile unless the Court is satisfied that the statement of the witness exhibits an element of hostility or he has resiled from a material statement made by him before an earlier authority or the Court was satisfied that he is not speaking the truth. But there must be some material before the Court to base its satisfaction upon. [A.I.R. 1977 S.C. 170, Foll.]: (1980) 18 Del.L.T. (S.N.) 12.

The prosecutor must not be allowed to ask leading questions to the witness unless the witness has been declared, with the Court's permission, hostile whereafter he is cross-examined. After the witness has been led after the preliminaries to the material portion of his examination-in-chief, it is generally the prosecutor's duty to ask the witness to state the facts and leave the witness to tell the unvarnished tale of his own account. The prosecutor should not be allowed to frame his questions in such a manner that the witness by replying in simple yes or no gives the evidence which the prosecutor wishes to elicit from the witness: A.I.R. 1993 S.C. 1892.

A reading of the section indicates that there is no legal hurdle in putting leading question during examination-in-chief without permission of the Court, if the opposite side does not object to it. Need to obtain permission of the Court to put leading question would arise only in the contingency where the opposite side takes objection. Even if the opposite side objects, Court has a wide discretion in allowing leading question to be put. Second para to S. 142 shows that Court has no discretion to disallow a leading question if it relates to undisputed matters or introductory matters or matters already proved. Discretion to allow or disallow a leading question can be exercised by the Court only when such leading question relates to matters other than those enumerated above. [A.I.R. 1922 Pat. 582, Dissent. from]: (1992) 1 Ker.L.J. 212: (1992) 1 Ker.L.T. 878 (D.B.). *See* also 1987 Cr.L.R. 91: 1987 Rec.Cr.C. 65 (Raj.).

The law is not that leading question by itself is illegal or improper when it is put by the party who calls the witness. But if the question itself contained the entire answer, Court would treat such answer with the worth it deserves. This is the disadvantage of a leading question when put in chief-examination: (1992) 1 Ker.L.J. 212: (1992) 1 Ker.L.T. 878 (D.B.).

Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the prosecution cannot be allowed to cross-examine the witness. Before allowing such a request, the Court may look into the statements made by the witness before the Investigating Officer or previous authorities to find out whether or not the witness was making an inconsistent statement on a most material point; but the Court must, however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention. Though it will largely depend on the facts and circumstances of each case, but this much is broadly clear that the contingency of cross-examining the witness by the party calling him is an extra-ordinary phenomenon and permission should be given only in special cases: A.I.R. 1977 S.C. 170.

Section 143—Notes.

S. 143 lays down that leading questions may be asked in cross-examination. The reason why leading questions are allowed to be put to an adverse witness in cross-examination is that the purpose of a cross-examination being to test the accuracy, credibility and general value of the evidence given, and to sift the facts already stated by the witness, it sometimes becomes necessary for a party to put leading questions in order to elicit facts in support of his case, even though the facts so elicited may be entirely unconnected with facts testified to in an examination-in-chief. Order of the officer holding an enquiry

144. Evidence as to matters in writing.—Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration

The question is, whether *A* assaulted *B*.

C deposes that he heard *A* say to *D*—"*B* wrote a letter accusing me of theft, and I will be revenged on him". This statement is relevant, as showing *A*'s motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

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that "no leading questions shall be allowed" betrays an ignorance of the principles on which a cross-examination should be allowed to be conducted. It is open to the officer conducting the enquiry to disallow a particular question when that question is composite, irrelevant or confusing. But a general order restricting the right of the petitioner to put any leading question at all stands on a completely different footing, and cannot be justified, regard being had to the basic meaning to be attached to the words "cross-examined": 1954 All.L.J. 316: A.I.R. 1954 All. 438.

The Court may, in its discretion under S. 143, permit the prosecution to cross-examine a witness even though he had been originally called by them with regard to the matters elicited by the defence: (1907-08) 12 Cal.W.N. 676: I.L.R. 42 Cal. 957. Leading questions such as can properly be put in cross-examination of a hostile witness cannot be put by the Public Prosecutor in examination-in-chief: 2 Pat.L.T. 757: A.I.R. 1951 Pat. 46.

If a Judge disallows a question, the pleader should have the question and order disallowing it recorded, if such a refusal is illegal: 36 I.C. 468: 9 Bur.L.T. 113. On this section, *see* I.L.R. 37 Cal. 467: (1909-10) 14 Cal.W.N. 1114.

Section 144—Notes.

See I.L.R. 35 Cal. 141; I.L.R. 19 All. 390: 12 Cr.L.J. 214.

Where a claim for bonus is being investigated by the Industrial Tribunal and the workmen upon whom the onus lies to establish their claim do not give any evidence in support of their claim, the mere non-production of the balance-sheet by the company even though called upon to do so, would not justify the raising of presumption under S. 114, *Illus.* (*g*), Evidence Act. Even if the company has stated that there was no financial inability to pay the claim that does not necessarily mean that it had an available surplus or that the available surplus amounted to whatever was claimed: A.I.R. 1957 Cal. 500.

Where a delivery warrant is issued for division of properties by metes and bounds after a preliminary decree was passed in a suit for partition and possession, endorsement on a delivery warrant made by the revenue authorities cannot be conclusive evidence of the fact that division was effected and possession was given. No doubt, such an endorsement on a warrant, may give rise to a presumption that what is stated therein is true, but it is only a rebuttable presumption: A.I.R. 1957 Mys. 71: I.L.R. (1957) Mys. 14.

[1]**145. Cross-examination as to previous statements in writing.**—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

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1. As to the application of S. 145 to Police diaries, *see* the Code of Criminal Procedure, 1898 (5 of 1898), S. 172.

Section 145—Synopsis.

1. Scope and applicability.
2. Previous statement.
3. Reduced into writing.
4. "Statement"—Meaning of.
5. Contradiction by omission.
6. Previous statement must be put to witness.
7. Writing containing statement need not come from proper custody.
8. Witness not to be contradicted by statement of third party.
9. Contradiction by admission.
10. Use of statements in police diary.
11. Use of first information report.
12. Use of statement made during investigation.
13. Use of statement contained in inquest report.
14. Use of statement made to commission of enquiry.
15. Use of statement made before committing Magistrate.
16. Use of confessional or other statements recorded by Magistrate/Court.
17. Use of statement of victim.
18. Miscellaneous.

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1. Scope and applicability.—As to relative scope of this section and S. 155, *see* Notes under the latter section scope and for application of the section, *see* A.I.R. 1963 Cal. 431; I.L.R. 19 All. 390; Rat. 610 and 924; 11 B.H.C.R. 120: I.L.R. 20 Cal. 642; I.L.R. 31 Cal. 142; I.L.R. 33 Cal. 1023; (1923-24) 28 Cal.W.N. 587: I.L.R. 51 Cal. 849; A.I.R. 1942 Cal. 277: 74 Cal.L.J. 547.

S. 155, Evidence Act, lays down that the credit of a witness may be impeached *inter alia* by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted, but it does not lay down the manner in which the former statement is to be proved. The mode of proof of such a statement in writing when it is ought to be tendered in evidence for contradicting a witness is provided in S. 145 of the Act. S. 155 is controlled by S. 145, and is not independent of it. It would follow that so far as the Madras High Court is concerned, it does not appear that there was any other procedure.

The High Courts are unanimous on the point that if it is intended to contradict a witness by the writing, his attention must, before the writing could be proved, be called to those parts which are to be used for purpose of contradicting him. The proper procedure would, therefore, be to ask a witness first whether he made such and such statement before the Police Officer. If the witness answers in the affirmative, the previous statement in writing need not be proved and the cross-examiner may, if he so chooses, leave it to the party who called the witness to have the discrepancy, if any, explained in course of re-examination if, on the other hand, the witness denies having made the previous statement attributed to him or states he does not remember having made any such statement, and it is desired to contradict him, by the record of the previous statement, the cross-examiner must read out to the witness the relevant portion or portions of the record which are alleged to be contradictory to his statement in Court or give him an opportunity to reconcile the same if he can. The best way of putting a statement is to put it in the actual words in which it stands recorded within quotation marks: (1958) 2 An.W.R. 627: 1958 M.L.J. (Cr.) 942.

The question whether there has been a compliance with S. 145, Evidence Act, or not is purely a question of fact. The question is not one of form but of substance. If there has been substantial compliance that is sufficient in law: A.I.R. 1958 Andh. Pra. 571: 1958 M.L.J. (Cr.) 797: (1958) 2 An.W.R. 365.

A pure and simple reading of S. 145 makes it perfectly clear that the rule laid down in it is only applicable when a witness

is sought to be contradicted by his previous statement. Where, however, there is no statement in existence which could be contradicted by previous statement, this rule does not apply and it is not necessary before it could be admissible in evidence to draw the attention of the witness to it: 1957 B.L.J.R. 542: A.I.R. 1958 Pat. 294.

S. 145 is in two parts, both of them dealing with cross-examination. The first part deals with cross-examination other than by way of contradiction and the second by way of contradiction only. It is not impossible to invoke the second part without putting questions under the first part: A.I.R. 1959 S.C. 1012: 1959 Cr.L.J. 1231.

A witness cannot be contradicted by first supposing that a certain thing must have taken place in a manner not deposed to by the witness and then to find that was not consistent with the statement made by that witness: (1963) 1 S.C.R. 253: A.I.R. 1963 S.C. 1821.

S. 145 seems to be a self-complete section and the formalities prescribed in S. 163 for calling and inspecting a document from the possession of the other side are not attracted to S. 145: A.I.R. 1955 Cal. 138 (D.B.).

The object of S. 145 is to give witness chance of explaining or reconciling his statements: A.I.R. 1927 Cal. 514. *See* also 1966 Cr.L.J. 343 (Pat.); (1967) 33 Cut.L.T. 90 (D.B.).

S. 145, Evidence Act permits cross-examination as regards any previous statements made by witness relevant to the matter in the criminal trial. The section lays down no limitation as to the proceeding or occasion on which statement was made. Where the Magistrate disallowed putting to the witness in cross-examination certain previous statement made by him on the ground that the statements had not been recorded in connection with the case before him, *held*, that the Magistrate ought to have allowed cross-examination: 1961 Nag.L.J. (Notes) 3.

For the purpose of contradicting witness by cross-examination, a question as to any part of statements made previously thereof may also be used in re-examination of such witness, but for the purpose only of explaining any matter referred to in the cross-examination. When the Court disallows any question on the basis that the accused or the prosecution cannot be allowed to cross-examine on account of the limitation contained in proviso of section, the Court must record a speaking order while disallowing the question: 1971 Cr.L.J. 1335 (Del.).

It has been held in A.I.R. 1966 S.C. 405 that provisions of S. 145, Evidence Act are not applicable to the parties and they are applicable to the witnesses only. As such it is not necessary to recall the plaintiff to confront him with his admission contained in his previous statement: (1990) 1 Raj.L.W. 179.

It is clear from a plain perusal of the provision embodied in S. 145 that once a person comes to occupy the position of a witness and it is found that he made two contradictory statements either in different proceedings or in two different stages of a proceeding, the provision comes into play. It is not the requirement of the provision that the witness's previous statement reduced into writing must always be made by him in his capacity as a witness or on oath. Therefore, to read such limitations or qualifications would be doing violence to its language and cannot, therefore, be imposed as pre-condition for its applicability: 1987 M.P.L.J. 475.

When it is sought to contradict a witness with reference to any statement of his not reduced to writing, the use of statements made before but brought out otherwise in evidence is legally permissible. But in all cases where the contradiction is sought to be made out with reference to a statement reduced into writing, the appropriate procedure that should be followed is one, contained in S. 145, Evidence Act. Any other procedure is not countenanced by the Evidence Act, more so as this rule of confronting a witness with a portion of the proved statement recorded by the Police Officer finds special mention in the proviso to sub-S. (1) of S. 162, Cr.P.Code: 1961 An.L.T. 914: (1962) 2 Cr.L.J. 523.

A petition of complaint filed before a Magistrate by a witness some days after the occurrence can be used not only to corroborate him under S. 157 but also to contradict him under S. 145 or to impeach his credit under S. 155: (1940-41) 45 Cal.W.N. 763: A I.R. 1941 Cal. 533. Generally, an accused must be convicted upon evidence recorded by a Judge in the course of the trial by him and previous statements made by a witness out of a Court, though repeated in Court, have only a limited purpose and effect and when

they are not repeated but denied in Court, this purpose and effect may be more limited still: A.I.R. 1944 Sind 38.

If controlled by S. 42, Cr.P.Code—Section is controlled by S. 162, Cr.P.Code: 1959 M.L.J. (Cr.) 380: (1959) 1 An.W.R. 419: A.I.R. 1960 Andh. Pra. 76 (D.B.).

In view of the provisions of S. 162, Cr.P.Code and S. 145 of the Evidence Act it is absolutely clear that the Court should faithfully record the contradictions brought out in the evidence of the witnesses and there is no question of recording the gist of the statement which will create more confusion than serving the purpose for which clear provisions have been made in the law. [1959 Cr.L.J. 1231:A.I.R. 1959 S.C. 1012, Foll.]: 1985 Cr.L.J. 1871.

A previous statement made in writing under S. 313 of the Cr.P.Code can be used for contradiction as provided under S. 145 of the Evidence Act: 1987 M.P.L.J. 475.

There is no law which governs the order in which two contesting parties are entitled to cross-examine a witness of the opposite party: (1976) 17 Guj.L.R. 1007.

Charge for offence of murder—Investigation Court, if can obtain specimen handwriting or signature of accused. *See* 1983 Cr.L.J. 1482: 1983 Kash.L.J. 166.

Previous statement in writing bore thumb-impression—Whether cannot be proved by confronting: (1981) 1 M.P.W.N. 75.

It is only when a witness denied his prior contradictory statement that it is required to be proved by its recorder; the earlier statement need not be proved unless the witness denies it and he has to be confronted with the contradictory portions of his earlier statement: (1972) 1 An.W.R. 33.

Contradictions and inconsistencies not with regard to the main occurrence, *held*, are of no consequence: 1982 M.P.W.N. 2. *See* also 1979 Jab.L.J. (Note) 7; (1978) 2 M.P.W.N. 269.

Where contradictions have been elicited, failure to exhibit the contradictions does not mean that the contradictions have not been proved: (1974) 2 Karn.L.J. (Jr.) 42 (S.N.) 141.

Statements made during cross-examination—Use of. *See* 1984 Cr.L.J. 1215: (1984) 57 Cut.L.T. 505.

Where a witness in the compensation case under S. 110-A of the Motor Vehicles Act, 1939 had fully supported the claimant's version but later on in the vehicle driver's trial in the criminal Court he resiled and deposed that the accident was caused by the rash and negligent driving of his scooter by the deceased whereafter he was recalled for further cross-examination in the compensation case where he resiled from his original testimony without having been confronted with his statement in the criminal Court, *held*, his testimony in the criminal Court could not be used to contradict his statement in the compensation case: (1986-1) 89 Punj.L.R. 92.

Where the Motor Accidents Claims Tribunal relying upon the petitioner's earlier statement in a criminal case rejected petitioner's claim for recovery of compensation though said statement was never put to the witness in cross-examination for controverting, *held*, it was impermissible for the Tribunal to use the earlier statement of the criminal case, against the petitioner without confronting him under S. 145, Evidence Act. This requirement is not only of law but of principles of natural justice and equity also that one must be allowed to explain under what circumstances he gave earlier statement and whether he at all gave it. It is more so, when victim is being deprived of his compensation on the basis of it: 1986 Raj.L.W. 689.

Disciplinary proceedings against Government servant—Use of previous statement—Procedure: A.I.R. 1960 Ori. 68.

Previous statement made by investigating officer during departmental proceedings—Accused has right to obtain copy of relevant previous statement—S. 162(1) does not prohibit such use: 1969 Cur.L.J. 686 (Punj.).

An illiterate person is not immune from the processes of law with regard to contradiction by a previous statement, because S. 145 makes not the slightest difference whether the witness is literate or illiterate: (1939) 41 Punj.L.R. 775: A.I.R. 1939 Lah. 268.

Hostile witness—Previous statements can be used to contradict him by complying with formalities laid down in the section: 1967 Cr.L.J. 1023: A.I.R. 1967 Manipur 11. *See* also (1978) 2 M.P.W.N. 47; (1977) 79 Bom.L.R. 132 (D.B.); (1985) 1 Crimes 31 (Del.) [Evidence of a so-called hostile witness is not completely effected.]

Where the witnesses, who were treated as hostile by the prosecution were confronted

with their earlier statements to the Police and their evidence was rejected as it was contradicted by their earlier statements, *held*, such use of the statements is permissible under S. 155 of the Evidence Act and the proviso to S. 162(1) of the Cr.P.Code read with S. 145, Evidence Act: A.I.R. 1979 S.C. 400.

When a witness is treated as hostile, particular portion of the previous statement must be read over and explained to the witness and the witness asked whether he had stated so in the previous statement recorded by the Police Officer. Marking of the whole statement is not contemplated under S. 145 of the Evidence Act.

Material elicited as contradiction by use of S. 145 of the Evidence Act is not substantive evidence and cannot be acted upon to base a conviction: (1982) 1 Karn.L.J. 433: 1982 Cr.L.J. 1553 (D.B.).

Even in a criminal case when a witness is cross-examined and contradicted, with the Court's leave, by the party calling him, his evidence, as a matter of law, cannot be treated as having washed off the record altogether; it is for the Court of fact to consider, in each case, whether the witness by reason of the contradiction stands thoroughly discredited or can he still be believed in respect of a part of his testimony. If the Court finds that the credit of the witness has not been completely shaken, it may, with due caution and care, and after considering his evidence as a whole, and in the light of other evidence on record, accept and act upon that part of his testimony which the Court finds to be creditworthy. But where the whole testimony of the witness is impugned and the witness in the process stands squarely and totally discredited, the Court should, as matter of prudence, discard his evidence *in toto*. [A.I.R. 1931 Cal. 401 (F.B.); A.I.R. 1927 Bom. 501; A.I.R. 1933 Mad. 137; A.I.R. 1940 Pat. 289; A.I.R. 1969 Pat. 415; A.I.R. 1955 Raj. 65; A.I.R. 1941 Oudh 130; A.I.R. 1955 N.U.C. (Punj.) 5715; A.I.R. 1964 Madh. Pra. 30; A.I.R. 1965 Ori. 31; A.I.R. 1966 Mys. 248; 1951 Ker.L.T. 471; A.I.R. 1953 J.&K. 41, Approved]: A.I.R. 1976 S.C. 294: 1976 Cr.L.J. 295: (1976) 1 S.C.C. 727: (1976) 2 S.C.R. 11.

2. Previous statement.—Previous statements can be used only for the purpose of cross-examining a witness. They cannot be admitted as evidence against an accused: 12 Cr.L.J. 214: 10 I.C. 119.

The statement of the prosecution witnesses recorded by the predecessor Assistant Sessions Judge are "former statements" of the witnesses who were subsequently examined after the *de novo* trial, though in the same proceeding. These statements can be used for contradiction under S. 145 of the Evidence Act: (1973) 39 Cut.L.T. 934: (1972) 2 Cut.W.R. 1542: 1974 Cr.L.J. 567.

Even if the evidence on commission is not read as evidence in the suit as such an evidence constitutes previous statement of the witness, it would, therefore, be available for the purposes of S. 145: A.I.R. 1972 Ori. 213: (1972) 1 Cut.W.R. 699. *See* also 1983 M.P.W.N. 59 [Whether date of stamps purchased for execution of a deed is a previous statement of the purchaser.]

3. Reduced into writing.—The expression "writing" appearing in S. 145 refers to the tangible object that appeals to the sense of sight and that which is susceptible of being reproduced by printing, lithography, photography, etc. It is not wide enough to include a statement appearing on a tape which can be reproduced through the mechanism of a tape-recorder. The record of a conversation appearing on a tape-recorder cannot be regarded as a statement in writing or reduced into writing. The record which appears on a tape-recorder cannot fall within the ambit of the definition of "writing" as given in S. 3 (65), General Clauses Act, 1897: A.I.R. 1956 Punj. 173: (1956) 58 Punj.L.R. 441.

Tape-recorded statements—Cannot be taken as reliable without examination of person concerned: I.L.R. (1962) 2 Punj. 642: A.I.R. 1963 Punj. 298.

A tape-recorded conversation, comparable as it is to a photograph, is admissible under S. 8 provided it is relevant and the voice has been identified and the accuracy of conversation has been proved by eliminating the possibility of erasure of the recorded tape. But where in a divorce proceeding on the ground of the wife's mental disorder, the tape-recorded conversation produced by the husband contained the wife's admission about her ailment when there was not even a remote reference to the recorded conversation in the petition and there was no explanation by the husband even in his statement of the circumstances and the manner in which the conversation was recorded apart from the husband's testimony that the recorded

female voice was that of the wife nor was her voice compared by recording it in the Court nor the husband could tell the durations of different intervening intervals between recordings of the conversation, *held*, the tape could not be used as evidence either to prove her admission or for shaking her veracity in her cross-examination. [A.I.R. 1968 S.C. 147, Foll.]: A.I.R. 1985 P.&H. 128: (1985) 1 Hindu L.R. 378: 1985 Marriage L.J. 42.

The Court can direct a party to the suit to give his voice in tape-record for comparison. [(1981) 83 Punj.L.R. (Del.) 154, Dissent.; (1969) 71 Punj.L.R. 519, Foll.]: (1985-2) 88 Punj.L.R. 41.

Where the eviction order passed by the Rent Controller and upheld in appeal by the Tribunal was based on photographs without their negatives having been produced and proved, *held*, the photographs were inadmissible and, therefore, they could be discarded in second appeal and the other remaining evidence could be appreciated afresh: (1992) 48 Del.L.T. 65.

Photographs of scene of occurrence taken by Investigating Agency—All photographs sent to expert and his opinion obtained—Some of the photographs not supplied to accused—Defence is likely to suffer at the time of cross-examination: 1983 Cr.L.J. 864: (1983) 25 Del.L.T. 254.

In order that previous statement reduced to writing may be used for the purposes of cross-examination under S. 145, it is not necessary that it must have been reduced to writing by a person having jurisdiction to do so: I.L.R. 24 Pat. 623: A.I.R. 1946 Pat. 82. The section contemplates a statement which is either written by the witness himself or which was reduced into writing by someone else: A.I.R. 1969 Andh. Pra. 148.

4. "Statement"—Meaning of.—*See* A.I.R. 1959 S.C. 356, cited under S. 157.

The term "statement" is not defined anywhere in the Evidence Act. It has a wider connotation. The section itself contemplates a statement which is either written by the witness himself or which was reduced into writing by some one else. It would not, therefore, be proper to construe the expression "statement" in a narrower way. That would defeat the very purpose of S. 145. It is, therefore, clear that even the statements which are not fully recorded or statements which are recorded in the form of memorandum are statements falling within the ambit of S. 145 of the Evidence Act: (1970) 1 An.W.R. 90: A.I.R. 1969 Andh. Pra. 148.

A "statement" not only includes what is expressly stated therein but what are necessarily implied therefrom. It must be deemed to contain by implication even omissions provided they can by construction be deemed to be part of the statement in writing itself: A.I.R. 1959 S.C. 1012: 1959 Cr.L.J. 1231.

5. Contradiction by omission.—All omissions found in the statements made to the Police are not contradictions and, hence, it is not open to the Court to make use of such omissions to show that the witness had said in the Court something which he did not say before the Police: A.I.R. 1958 Andh. Pra. 571: (1958) 2 An.W.R. 365: 1958 M.L.J. (Cr.) 797.

Contradiction—What amounts to—Every omission in statement under S. 162, Cr.P. Code is not contradiction: I.L.R. (1964) Cut. 752: (1965) 1 Cr.L.J. 317: A.I.R. 1965 Ori. 33.

To find a contradiction by omission, the Court should ascertain whether the two statements cannot stand together and whether the statement made by the witness in the witness-box should have been made by him while reporting the matter soon after the incident. If the two statements cannot stand together and the statement in the Court is such that the witness should necessarily have made at the time of his earlier statement, *held*, only then can the omission be considered to be a contradiction. Before using a prior statement of a witness to contradict him, his attention should be drawn to its relevant portion and he should be given an opportunity of explaining any apparent discrepancy; this is all the more so in the case of a contradiction by omission: 1985 Cr.L.J. 1933.

It is only a contradiction with the statement under S. 161, Cr.P.Code which can be legally proved and utilised by the accused and not an omission. Therefore, when the so called improvement made by the witnesses in their testimony in Court came within the purview of "omission" and were not contradictions, *held*, his testimony could not be discarded on that ground: 1993 Cr.L.J. 1736 (All.) (D.B.).

Merely because the prosecution had raised no objection and allowed the

questions and answers relating to contradiction by omission to come on record, *held*, the matter is thereby not concluded; it is open to the prosecution to contend and the High Court to go behind it and accept in appeal that the answers were factually or legally not tenable: 1991 Cr.L.J. (N.O.C.) 25 (Ker.) (D.B.).

Where a witness was sought to be contradicted with reference to first information report and also case diary, it was necessary that omissions sought to be elicited in the statement of the witness with reference to said two documents were separately put to the witness and putting questions about omission with reference to two documents at the same place could lead to confusion: 1990 Cr.L.J. 1017 (Madh. Pra.).

Omissions in statements of prosecution witnesses to Police cannot be regarded as contradictions but serious and glaring omissions can be relied upon as relevant circumstances: 1989 Cr.L.J. 1876 (Gau.).

Some omissions in the evidence of the witness, which even did not amount to contradiction, *held*, cannot be given too much weight: 1990 Cr.L.J. 839: 1989 All.L.J. 454 (D.B.).

Where the Magistrate used omissions and contradictions without giving opportunity to explain them, *held*, appreciation of evidence was faulty: (1985) 2 W.L.N. 451: 1985 Raj.L.W. 502.

Though a witness was asked question regarding his previous statements made in other cases, and he expressed ignorance about these, but he was never confronted with those statements, he cannot be condemned as unworthy of credit. When as a matter of fact most of the cross-examination of the witness was based on an attempt to prove omissions made by the witness in his earlier deposition before the Police, the trial Court should not have allowed the earlier statements of the witness before the Police to be used for that purpose: 1976 Kash.L.J. 253: 1976 Cr.L.J. 1310 (D.B.).

Where High Court outrightly excluded a material omission which did not amount to contradiction, from duly proved previous statement's of the witness from consideration, *held*, neither proof nor use of such omission was barred by S. 145. The High Court was in error in ignoring such omission: A.I.R. 1974 S.C. 308: 1974 Cr.L.J. 369: (1974) 3 S.C.C. 704.

6. Previous statement must be put to witness.—Where a previous statement of a witness is sought to be used for contradicting him, the statement should be put to him and the witness questioned as to draw out from him whether there was any truth in the statement: I.L.R. (1952) Nag. 700: A.I.R. 1953 Nag. 154; A.I.R. 1915 P.C. 7.

A witness may be cross-examined as to previous statements made in writing or reduced to writing without such writing being shown to him; but if it is intended to contradict him by the writing, it is necessary under S. 145 to draw his attention before the writing can be proved to those parts of it which are to be used for the purpose of contradicting him. If the records of the previous trial are before the Magistrate, there is nothing to prevent the parties to the proceeding from making the use of the original records. As a matter of fact in such cases, only the original records should be used; and they can be dispensed with only when it is proved that secondary evidence is allowable. It is not necessary to require the party to produce certified copies of the statement before Court. When the records are there, it is the duty of the Magistrate while regulating the procedure of his own Court, to refer to the record of the previous statement himself, and see whether there is any contradiction between the statements then made and the evidence now given before him. Where the trial Court does not give the accused the benefit of the contradictions sought to be brought on record with the help of statements of the witnesses in a previous trial, the record of which was before the same Magistrate, it vitiates the procedure that is followed at the trial and the defect is of such a character as to enable the High Court to hold that it has resulted in miscarriage of justice: 1957 All.W.R. (Supp.) 52; (1956-57) 61 Cal.W.N. 339: A.I.R. 1958 Cal. 186.

To cross-examine a witness on a previous deposition with a view to discrediting him, the attention of the witness must be drawn to those discrepancies so that he may have the chance of explaining them. In such a case it is not proper for the Judge to stop the examination and have the whole deposition filed with a view to discrepancies being pointed out at the time of argument: A.I.R. 1931 Lah. 38; 1928 Mad.W.N. 789. The passage are to be specifically referred to: 12 R.D. 312: A.I.R.

1928 All. 511. There is no duty cast upon Counsel who wishes to cross-examine a witness by putting to him a previous statement, first to prove that statement, S. 145 has to be read with S. 162, Cr.P.Code, and quite clearly indicates that the attention of a witness is to be called to the previous statement before the writing can be proved. If the witness admits the previous statement, or explains any discrepancy or contradiction, it obviously makes it unnecessary for the statements thereafter to be proved. On the other hand, if the statement still requires to be proved that can be done by calling the person before whom it was made: I.L.R. (1939) Lah. 509: A.I.R. 1939 Lah. 268. *See* also A.I.R. 1958 All. 445; A.I.R. 1958 Tripura 1.

There can be no hard and fast rule as regards the compliance with the requirements of S. 145. All that is required is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner. The matter is one of substance and not of mere form. Thus, where the witness is questioned in the cross-examination under the first part of the section about every material passage in his previous statement, point by point, there is a substantial compliance with what S. 145 requires, even though at the stage of acting under the second part, the attention of the witness is not drawn to the passages which are to be relied upon for contradiction: A.I.R. 1952 S.C. 214: 1952 Cr.L.J. 1131; A.I.R. 1942 Cal. 277.

Deposition not read over to witness as required by S. 360, Cr.P.Code: I.L.R. 6 Pat. 478: A.I.R. 1927 Pat. 315. Replication filed by a party under O. 6, R. 5, C.P.Code: (1939) 41 Punj.L.R. 652: A.I.R. 1939 Lah. 529. Attention of complainant to be drawn to statement used in cross-examination to contradict: 31 I.C. 354: (1915) 17 Bom.L.R. 59.

In a case where some passage here and there differed from the later version of the witness, the procedure, of putting every passage which differed from her testimony in the Court of Sessions with a view to affording her an opportunity of explaining why she had made a contrary statement, would have been necessary. But where the witness admitted that her statement, which was read to her fully, was truly recorded in the committal Court and that she only denied that it was the statement, because she said that she was made to depose that way by the Police, it would have been useless to point out the discrepancies between the two statements because her explanation would have been the same. In these circumstances, the requirements of S. 145 of the Indian Evidence Act were fully complied with and the earlier statement could be read as evidence in the Sessions trial.

It would be impossible to think that Police could exert pressure to make successive statements to the Police, then to the Magistrate under S. 164 and then to the committal Court. It may be the other way: A.I.R. 1970 S.C. 1305.

According to S. 145, if it is intended to contradict a witness, he must be cross-examined as to the previous statement in writing and his attention must be drawn to those parts of the previous statements by which it is intended to contradict him in order to enable him to explain the inconsistency between the statement in Court and the previous statement. Even where this course is followed, the previous statement, unless relevant under some section of Chap. II of the Evidence Act is not substantive evidence and is admissible only for the purpose of impeaching the credit of the witness: A.I.R. 1950 Raj. 10. *See* also I.L.R. (1946) Nag. 946: A.I.R. 1946 Nag. 321.

The statement of a witness abstracted in a judgment can be used only in one of two ways, either under S. 145 to contradict the witness, or as an admission under S. 21. For the former purpose, it is incumbent upon the party examining the witness, before proving the writing to call his attention to those parts of it which are to be used for the purpose of contradicting him. This is an essential step in the procedure, the omission of which is likely to cause grave injustice: I.L.R. 53 Mad. 952: 60 M.L.J. 13. *See* also 170 I.C. 315: (1937) 39 Punj.L.R. 200: A.I.R. 1937 Lah. 480.

Where a previous statement of a witness is sought to be used for contradicting him, all that is required under S. 145 is that the witness's attention must be called to the particular portion of the previous statement which is sought to be relied upon: 1962 Jab.L.J. 796: A.I.R. 1963 Madh. Pra. 155.

Where the whole of the previous statement made by the witness is read out to him

and he is cross-examined in respect of it but he gives evasive replies, S. 145 is fully complied with although the witness is not specifically asked about particular portions of that statement: (1938) 40 Punj.L.R. 471.

The admitted previous statement of a witness can at best be used to contradict him in the cross-examination of such a witness when he gives evidence in the trial Court in the manner provided in S. 145. The attention of the witness should be called to those parts of the previous statement which are to be used for the purpose of contradicting him. When the witness is contradicted in the aforesaid manner, then that part of the statement which have been put to the witness will be considered alongwith the evidence to assess the worth of the witness in determining his veracity. The whole of the previous statement, however, cannot be treated as substantive evidence: A.I.R. 1971 S.C. 1910: 1971 Cr.L.J. 1429.

Even where a witness is confronted by his previous statement and given an opportunity to explain, that part of the statement that is put to him does not constitute substantive evidence: A.I.R. 1971 S.C. 2256.

Once a party accepts his earlier statement, made in an earlier proceeding, it becomes a substantive piece of evidence of the facts admitted therein in view of S. 17 and S. 21; what weightage is to be attached to such a statement is a different matter. Before using such a statement, it is not required to be put to its maker to provide him an opportunity to explain it when he appears as a witness or by calling him as a witness: 1993 Cr.L.J. 1008 (Him. Pra.).

Where a witness has made in Court a statement inconsistent or conflicting with his previous statement under S. 161 of the Code of Criminal Procedure and it is intended to contradict him with such statement, the relevant portion of his previous statement should be read out to him and he should be asked if he had previously made that particular statement. If the witness admits having made such statement, no further proof of that statement is necessary, but if he denies, or says he does not recollect having made it, that portion of his previous statement should, subject to its proof at a subsequent stage, be marked and exhibited and the witness confronted with it; the witness must also be called upon and afforded an opportunity to explain the contradiction or reconcile the discrepancy pointed out to him.

Under S. 162 of the Code of Criminal Procedure read with S. 145 of the Evidence Act, it is only that portion of the statement which is used for contradicting the prosecution witness that can be proved or admitted into evidence and not the entire previous statement. The practice of exhibiting the entire statement is illegal.

Each statement of fact occurring in the previous statement of a witness, which is found to be inconsistent with the statement made by him in Court should be put separately and point by point to the witness and he be confronted with his previous statement on those points so as to afford him an opportunity to explain contradictions. The practice of putting a long statement to the witness containing several facts, or mere reading out the whole statement, may confuse the witness thus, defeating the very purpose of the wholesome provision regarding confrontation contained in S. 145: (1972) 74 Punj.L.R. 387; 1971 Cr.L.J. 1422.

Unless the particular matter or point in the previous statement sought to be contradicted is placed before the witness for explanation, the previous statement cannot be used in evidence. In other words, the drawing of the attention of the witness to his previous statement sought to be contradicted and giving of all opportunities to him for explanation are compulsory. Where there was nothing on the record to show that the previous statement of the witness was placed before him and that the witness was given the chance for explanation, and further his previous statement was not marked and exhibited, *held*, his previous statement before Police could not be used: 1989 Cr.L.J. 1876 (Gau.) (D.B.).

Where the Sessions Judge did not bring to the notice of the witnesses relevant portions of the case diary to contrâdict their evidence but only the beginning and end of the portions with some dotted lines in between were put in inverted commas to which the attention of the witnesses was drawn, *held*, though it is a practice of some Judges for reducing the burden of writing, it needs to be deprecated: 1990 Cr.L.J. 1059: (1989) 1 Ker.L.N. 462 (D.B.). But where practically the entire case diary statement was read over and the witness denied each and every such statement

but the trial Court did not extract the entire statement in the deposition but only its portions in the beginning and at the end, connecting the two portions with dots but at the same time it noted that the statement has been read over and marked, *held*, the procedure adopted amounted to substantial compliance with the requirements of S. 145: 1990 Cr.L.J. 1477: (1990) 1 Ker.L.T. 21 (D.B.).

It is really a matter of substance and not of form that the conditions of S. 145 must be complied with. The whole purpose of the second part of S. 145 is that before the credit of a witness is set aside and his testimony is overthrown because of repugnancy of his evidence, every circumstances intended to be used as a contradiction must be put to him in order that his attention may be drawn separately to every part of his previous statement which is intended to be used for the purpose of contradiction. This is required in fairness to the witness so that a reasonable opportunity of explaining the contradictions may be afforded to him in a reasonable manner. But there cannot be a hard and fast rule about this matter and the Court must see whether there has been a substantial compliance. It cannot be said that a contradiction brought on record is inadmissible just because there has occurred a slight deviation from the usual procedure, that is, marking the statements as "*A* to *A* "or "*B* to *B*". If it can be gathered from the answers given by the witness in the particular context of the portions sought to be used for the purpose of contradiction that those portion were in the mind of the witness and he tried to explain them, it cannot be said that there is want of compliance with S. 145: 1964 M.P.L.J. 797: (1964) 1 Cr.L.J. 455.

When the prosecution cross-examines his witness and asks whether he made certain statements before Police during investigation or before a Magistrate under S. 164, Cr.P. Code and the witness denies it, it is the duty of the prosecution to confront him with those statement or get them marked as exhibits so that the witness might be afforded an opportunity either to explain the contradiction or deny them: 1966 Cr.L.J. 1155: A.I.R. 1966 Mys. 248. *See* also 1983 M.P.W.N. 172.

Inconsistency between complainant's evidence and complaint petition on a point—Complainant's attention not drawn to such inconsistency—Effect—Complainant's evidence on such point corroborated by prosecution and even defence witnesses—Concurrent finding of fact of both lower Courts on such point in favour of complainant—In revision, defence cannot take advantage of such inconsistency: 1969 Cr.L.J. 432: A.I.R. 1969 Ori. 59.

Where in a case of adultery, the judicial Magistrate in passing impugned order of discharge in favour of accused relied upon the fact that in his earlier case the petitioner did not state that the opposite party committed adultery with his wife, *held*, Magistrate was not justified in relying upon the same without taking recourse to S. 145. Under the said section before any witness was to be discredited with reference to a contradictory statement made by him earlier, it was incumbent on the part of the accused to draw his attention to the previous statement by which he was to be contradicted to enable him to give an explanation: (1983-84) 88 Cal.W.N. 325.

In respect of documents used for purpose of contradiction.—Where documents are desired to be used for the purpose of contradicting a witness under S. 145, they should be filed immediately after the examination of the witness and his attention must be drawn to them before they could be proved. It is not permissible to prove them at a hearing subsequent to the examination of the witness: 1944 R.D. 349.

A witness cannot be disbelieved without his attention being drawn to the documents inconsistent with his deposition even though the documents were produced after his examination. In such a case he should be recalled for further cross-examination: A.I.R. 1923 P.C. 95.

A document which is used to contradict a witness must be put to the witness. Simply because the witness does not go into the witness-box, the Court is not entitled to break the law and admit such document: 150 I.C. 841: A.I.R. 1934 Pat. 55(2). *See* also 1982 M.P.W.N. 162.

Where certified copy of the deposition in the criminal Court was filed after the evidence in a civil suit was closed and argument concluded and judgment was reserved and though the order sheet recorded that the witness was confronted with the same, it was not clear that said document was proved in accordance with law as the original records

did not appear to have been produced or that the witness was recalled and put on oath before confrontation which was made on the same day the document was filed and there was no record of the witness's reaction on confrontation, *held*, said document could not be admitted as substantive evidence and relied upon. [A.I.R. 1915 P.C. 7; A.I.R. 1952 S.C. 214, Rel. on; A.I.R. 1966 S.C. 405; A.I.R. 1970 S.C. 1305, Disting.]: A.I.R. 1971 Cal. 494: (1971-72) 76 Cal.W.N. 17 (D.B.).

Before a previous statement of a witness in writing can be used to contradict his evidence, his attention must be specifically drawn to the statement sought to be used under S. 145.

That is, however, necessary only if the document containing the statement becomes relevant solely under the section and is otherwise irrelevant and inadmissible. If the document is otherwise relevant and admissible as an admission under S. 21 of the Act, it is not necessary to observe the provisions of S. 145 before using it: 165 I.C. 805: 17 Pat.L.T. 621: A.I.R. 1936 Pat. 588. *See* also 1939 M.L.R. (Cr.) 76.

Use of document against witness—Opportunity should be given to him to explain to clear up the particular point of ambiguity or dispute: A.I.R. 1962 Ori. 11.

There is no conflict between Ss. 91 and 145 of the Evidence Act and S. 49 of the Registration Act; S. 145 of the Evidence Act is meant for a totally different purpose; its first part permits putting of relevant oral questions in cross-examination without showing the writing to the witness or proving it; but if it is intended to contradict him with any of its part, it may be done so provided it is not inadmissible for want of registration; if it is so admissible, it may be proved; the bar of S. 92 would not be attracted in such a case: A.I.R. 1974 P.&H. 350 (D.B.).

If a document purporting to grant a perpetual lease of property contains a narration of facts and has been registered, it could be used only under S. 145 of the Evidence Act for contradicting the statement of a witness; but if it is unregistered and cannot create any legal right, it is inadmissible to establish any such right in view of S. 49 of the Registration Act: (1986) 2 Kam.L.J. 390 (D.B.).

Where the objection to be taken is not that document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof. A strictly formal proof might not have been forthcoming had it been insisted on at the trial: A.I.R. 1943 P.C. 83: 1943 All.L.J. 292.

Where the Counsel for the plaintiff allowed a document to be exhibited in the trial Court with the endorsement, "formal proof dispensed with", *held*, it amounts to dispensing with not the formal proof of its executant's signature or thumb-impression but also of its contents; the long and extensive practice in the trial Courts bears out the position that on such endorsements, the parties take it for granted that the party relying upon the document is absolved of adducing formal proof of the document; such an endorsement is not half-hearted; it comprehends the entire document, such an untramelled endorsement is taken as having been made with full realisation of its legal consequences; the document becomes admissible as a whole. [A.I.R. 1957 All. 1 (F.B.); A.I.R. 1971 S.C. 1949; A.I.R. 1972 S.C. 608, Foll.]: A.I.R. 1982 All. 376 (D.B.).

Suit on handnote—Denial of debt but admission of signature on blank paper—Admission of debt contained in affidavit of defendant filed in prior case—Use of—Conditions. *See* 17 Pat.L.T. 621: 165 I.C. 805: A.I.R. 1936 Pat. 588. Non-compliance with provisions of the section, effect: 152 I.C. 425: A.I.R. 1934 Rang. 273. *See* also 11 O.W.N. 568: A.I.R. 1934 Oudh 229; 152 I.C. 873: A.I.R. 1934 All. 956.

A letter written by a witness is no evidence of the facts therein stated. The only legitimate use to which it could be put would be to use it in cross-examination for the purpose of discrediting the witness if what the witness had written was inconsistent with the evidence given by that witness: 1945 O.W.N. 287: A.I.R. 1945 P.C. 174 .

Where in an eviction case on the ground of *bona fide* requirement, the tenant pleaded that one G had negotiated and executed an agreement for sale of the demised property on behalf of the landlord with the tenant in

his own handwriting and *G* denied the writing when confronted in cross-examination but the tenant's request for sending agreement to a handwriting expert was declined by the trial Court on the ground that the agreement was being used only for the limited purpose of impeaching the credibility of the witness by confronting him with his previous inconsistent statement, *held*, the agreement was not limited to such purpose alone; it was a substantive evidence against the landlord for proving not only that it was in *G*'s writing but also that he was acting as the landlord's authorised agent; case remanded: A.I.R. 1977 Karn. 113: (1977) 1 Karn.L.J. 87.

Where the rent receipt was not put to its author in his cross-examination to contradict the witness because the party cross-examining him was not aware of its existence and the receipt was filed later in examination of another witness who was not the tenant named in the receipt, *held*, the receipt was inadmissible to contradict the testimony of its author; it was the duty of the cross-examining party to recall the witness for cross-examining him in respect of the receipt under O. 18, R. 17 of the Code of Civil Procedure. [A.I.R. 1923 P.C. 95; A.I.R. 1956 S.C. 738; A.I.R. 1947 Bom. 156, Rel. on]: A.I.R. 1972 All. 219 (D.B.).

Writer of letter marked as exhibit giving evidence in Court—Endorsement on back of letter containing a statement contradictory to that given in Court—Attention of such witness not drawn to such endorsement—Endorsement cannot be used in evidence: A.I.R. 1963 Pat. 153.

7. Writing containing statement need not come from proper custody.—There is nothing in the Evidence Act to show that a document, which is meant to contradict a witness or impeach his credit, must come from proper or legitimate custody. So a question to the prosecution witness in cross-examination with reference to the contents of a letter alleged to have been written by him to another asking the latter to depose to a certain effect cannot be disallowed on the ground that it had not been proved to have come from proper custody: 16 Nag.L.J. 198: 36 Cr.L.J. 1162. *See* also 174 I.C. 678: A.I.R. 1938 Pesh. 18.

8. Witness not to be contradicted by statement of third party.—The two contradictory statements must have been made by one and the same person. Statement made by one person cannot be contradicted by the statement of another under S. 145: (1991) 1 Ker.L.T. (S.N.) 16 (Case No. 20): I.L.R. (1991) 2 Ker. 544; A.I.R. 1968 S.C. 1281; A.I.R. 1924 Mad. 537.

Maker of statement alone and no one else can be contradicted with his previous statement: 1966 Cr.L.J. 343 (Pat.).

The previous contradictory statement of witness can be used only to contradict and discredit its maker. It cannot be used to impeach or undermine the credit of other witnesses. Thus, where previous inconsistent statement of a witness was used by the trial Court against the credit of other witnesses, *held*, the trial Court was in error in doing so: A.I.R. 1976 S.C. 1421: (1976) 2 S.C.C. 836: 1976 Cr.L.J. 1162.

It is obvious from a perusal of S. 145 that it applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding. If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statement under S. 145. Thus, where the statement made by a person or witness is contradicted not by his own statement but by the statement of another prosecution witness, the question of the application of S. 145 does not arise. To illustrate, we might give an instance—Suppose *A*, a prosecution witness, makes a particular statement regarding the part played by an accused but another witness *B* makes a statement which is inconsistent with the statement made by *A*, in such a case S. 145 is not at all attracted. [A.I.R. 1974 S.C. 117, Rel. on]: A.I.R. 1982 S.C. 839: (1982) 2 Bom.C.R. 316: (1982) 1 S.C.C. 700; 1982 All.W.C. 242: 1982 All.Cr.R. 156.

9. Contradiction by admission.—An admission is the best evidence that an opposite party can rely upon and though not conclusive is decisive of the matter unless successfully withdrawn or proved erroneous. Previous statements containing the admissions even if not confronted to the party are admissible against him in the suit: (1972) 2 Cut.W.R. 1842; 1983 All.L.J. 1382.

A duly proved admission, even if its maker appears as a witness or not or has been confronted with it or not, is admissible in evidence. The purpose of contradicting the

witness under S. 145 is quite different from the purpose of proving the admission; an admission is substantive evidence of the fact admitted while a previous statement used to contradict the witness is not; the latter only throws doubt on the veracity of the witness; but the weight to be attached to an admission as evidence is an altogether a different thing: (1972) 38 Cut.L.T. 161.

S. 145 is based on the principle that the previous statement does not constitute substantive evidence; the law enunciated by certain High Courts previously that an admission cannot be used against a party unless it is put to him and an opportunity is afforded to the party to explain it, is no longer the law in view of the decision in A.I.R. 1966 S.C. 405. The purpose of contradicting a witness under S. 145 is very much different from proving an admission; an admission is substantive evidence of the fact admitted while the previous statement used to contradict the witness merely throws doubt on his veracity; thus, S. 145 is not attracted to admissions; it is open to the Court to reject their exculpatory parts and admit their inculpatory parts: (1995) 1 An.L.T. 511; A.I.R. 1977 Karn. 113: (1977) 1 Karn.L.J. 87.

It is not the requirement of law that before prior admission of a party is received it should have been put to him or his attention should have been drawn to it as in the case of prior admissions of witnesses. But while considering the probative value to be attached to such admissions, it is necessary that the same be brought to the notice of the maker, if he is a party to the proceedings, and his views taken note of for what it is worth: 1983 Hindu L.R. 11 (Karn.).

Previous statement by the plaintiff making an admission on the relevant question in issue may be proved and accepted as substantive evidence without the previous statement being put to him.

As regards witnesses examined on behalf of the plaintiff, under S. 145, of the Evidence Act, they can be contradicted by their previous statements. It is clear that the previous statements of witnesses who are not parties can be only used for the purpose of contradiction and not as substantive evidence: (1973) 1 Cut.W.R. 351: (1973) 39 Cut.L.T. 589.

There is a cardinal distinction between a party whose prior admission is to be proved as a substantive evidence and a witness who is sought to be discredited by confronting him with his prior statement which is not a substantive evidence. In the former case, the admission being evidence *proprio vigore* need not be put to the party; in the latter case, the witness cannot be disbelieved unless he has been confronted with his prior statement: A.I.R. 1966 S.C. 405, Foll.]: A.I.R. 1974 S.C. 117: (1974) 1 S.C.C. 78: (1973) 2 S.C.W.R. 637.

Previous admissions of a party can be taken into account against him even if he was not confronted with the same when he appeared in the witness-box in the subsequent proceedings. [A.I.R. 1946 Lah. 65 (F.B.) held to have been disapproved in A.I.R. 1966 S.C. 405]: A.I.R. 1971 P.&H. 177 (D.B.).

The object of S. 145 is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the broad point of ambiguity or dispute; but this procedure does not apply to admissions in view of Ss. 17 and 21. The purpose of contradicting the witness under S. 145 is quite different from the purpose of proving the admission. [A.I.R. 1966 S.C. 405, Rel. on]: A.I.R. 1971 Pat. 215 (D.B.).

Admissions are substantive evidence by themselves, though they are not conclusive proof of the matters admitted. The admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness-box or not and whether such party when appearing as witness was confronted with a statement made contrary to its previous admissions. [A.I.R. 1966 S.C. 405, Rel. on]: A.I.R. 1971 Pat. 215 (D.B.).

The rule of evidence that "admission is not conclusive proof" is to be considered in regard to two features: (1) what weight is to be attached to the admission for which purpose it has to be found out whether the admission is clear, unambiguous and relevant piece of evidence; and (2) even if the admission is so proved and is intended to be used against the party making the admission that party if under cross-examination as a witness to tender its explanation and to clear up the point of ambiguity or dispute; this being a general salutary and intelligible rule, a mere proof of the admission after that party has concluded his evidence, will be of no avail and cannot be utilised against it: A.I.R. 1977 S.C. 1712: (1977) 2 S.C.C. 49: (1977) 2 S.C.R. 671.

The decision in A.I.R. 1946 Lah. 65 (F.B.) does not give due weight to the difference between the language of Ss. 17 and 32 on the one hand and of S. 145 on the other. S. 145 specifically requires that a previous statement made by a witness in writing or reduced into writing, could be used in cross-examination if it is intended to contradict him by drawing his attention to those portions of the writing which are to be used for the purpose of contradicting him. There is no similar provision with regard to statements which are admissible under Ss. 17 to 21 and 32. This view finds support from A.I.R. 1957 All. 1 (F.B.) in which it was observed that when admissions made by parties were to be proved in a case, it was not obligatory on the party who produced those documents to draw in cross-examination the attention of the opponent to the said admissions before he could be permitted to use them for the purpose of contradicting the opponent provided that the admissions were clear and unambiguous. It was also held that the party producing such document containing such admissions could use them as substantive evidence in the case without drawing in cross-examination the attention of the opponent to those admissions: A.I.R. 1973 Mys. 280 (D.B.).

If admission is proved and if it is thereafter to be used against the party who has made it, the question comes within the provisions of S. 145: A.I.R. 1977 S.C. 1712: (1977) 2 S.C.C. 49: (1977) 2 S.C.R. 671.

Where an admission is not put to the party making it and the party making it is not examined on it under S. 144, the admission is not legal evidence and cannot be used against the party making it: A.I.R. 1930 Lah. 695; A.I.R. 1934 Lah. 750; A.I.R. 1934 Lah. 753.

Where the object of trying to prove certain documentary admissions is to utilise those admissions to prove a party's case and not to contradict the persons making the admissions, S. 145 could have no application. The admission in question could be proved according to the provisions of S. 67 by the production of other witnesses: 1941 O.A. (Supp.) 420: 1941 All.L.J. (Supp.) 89.

Admission by plaintiff in previous suit—Binding on him in fresh suit, unless rebutted: A.I.R. 1968 Cal. 550.

Admission in plaint in previous suit—Party appearing as defendant in subsequent suit but not examined as witness—S. 145 cannot be invoked but previous statement can be proved as admission against such party under S. 21: I.L.R. (1962) Cut. 422: A.I.R. 1963 Ori. 45.

Statement of a witness made in previous case—Use of it in subsequent case to contradict him or impeach his character—Before so using it, the party should be allowed to draw the witness's attention to his previous statements: 1970 Cr.L.J. 350: A.I.R. 1970 Pat. 95: 1970 B.L.J.R. 926 (D.B.).

Without complying with the procedure laid down in S. 145, an admission contained in a previous statement cannot be used as a legal evidence against a party: (1945) 47 Punj.L.R. 391: A.I.R. 1946 Lah. 65 (F.B.). *See* also A.I.R. 1955 All. 361; A.I.R. 1955 Cal. 206.

Statements made in a previous litigation cannot be treated as substantive evidence in the subsequent case; they can only be made use of under S. 145 to contradict the maker of the previous statements if he deposes as a witness in the subsequent proceedings: (1991-2) 100 Punj.L.R. 178.

Admission in prior proceedings—Mutation petition—Admission by party adverse to the position taken by him in the suit is admissible against him—He need not be confronted with it while in the witness-box—Difference between purpose of proof of admission and earlier contradictory statement: I.L.R. (1966) Cut. 483.

Where in a partition suit, the defendant's admission contained in an earlier agreement for partition that the vehicle was a joint family property was not put to any of the defendants when they deposed at the trial, *held*, the admission would go in as substantive evidence and could be relied upon by the Court. [A.I.R. 1966 S.C. 405; A.I.R. 1974 S.C. 117, Foll.]: A.I.R. 1986 Cal. 390: (1985-86) 90 Cal.W.N. 1018 (D.B.).

Contradiction by reference to previous admission—Document containing previous admission cannot be used against party unless opportunity to explain is given: (1964-65) 69 Cal.W.N. 210: A.I.R. 1965 Cal. 328.

The object of S. 145 is to afford an opportunity to the witness to explain his previous statement when it appears to be contradictory to his deposition made in the witness-

box. Where the witness, having more than one opportunity to explain his statement in a previous suit, does not avail himself of it, his deposition in the previous suit is admissible to prove an admission made by him in the previous suit: 1962 Jab.L.J. 796: A.I.R. 1963 Madh. Pra. 155.

Admission is substantive evidence even though party is not confronted with the statement—Weight to be attached to it is different matter: A.I.R. 1966 S.C. 405.

The rule as to confrontation does not and should not apply to admission in so far as they are relevant facts in themselves. As admissions, they carry an inherent evidentiary value of their own. If a party is proved or admits to have made an admission, it is his duty to explain it and not for the other party to call him to explain the same. Thus, where in an election dispute on the ground of disqualification as to age of the candidate, his case at the trial was that the entries in school records in respect of his age were made by the school authorities at the instance of his father but that they were made incorrectly, because his father was illiterate, no question could arise of contradicting him so far as the factum or the origin of those entries was concerned. It was, therefore, not necessary to confront him with the documents before using them in evidence. Besides, where the candidate himself had referred to some of the documents in his examination-in-chief it could not be said that his attention was not drawn to them. In such a case no prejudice could have been caused to him. In the circumstances, S. 145 was not attracted: I.L.R. (1964) 14 Raj. 26: A.I.R. 1964 Raj. 126.

Where in a civil case, a document containing an admission has already been admitted by the opponent in his examination-in-chief, it can be used to contradict the testimony subsequently given by him in the witness-box without drawing his attention to the admission. It is for the maker to come forward and explain it away in his examination-in-chief. Where the admission in a previous statement by a witness falls within the purview of S. 21, it does not require further proof when the statement is admitted by the witness. It is substantive evidence and it is not obligatory to draw the attention of the witness to the admission during his cross-examination: 1962 Jab.L.J. 796: A.I.R. 1963 Madh. Pra 155.

Previous statement of parties—One of them not examined—Admissibility of statement as admission. *See* A.I.R. 1957 Ori. 104.

Document containing admission by opponent—Document admitted by opponent's Counsel—Whether admission should be put to opponent before using it against him for contradiction. *See* A.I.R. 1957 All. 1.

If an admission of a party is contained in a document then under S. 145, such an admission is not admissible unless it has been put to the party for whom he appears as a witness. English authorities seem to go further and would apply this rule even to oral statements and even though the law in India may not go so far as to apply this rule of confronting to the extent that it has gone in England there is no doubt that the weight of authorities seems to be that a witness or a party who appears in a witness-box should be given an opportunity to explain any previous statement which he has made and which is contrary to his statement made in the Court and where this is not done, such previous oral admission, even though not hit by S. 145, would be of little evidentiary value: (1950) 52 Punj.L.R. 287: A.I.R. 1950 East Punj. 291. *See* also A.I.R. 1957 Pat. 293.

Document admitted "subject to all just exceptions" within O. 12, R. 2—Admission limited for purpose of doing away for formal proof of document—Requirements of Evidence Act not done away with: 1963 All.L.J. 680: A.I.R. 1964 All. 345.

Document containing admission—Use of by one party against other who is examined as witness—Procedure: (1959) 2 An.W.R. 7.

Though an admission made by legal adviser can be proved against a party if he does not appear in Court as a witness, for complying with the provisions of S. 145 of the Evidence Act, nevertheless, when he appears as a witness and examines himself, he should be given an opportunity of explaining such an admission before it can be used against him. Rules of natural justice also require that a party should not be prejudiced by any admission made by his legal adviser unless he is given an opportunity to explain the same, especially when he had come to the witness-box and examined himself: I.L.R. (1963) Cut. 901.

10. Use of statements in police diary.—It is open to the prosecution and the defence to

utilise the case diary for purpose of contradiction under S. 145 of the Evidence Act. If they failed to do their part of the duty and the Sessions Judge himself do not draw the attention of the witnesses to the case diary during trial, there can be no further use of it and the Sessions Judge could not use the case diary for coming to the conclusion as to whether certain statements were previously made by the witnesses: 28 Cut.L.T. 523: I.L.R. (1963) Cut. 67: (1963) 1 Cr.L.J. 550.

It is not possible to give a general or categorical answer to the question whether an omission of a detail in the police diary statement can be used for contradicting that detail which the witness supplied in Court. The answer will depend on facts and circumstances of each case whether a particular omission ought to be taken as amounting to contradiction. Before the contradictory statement can be used as evidence against the prosecution and also to discredit the witness, the attention of that witness has to be called to that particular part and his explanation sought. It, therefore, follows that calling attention to the whole of that statement and showing that the contradictory portion does not exist is not enough. What is necessary to put to the witness is what he actually stated to the Police with regard to the particular detail of the incident and what he stated in Court. And when these two statements are either not reconciled by the explanation offered by the witness or are irreconcilable then contradiction may be said to exist. The omission must refer to a detail which if it really existed could not have been missed by the witness as being an essential link in the chain of events: 1959 M.P.C. 517: A.I.R. 1959 Madh. Pra. 391.

It is open to Counsel for the accused to bring out by questions in cross-examination discrepancies between the evidence of the witnesses as given in Court and the statements as made to the Police with a view to throwing doubt on the credibility of their testimony: (1943) 45 Punj.L.R. 155. It is only what is written in the Police diaries that can be used under this section but not what the Sub-Inspector of Police stated that a witness did or did not say: 108 I.C. 162: A.I.R. 1928 Lah. 507. Procedure to be adopted where statements in Police diaries are sought to be used under this section: 1933 Mad.W.N. 919; 14 Pat.L.T. 543: A.I.R. 1933 Pat. 589. In the case of statements before Inspector of Excise: 1933 Mad.W.N. 1270.

So far as S. 172(3) of the Cr.P.Code is concerned the embargo on the right of the accused or his representative in calling for the case diary or seeing any part of it is only a partial one and not absolute because if a part of the diary has been used by the Police Officer, to refresh his memory or the Court uses it for the purpose of contradicting such Police Officer, the provisions of Ss. 161 and 145 of the Evidence Act, will be applicable: [A.I.R. 1975 S.C. 865; A.I.R. 1982 S.C.149, Expl.]: 1988 Cr.L.J. 1077 (Raj.).

Case diary maintained by Police Officers—Use of. *See* 1985 Cr.L.J. (N.O.C.) 56: I.L.R. (1984) 2 Del. 627; 1972 Mah.L.J. 389: (1972) 74 Bom.L.R. 117.

11. Use of first information report.—The first information report can be proved to impeach the credit of the witness by cross-examination under this section: 107 I.C. 761; (1972) 74 Bom.L.R. 117: 1972 Mah.L.J. 389 [Use of first information report in trial.]

First information report—Use of, to contradict evidence of informant: 1957 M.P.L.J. (Notes) 178.

First information report. *See* I.L.R. 8 Lah. 605. *See* also I.L.R. 54 Cal. 237: 170 I.C. 315; (1937) 39 Punj.L.R. 200.

Statement made in F.I.R.—Use of. *See* (1965) 1 Cr.L.J. 744: A.I.R. 1965 Ori. 99; 1957 All.L.J. 963; 1984 Cr.L.J. 1215: (1984) 57 Cut.L.T. 505.

First information report—Evidentiary value—Cannot be utilised to contradict witnesses other than the maker: (1964) 2 Cr.L.J. 676: I.L.R. (1964) Guj. 376: A.I.R. 1964 Guj. 261.

F.I.R. is not substantive evidence: (1962) 2 Cr.L.J. 751: A.I.R. 1962 Cal. 641. It is an information of a cognizable offence given under S. 154 of the Criminal Procedure Code and if there is any statement made therein it can only be used for the purposes of contradicting and discrediting a witness under S. 145 of the Evidence Act: A.I.R. 1973 S.C. 491: 1972 Cr.L.J. 1204: (1972) 3 S.C.C. 590. But where the witness was not confronted with his alleged inconsistent statements contained in the first information report or in the case diary, no reliance could be placed on such statements: (1994) 6 S.C.C. 29: 1994 S.C.C. (Cr.) 1585. *See* also A.I.R. 1992 S.C. 1389.

A first information report, though its importance as conveying the earliest

information regarding the occurrence cannot be doubted, is not substantive evidence; it can, only be used as a previous statement either for corroborating its maker under S. 157 or for contradicting him under S. 145; it cannot be used to corroborate or contradict other witnesses: A.I.R. 1972 S.C. 283: 1972 Cr.L.J. 233; A.I.R. 1975 S.C. 757: 1975 Cr.L.J. 634: (1975) 3 S.C.C. 851; 1973 Cr.L.J. 1686 (Ori.) (F.B.).

Where the first information report given by the accused himself to a Police Officer amounts to a confession, its proof is prohibited by S. 25 of the Evidence Act except to the extent it is permitted by S. 27 of the Evidence Act; the first information report recorded under S. 154 of the Code of Criminal Procedure is not a substantive piece of evidence; it may, however, be used to corroborate the informant under S. 157 of the Evidence Act or to contradict him under S. 145 of the Evidence Act if the informant is examined as a witness at the trial. But the first information report having been lodged by the accused himself it is admissible against him as evidence of his conduct under S. 8 of the Evidence Act and its non-confessional portion would also be relevant under S. 21 of the Evidence Act but its confessional portion cannot be used at all against the accused because of the ban under S. 25 of the Evidence Act: (1994) 1 An.L.T. (Cr.) 695 (S.C.).

First information report by accused—Use at trial. *See* A.I.R. 1957 S.C. 366: 1957 M.L.J. (Cr.) 314.

First information by accused containing confession—How far admissible in evidence: A.I.R. 1966 S.C. 119.

First information report by accused—Cannot be used as evidence against him: (1963) 2 M.L.J. 473: 1963 M.L.J. (Cr.) 558.

First information report—Cannot be used for contradiction unless portions are put to witness in examination: I.L.R. (1964) Guj. 376: A.I.R. 1964 Guj. 261.

Information recorded by Police Officer on the basis of his own information—Admissibility in evidence. *See* A.I.R. 1958 Tripura 1.

Contradictions and omission in first information report relied upon by defence—Person whose statement is recorded as first information report must be confronted with them—Proper course in marking statement alleged to be first information reports as exhibits in case: I.L.R. (1964) Guj. 799: (1965) 1 Cr.L.J. 696: A.I.R. 1965 Guj. 143.

Written report made by witness to Police, read out to him during his examination-in-chief—Parts of report relied upon by defence should be duly proved as required under proviso to S. 162(1), Cr.P.Code before they could be used in contradicting the witness: (1965) 2 Cr.L.J. 661: A.I.R. 1965 Ori. 205.

Cross complaint by accused to Police—Uncertified copy produced through defence witness—Accused not himself giving evidence in Court—Admissibility—Duty of Court: (1963) 1 Cr.L.J. 355 (Guj.).

First information report—Natural death of informant long after occurrence but before commitment proceedings—F.I.R. not admissible either under S. 32(1) or S. 8, Evidence Act: (1964) 2 Cr.L.J. 696: A.I.R. 1964 Ori. 262.

Two complaints one by *A* and the other by *M* in respect of same incident—Divergent versions—Complaints investigated simultaneously—Statement of *A* recorded as first information in one case and statement of *M* as first information in the other—*B* questioned during investigation—Prosecution against *B* and *M*—*Held*, no portion of *B*'s statement could be used to contradict statement of *M* in his complaint, either under S. 157 or S. 145—*B* not being examined as a witness in the case, his previous statement could not be used either to contradict his evidence or corroborate it even if it is to be held that it is a statement coming under S. 154, Cr.P.Code: 1968 Cr.L.J. 1479: A.I.R. 1968 S.C. 1281.

12. Use of statement made during investigation.—From a reading of S. 145, Evidence Act and S. 162, Criminal Procedure Code, it is clear that the statement made by a witness in the course of investigation may, if duly proved be used to contradict that witness and if it is intended to contradict the witness under the second part of S. 145, of the Indian Evidence Act, he should be confronted with the concerned portions of the writings. What matters in the matter of compliance with these provisions is the substance and not the form. If it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purposes of contradicting him. In the instant case, neither in form nor in substance have the provisions of S. 145 of the

Indian Evidence Act been complied with. The Investigating Officer did not even offer formal evidence that the statements within inverted commas put to him and to the witness were taken from the recorded statements under S. 162, Criminal Procedure Code. The statements themselves were not marked. This is a serious defect committed by the prosecution and the Sessions Judge. [A.I.R. 1952 S.C. 214; A.I.R. 1951 S.C. 441; A.I.R. 1959 S.C. 1012, Foll.]: 1970 M.L.J. (Cr.) 661: 1971 Ker.L.T. 326 (D.B.).

It is settled law that statements made to Police are not substantive evidence and they can be used for the purpose of contradiction only as provided for by S. 145 of the Evidence Act: I.L.R. (1966) Guj. 500: (1966) 7 Guj.L.R. 662; 1968 All.Cr.R. 8; 33 Cut.L.T. 971; (1987) 1 All Cr.L.R. 113: (1988) 1 Rec. Cr.R. 1 (P.&H.). Where any part of such statement is so used, any part thereof may also be used in the re-examination of the witness for the limited purpose of explaining any matter referred to in his cross-examination: A.I.R. 1980 S.C. 873. Departure from such statement may discredit witness: A.I.R. 1965 Ori. 31: 1965 Cr.L.J. 315: 30 Cut.L.T. 517.

Statements made to Police under S. 162 of the Code of Criminal Procedure can be used, whether by the accused or prosecution, to contradict their makers in the manner set out in S. 145; they cannot be used for corroborating a witness in the Court; confronting a witness with his previous contradictory statement aims at showing his unreliability and the need to ignore his evidence: (1992) 1 An.W.R. 16.

Statement made to Police—Use of, for discrediting witness—Omission in statement must amount to contradiction: I.L.R. (1963) 15 Assam 552.

Statement to Police Officer during investigation—May be used only for the purpose of contradicting evidence of witness and not for the purpose of corroborating his evidences nor for contradicting a person examined in course of investigation but later figures either as a Court witness or as a defence witness: 1984 Cr.L.J. 1215: (1984) 57 Cut.L.T. 505.

Cr.P.Code, 1898, S. 162—Statement of witness during investigation by Police cannot be used except for serving interest of accused—Accused can use it only for limited purpose of contradicting witness in manner provided by S. 145 of the Evidence Act: (1968) 1 An.L.T. 249. Defence witness or Court witness cannot be cross-examined with reference to statement before Police: 1978 B.B.C.J. 284.

Contradictions in statements by prosecution witnesses to Police during investigation—Proof of—Correct procedure to be followed: I.L.R. (1963) 15 Assam 189: A.I.R. 1963 Assam 151.

Section can be used only to show that the witness is contradicting something he had said before; but not to show that he had omitted to state in former inquiry to the Police what he was stating at the trial: I.L.R. 56 Mad. 475: A.I.R. 1933 Mad. 372(2): 64 M.L.J. 519.

Statement to Police—Omission to assert fact—Effect—Contradiction or inconsistency. *See* 1957 M.P.L.J. 852: A.I.R. 1958 Madh. Pra. 13.

Statement made during investigation under S. 162, Cr.P. Code—Statement can be put to the witness in civil proceedings under S. 145, Evidence Act: 1964 M.P.L.J. (Notes) 145.

Omission in statements of prosecution witnesses to Police cannot be regarded as contradictions—But serious and glaring omissions can be relied upon as relevant circumstances: I.L.R. (1963) 15 Assam 189: A.I.R. 1963 Assam 151.

Omission in Police statement and statements not recorded if could be used to contradict witnesses: 1968 Cr.L.J. 1192: A.I.R. 1968 Ori. 172.

Circumstances whereunder omissions from statement before Police can be allowed to be brought on record—Duty of Court in admitting evidence of recorded statement: (1967) 8 Guj.L.R. 25.

Two independent reports to Police—Second report not in course of investigation—Admissibility in evidence: A.I.R. 1957 All. 755: 1957 Cr.L.J. 1200.

Cross-examination of defence witness on his previous statement to Police: 1968 Cr.L.J. 1647: A.I.R. 1968 S.C. 1390.

Prosecution witness confronted with previous contradictory statement—Witness admitting what he told Police was true—Statement before Police is not made admissible: A.I.R. 1966 Mys. 248.

Ss. 145, 146 and 155(3) are complementary to each other; read together, a cross-examiner cannot be restricted from putting questions except to the extent indicated in Ss. 148 to 152. Where trial Court permitted the defence Counsel to use the statement recorded by the Police in connection with another case for cross-examining a prosecution witness, *held*, he was perfectly right in doing so as S. 162 of Cr.P.Code was never intended to curb the right of the accused to contradict a witness with his previous statement: 1994 Cr.L.J. 464 (Ker.).

It is no doubt a legitimate right of the accused persons to defend themselves by proving, if they can, that the prosecution witnesses had made different statements on previous occasions. If the prosecution is in possession of these statements and does not make them available to the accused this precious right is taken away from the accused and they are handicapped in their defence. It is immaterial for their purpose whether this unfortunate result accrues on account of any dishonest motive, or sheer negligence on the part of the prosecution. But such grievance can be made by the defence only if the statements in questionnaire is in possession of the prosecution. Where they are in possession of a third party it is for the accused to summon them from that person and if the statements are not secured no blame can be attached to the prosecution: A.I.R. 1969 Ori. 176.

Before the prosecution can take advantage of contradicting the witness under S. 145, it is the duty of the prosecution to get the statements of those witnesses made under S. 161 of the Code of Criminal Procedure proved by the officer who has recorded those statements during the course of investigation. Thus, where the prosecution failed to prove the statements in the required manner, *held*, those statements could not be looked into by the Court: A.I.R. 1978 J.&K. 53: 1977 Kash.L.J. 94 (D.B.).

A prosecution witness is a witness examined by the prosecution. It is immaterial whether the complainant examines witnesses on his behalf in prosecuting the complaint or a prosecution is launched by the State through the investigating agency, the witnesses so examined in support of the prosecution case remain prosecution witnesses and as such, if they have made any previous statements to the investigating officers in regard to the very incident in question, those statements can be used to contradict the witnesses if such an occasion arises. [1960 Cr.L.J. 208 (Andh. Pra.), Disting.]: (1977) 2 Karn.L.J. 261: I.L.R. (1977) 2 Karn. 1403: 1978 Cr.L.J. 295.

Investigation under Chapter other than Chap. 14, Cr.P.Code—Statement received by Police—Prohibition under S. 162 does not apply—Statement can be used to contradict maker—Statement for being used to contradict maker need not necessarily be recorded during investigation under Chap. XIV: 1985 Cr.L.J. 159 (Sikkim).

The notes on the site plan prepared by the Investigating Officer regarding distances from which the witnesses claimed to have witnessed the incident are statements recorded by Police Officer in the course of investigation and are hit by S. 162 of the Cr.P.Code. These notes can be used only for the purpose of contradicting the prosecution witnesses concerned in accordance with the provisions of S. 145 and for no other purpose: A.I.R. 1976 S.C. 1421: (1976) 2 S.C.C. 836: 1976 Cr.L.J. 1162.

Statement contained in the panchnama cannot be used in evidence except for the purpose of contradicting the witness; his attention, before the writing can be proved, be called to those parts of it which are to be used for contradicting him. Thus, where a witness is contradicted by his previous statement and is given an opportunity to explain, that part of the statement that is put to him does not constitute substantive evidence: A.I.R. 1971 S.C. 2256: 1971 Cr.L.J. 1547.

Former statement to person not legally competent to investigate—Use of for contradicting him: 1968 Cr.L.J. 201: A.I.R. 1968 Ori. 20.

In the case of statements made to a Headman in the course of an enquiry in a criminal case: 144 I.C. 369: A.I.R. 1933 Rang. 119.

The witnesses in their statements before the Police attributed a clear intention to the accused to commit murder, but before the Court they stated that the accused was insane and, therefore, he committed the murder. *Held*, that in the circumstances it was necessarily implied in the previous statements of the witnesses before the Police that the accused was not insane at the time he committed the murder. In this view the previous statements of the witnesses before the Police could be used to contradict their version in the Court: (1964) 7 S.C.R. 361: A.I.R. 1964 S.C. 1563. *See* also 1979 Cur.L.J. 12; (1978) 2 M.P.W.N. 199; 1978 Jab.L.J. (Note) 70.

Where a witness was examined at the accused's instance but he was examined-in-chief by the public prosecutor under the

Court's direction and he did not support the prosecution case that the wife set ablaze and found naked and dead in the well was thrown therein by the accused but the Court refused to declare him hostile and did not permit him to be cross-examined, *held*, feeling that its witness is not telling the whole truth or is suppressing some parts thereof, the prosecution can request the Court to declare him hostile and permit it to ask questions which might be put in cross-examination; it may as well seek permission under S. 145 of the Evidence Act to contradict the statement of the witness under S. 162 of the Cr.P.Code. Moreover, if the Court finds from the witness's demeanour, temper, attitude, bearing or tenor or tendency or from his inconsistent statements or otherwise that it is expedient to extract the truth and to do justice, the Court should grant the permission under S. 154 of the Evidence Act: 1995 Cr.L.J. 2195 (Bom.) (D.B.).

Where a prosecution witness deposes in Court that the accused gave a blow on the victim but he had failed to make such statement before the Police, it is a material omission amounting to a contradiction though every omission is not a contradiction. Similarly, if a witness does not name the accused before the Police to have taken part in the assault but implicates them in Court, it amounts to a contradiction: 1968 Cr.L.J. 1190: A.I.R. 1968 Ori. 167.

Final report by Police finding no case against accused—Trial on basis of subsequent private complaint—S. 162 still applies—Accused can get copies of statements made to Police by prosecution witnesses for contradicting them: 30 Cut.L.T. 500: (1965) 1 Cr.L.J. 191: A.I.R. 1965 Ori. 21.

A filed a suit for damages against *B* for cutting away her (plaintiff's) garden and for carrying away a she-buffalo and a calf. *A* had also filed a complaint before the Police and during the course of investigation certain statements were recorded under S. 162, Cr.P. Code. In appeal against the decree of the trial Courts as confirmed by the lower appellate Court, it was contended that the Courts below were wrong in not allowing *B* to use the S. 162 statements for purposes of cross-examining *A*'s witnesses and also in rejecting the application for calling the Inspector who recorded the statements to prove them. *Held*, the statements recorded by a Police Officer under S. 162, Cr.P.Code, could be used in a civil proceeding under S. 145 of the Evidence Act. The witnesses can be confronted with the statements; and if need be, the officers who took down the statements may be summoned to prove those statements: (1963) 2 An.W.R. 485: (1964) 1 Cr.L.J. 504: A.I.R. 1964 Andh. Pra. 198.

Where the plaintiff in a civil suit for declaring him an Indian citizen was confronted with his previous statement recorded by the Police under S. 162 of the Code of Criminal Procedure but which contained his signatures thereon contrary to the provision of that section, *held*, the previous statement was not rendered involuntary or inadmissible; its only legal effect was that the Court would keep in mind the rule of caution; all Police Officers cannot be taken as unreliable: 1995 Cr.L.J. 568 (Bom.).

Where the trial Court did not allow cross-examination of a prosecution witness on a very material point with regard to his earlier statement to the Police, *held*, untested evidence of such witness could not be relied upon for the purpose of corroboration of evidence of eye-witness: A.I.R. 1976 S.C. 560: 1975 U.J. (S.C.) 940: (1976) 1 S.C.C. 442: (1976) 2 S.C.R. 339.

Compliant against Sub-Inspector of Police and Head Constable—Report made by them at Police station—Admissibility at trial: 1958 All.L.J. 152: 1958 All.Cr.R. 204.

Right of accused to get copies of statements of witnesses made during investigation.—S. 145, Evidence Act seems to be a self-complete section and the formalities prescribed in S. 163, Evidence Act, for calling for and inspecting a document from the possession of the other side are not attracted to S. 145. In trials arising within the Presidency Town of Calcutta the accused cannot get copies of statements of witnesses recorded in Police diaries as a matter of course, but in suitable cases the Magistrate can order the granting of such copies under the provisions of S. 145, Evidence Act, read with S. 165 of the same Act without making the accused go through the formalities of S. 163 of that Act: (1954-55) 59 Cal.W.N. 729: A.I.R. 1955 Cal. 138. S. 145 does not help the accused to obtain copies of the statements of witnesses made during investigation of an offence though it enables him to make use of the statements if he happens to be in possession of them: 1954 Cr.L.J. 1751: A.I.R. 1954 S.C. 700; A.I.R. 1957 Raj. 185.

Cr.P.Code, 1898, Ss. 173(4), 94 and 252 to 259—Scope—Warrant case instituted on complaint by Customs Officer—Customs authorities making investigation before lodging complaint — Statements of witnesses

recorded during investigation—Right of accused to get copies of such statements and of documents proposed to be relied on by prosecution at or before commencement of inquiry or trial—Conditions for exercise of discretion of Court under S. 94: 1966 Cr.L.J. 1395: A.I.R. 1966 Bom. 253.

Where the copies of the statements of witnesses made before Police in course of further investigation were not supplied to the accused person on the ground that prosecution has chosen not to rely on these statements, *held*, statements of witnesses recorded in course of enquiry under S. 173(8) would continue to be statements recorded under S. 161, Cr.P.Code and thus, the accused was entitled to get copies of those statements: (1988) 1 Rec.Cr.R. 1 (Punj.).

13. Use of statement contained in inquest report.—Statements contained in the inquest reports cannot be used to discredit the evidence of the inquest officer unless they are put to him under S. 145: (1935) 48 Mad.L.W. 615: (1938) 2 M.L.J. 618.

An inquest report is required to be legally proved for it does not prove itself: (1906) 3 Cr.L.J. 41 (Bom.) (F.B.).

It is questionable how far an inquest report is admissible except under S. 145 of the Evidence Act: 1955 S.C.R. 1083: A.I.R. 1955 S.C. 216.

The inquest report, though a document of limited scope and nature, can nevertheless be utilised under S. 145: 1989 All.L.J. 1086 (D.B.), for impeaching credit during cross-examination: I.L.R. (1974) Him. Pra. 509 (D.B.).

14. Use of statement made to commission of enquiry.—The statement made by any person before the Commission of Enquiry under S. 6 of the Commissions of Enquiry Act, 1952 is wholly inadmissible in evidence in any future proceedings, civil or criminal; it cannot also be used for the purposes of cross-examination to contradict the witness or to impeach his credit: A.I.R. 1988 S.C. 1883: 1989 Cr.L.J. 1.

The law is well settled that because of the restrictions embodied in S. 6 of the Commissions of Enquiry Act, a statement made before the Commission by a witness cannot be used in a criminal trial in his cross-examination either to contradict the witness or to impeach his credit; even the copies of the statements made by the witnesses before the Commission cannot be furnished to nor summoned by the criminal Court; they have no evidentiary value in the criminal trial. [A.I.R. 1988 S.C. 1883, Foll.]: (1992) 48 Del.L.T. 309. *See* also 1978 Cr.L.J. 1157 (Bom.); 1968 M.P.L.J. 629

15. Use of statement made before committing Magistrate.—Statement of witness before committing Magistrate—Use as substantive evidence—Procedure. *See* A.I.R. 1958 Andh. Pra. 443.

Statements made in committal Court—Use of in Sessions Court—Non-compliance with S. 145, Evidence Act — Effect: 1959 Cr.L.J. 415: A.I.R. 1959 All. 238.

Witness in Sessions Court confronted with his statement in committal Court—Witness admitting that record was true but that the statement was false having been made under the Police pressure—There is sufficient compliance with S. 145—It would have been pointless to draw his attention to each sentence and ask for his explanation: (1970) 2 S.C.C. 61: 1970 Cr.L.J. 1144: A.I.R. 1970 S.C. 1305.

Evidence of witness in committing Court, when treated as evidence in the case: 1970 Cr.L.J. 931 (Ori.).

Corroboration of evidence admitted under the section—Witness resiling from statement in committal Court—Such statement can be admitted under S. 288, Cr.P.Code subject to provision under S. 145 of the Evidence Act—Court under duty to act with caution: 32 Cut.L.T. 1011: A.I.R. 1967 Ori. 24.

Prosecution witnesses turning hostile in Sessions Court—Their evidence in committal Court not put to them and their attention not drawn to it—Evidence in committal Court is not admissible: (1963) 1 Cr.L.J. 698: 1963 M.L.J. (Cr.) 523 (Mys.).

Evidence recorded before committing Magistrate—Admissibility of in Sessions trial—It cannot be used as substantive evidence unless witness is confronted with it: I.L.R. 42 Pat. 454.

S. 145 does not militate in any way against previous statements being used by way of corroboration of statements put in under S. 288, Cr.P.Code, which are substantive evidence in the case before the Court of Session: (1932-33) 37 Cal.W.N. 1066: 58 Cr.L.J. 66. Use of previous statements — Procedure. *See* A.I.R. 1958 Ker. 74.

Section, if controlled by S. 288, Cr. P. Code—Deposition in committal Court—Admissibility at trial—Conditions—Compliance with S. 145, Evidence Act—Necessity for. *See* I.L.R. 25 Punj. 356: A.I.R. 1954 Punj. 182.

Trial before Sessions Court—Previous depositions of witnesses recorded by committal Magistrate tendered under S. 288, Cr.P.Code—Witnesses not confronted with previous depositions as to contradictions regarding their evidence at trial—Previous depositions cannot affect evidence of witness given in trial Court: 1982 Cr.L.J. (N.O.C.) 169 (Gau.).

If statements of the witnesses are read in extenso to them and they admit that they have made those statements in the committal Court, the requirements of S. 288, Cr.P.Code, would be fully complied with. [1952 S.C.R. 812; (1971) 1 S.C.R. 56, Rel. on]: A.I.R. 1980 S.C. 628: (1980) 2 S.C.C. 84: 1980 Cr.L.J. 439: (1980) 2 S.C.R. 491.

Transfer of earlier statement of witness in committing Court to record of Sessions trial—Reasons for such transfer should be stated: 1967 Cr.L.J. 975: A.I.R. 1967 S.C. 1027.

Where previous statement of a witness made in the committal Court was not transferred to the Sessions record under S. 288, Cr.P.Code, *held*, it could not be used as a substantive evidence: A.I.R. 1976 S.C. 1421: (1976) 2 S.C.C. 836: 1976 Cr.L.J. 1162.

S. 288, Criminal Procedure Code, which provides for transfer of evidence recorded in the committing Court under certain circumstances, is subject, *inter alia*, to the provisions of S. 145. Thus, where in a murder case, after drawing the attention of the witnesses to their contradictory statements recorded by the Police with regard to their having seen the assault which they denied, the entire respective statements recorded by the committing Magistrate in Hindi were read out to the witnesses who did not deny to have made the same but only explained that they had deposed in that manner under threat and pressure from the Police and deposition of witnesses was transferred to the record of Sessions Court under S. 288, Cr.P.Code, after complying with provisions of S. 145 of the evidence Act, *held*, said evidence of witnesses recorded in the committing Court was substantive evidence and was clearly admissible. [I.L.R. (1976) 1 Del. 359, Affirmed]: A.I.R. 1977 S.C. 1304: 1977 Cr.L.J. 814: (1977) 2 S.C.C. 233: (1977) 3 S.C.R. 143.

16. Use of confessional or other statements recorded by Magistrate/Court.—A clearly proved free and voluntary confession, judicial or extra-judicial, or written or oral, is among the most effectual proof in law and deserves the highest credit. In case of a written confession, generally, there is no difficulty to hold that it was made by the accused. Free and willing mind of the accused and voluntariness of his confession are the corner stones of an extra-judicial confession. Thus, where the extra-judicial confession was made to an independent witness who is not expected to falsely implicate the accused by fabricating the story and the accused's confession, not a planted document, is also contained in the accused's letter addressed by him to Lord Shiva, appear to have been made voluntarily, the accused can be safely convicted on the extra-judicial confessions: 1987 W.L.N. (U.C.) 315: 1987 Rec.Cr.C. 224; (1973) 3 Cr.L.T. 71 (P.&H.) (D.B.).

Statements taken under S. 164, Cr.P.Code and not covered by S. 238 are inadmissible against the accused. But they can be used for the purpose of contradicting the statements subsequently made in Court by the persons making the former statements: 27 I.C. 197: 17 O.C. 363.

Statement of witness under S. 164, Cr.P. Code—Can be used for purpose of corroboration or contradiction of the witness: A.I.R. 1969 Ori. 289.

Statement of confession of witness—Statement recorded by Police and by Magistrate—Statement inadmissible except for corroboration to contradiction: (1965) 1 Cr.L.J. 321: A.I.R. 1965 Ori. 38.

Statement of confession—Use of to contradict or corroborate evidence given as approver: A.I.R. 1957 Assam 168: 1957 Cr.L.J. 1231.

Statements under S. 164, Cr.P.Code cannot be substituted as evidence of witness—They can be used only either to impeach, credit or corroborate. *See* 1957 Cr.L.J. 117 (All.). Where an approver goes back upon his confession, it can be used to contradict him when he is treated as a hostile witness, but it is not substantive evidence and cannot be used to contradict a co-accused's confession: 1939 Nag.L.J. 442: A.I.R. 1939 Nag. 295: I.L.R. (1941) Nag. 506. Writing need not be produced in absence of intention to contradict: A.I.R. 1925 Mad. 145: I.L.R. 47 Mad. 800: 48 M.L.J. 89.

Approver's statement recorded under S. 161(3), Cr.P.Code—His confession was

also recorded—He was examined as a witness after grant of pardon—Failure to supply copies of statement recorded by investigating officer and confession recorded by Magistrate to accused—Accused, *held*, prejudiced having been deprived of valuable materials for cross-examination: 1982 Cr.L.J. 2313: I.L.R. (1982) 2 Ker. 752.

It cannot be said that as the former statement of witness was recorded by the order of the Court which had no jurisdiction it cannot be used even for the purpose of contradiction or corroboration or shaking his credit. The statement of a person does not cease to be his statement merely because it was written in aforementioned circumstances. Such a statement can be used for the purpose of Ss. 145, 155 and 157 of the Act: A.I.R. 1987 P.&H. 126.

Failure to supply copies of statement of approver recorded by Investigating Officer and confession recorded by Magistrate to accused for purpose of cross-examination—Effect. *See* I.L.R. (1982) 2 Ker. 752: 1982 Cr.L.J. 2313.

Notes of evidence recorded by one Presiding Officer of Small Cause Court—Presiding Officer transferred—Witness again examined by succeeding Presiding Officer—Statement of witnesses recorded by earlier Presiding Officer—Falls under S. 145—Such statement can be used in cross-examination for contradicting the witness: (1970) 1 An.W.R. 90.

17. Use of statement of victim.—Where maker of a statement chanced to survive, *held*, such a statement is clearly not admissible as dying declaration; it could only be admitted as a previous statement for corroboration under S. 157 or for contradiction under S. 145 with respect to his evidence in Court: 1993 Cr.L.J. 1881 (Madh. Pra.) (D.B.); 1978 Cr.L.J. (N.O.C.) 255: 1978 Jab.L.J. 741 (D.B.). *See* also (1984) 2 Crimes 521 (All.).

Statement made by victim of attempt to murder under S. 307, I.P.Code—Use of to cross-examine and contradict victim in trial. *See* 1971 Cr.L.J. 1225.

Contradicted dying declaration—Value of. *See* (1978) 1 M.P.W.N. 96.

Statement made by the prosecutrix to the Doctor who examined her not put to the prosecutrix during cross-examination cannot be used to contradict her: (1994) 5 S.C.C. 728: 1994 S.C.C. (Cr.) 1573.

Minor contradictions in the statement of prosecutrix—Effect. *See* 1982 M.P.W.N. 397

Where the prosecutrix was allowed to be further cross-examined by way of additional evidence during the pendency of the appeal and she admitted having made certain statements in another case against the accused but nothing was placed on the record to show that those statements were admitted by her to be true, *held*, those statements could not be read as evidence in the case under appeal; the defence could take no advantage therefrom; besides, it is moot point when they could be deemed to be previous statements contemplated under S. 145: (1982) 1 Bom.C.R. 894.

18. Miscellaneous.—Where in a proceeding under S. 488, Cr.P.Code the husband while denying the maintainability of the application in his written statement admits that he had pronounced divorce orally on certain date, if the date so given is in conflict with the legally unproved documentary evidence filed by the husband, it is not open to the Magistrate to choose or reject the allegations made in the written statement of the husband without putting his conflicting assertions to him as required by S. 145 of the Evidence Act. Dubious statements have to be put to the persons making them before they can be used against them: 1968 All.L.J. 454.

The provisions of Rr. 6 and 7 of O. 33 C.P.Code, may not strictly apply to the prayer of the defendant for examining the plaintiff at the stage when the applicant wants to cross-examine the plaintiff but in face of the provisions of O. 33, Rr. 6 and 7, the subordinate Court should have reasonably afforded an opportunity to the defendant for cross-examining the plaintiff and bringing out correct state of affairs: 1983 All.W.C. 703: 1983 All.L.J. 1043: 1983 All.L.R. 505.

Where the earlier statement was recorded twelve years ago by the Chairman of the Committee which had 2 other members, and the Chairman was abroad in a country with which India had no reciprocal arrangements for summoning him and which, besides causing delay, would also involve expense of ten thousand rupees, *held*, it is unnecessary to summon him; the earlier statement could be proved by any member of the Committee or any other person acquainted with the Chairman's writing and signatures: (1972) 1 An.W.R. 33.

146. Questions lawful in cross-examination.—When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Where trap witnesses were cross-examined in a scrappy and jumpy manner and their evidence was without contradictions and inner variations between their respective statements were confined to omissions of trivial details, *held*, their testimony could not be dubbed as unreliable: 1983 Cr.L.J. 1: A.I.R. 1982 S.C. 1511.

Only such a Doctor can testify to the nature of injuries who has either examined the injured himself or who had all the data in original furnished by a person who had examined the injured or had operated upon him and prepared the operational note for the testifying Doctor to independently form his own opinion; the evidence of a Doctor based on some facts conveyed in letter to him cannot be taken as legally tendered: 1987 Cr.L.R. 422 (Raj.).

Section 146—Notes.

The relevant sections allowing imputations to be made to witnesses in cross-examination and controlling the exercise of that right are Ss. 146 to 153. It is quite clear that questions may be asked for which there are only reasonable grounds for thinking that imputation contained in them are well founded and that is by no means necessary before the question is asked that the person asking it should be in a position to establish the truth of the imputation beyond all doubt. It is difficult to believe that anything which will be permissible to be put under the Evidence Act can be punishable under the I.P. Code: (1945-46) 50 Cal.W.N. 545: A.I.R. 1947 Cal. 278.

Ss. 146 to 151 are to be read together; so read they spell out a duty for the Court, *viz.*, the exercise of its sense of proportion: (1982) 1 Bom.C.R. 519.

Ss. 145, 146 and 155(3) are complementary to each other; read together, a cross-examiner cannot be restricted from putting questions except to the extent indicated in Ss. 148 to 152. Where trial Court permitted the defence Counsel to use the statement recorded by the Police in connection with another case for cross-examining a prosecution witness, *held*, he was perfectly right in doing so as S. 162 of the Cr.P.Code was never intended to curb the right of the accused to contradict a witness with his previous statement: 1994 Cr.L.J. 464 (Ker.).

S. 146 deals with questions lawful in cross-examination; Cl. (1) thereof provides for a witness being cross-examined by questions tending to test his veracity. S. 153 generally deals with exclusion of evidence to contradict answers to questions testing his veracity; but Exception 2 provides that if the witness denies the facts suggested to impeach his impartiality, he may be contradicted. S. 155 deals with impeaching the credit of a witness by various ways set out in Cls. (1) to (4) thereof; and one of the ways set out in Cl. (3) is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. It cannot, therefore, be entirely correct that S. 146 must be read with S. 153: A.I.R. 1971 S.C. 1162: 1970 U.J. (S.C.) 604: (1971) 1 S.C.R. 399.

Purpose of cross-examination is to test the veracity of witnesses—Certain facts favouring accused came out in a natural manner during cross-examination of prosecution witness—Benefit will certainly go to accused: 1983 All.W.C. 625: 1983 All.Cr.R. 304.

Cross-examination—Asking of composite and ensuring questions—Not permissible—Answer by witness to one of the two questions loaded in one—Inference regarding truth of another question cannot be drawn: (1968-69) 73 Cal.W.N. 751.

Credibility of witness—Factors to be considered—Low status of witness—How far material: (1959) 2 An.W.R. 375.

A previous statement made and tape-recorded can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of other three last mentioned matters under S. 146 (1), S. 153, *Exception* 2 and S. 155: A.I.R. 1971 S.C. 1162: 1970 U.J. (S.C.) 604: (1971) 1 S.C.R. 399.

The Court can direct a party to the suit to give his voice in tape-record for comparison. [(1981) 83 Punj.L.R. (Del.) 154, Dissent.; (1969) 71 Punj.L.R. 519, Foll.]: (1985-2) 88 Punj.L.R. 41. But *see* (1981) 19 Del.L.T. 390: 1981 Cr.L.J. 927.

An accused has no unlimited right to cross-examine the complainant regardless of the matters in issue; the Court has the power to forbid questions which are asked to annoy the witness or are unduly and unnecessarily offensive; of course, if the question is offensive or even indecent or scandalous or embarrassing but all the same relevant to and having reasonable bearing the matters in issue, it can legitimately be asked. But the permission to cross-examine cannot be allowed to degenerate into a licence for shaking the deponent's character indiscriminately; S. 146(3) is not a gate to unbridled cross-examination: (1982) 1 Bom.C.R. 519.

Law is no respecter of men though it is a living instrument to achieve individual and social good and morality. Status however high, therefore, cannot be used or held as a shield to cover the core of the cause or reality of a truth. In the high temples of justice all the basic bones must be felt bare and attempt to reach them should not in any manner be stifled. S. 146(3) permits a cross-examiner to put questions which will not only shake the credit of a witness, but which will also expose his ethical and moral behaviour which may ultimately weigh with the Court while evaluating or appreciating evidence. By its very nature questions on *mala fides* as opposed to *bona fides*, immorality as opposed to good morality, dishonesty as against honesty, falsehood as against truthfulness, can all conceivably be put, provided there is necessity and foundation for the same. S. 155 expressly permits by indicating the mode and manner to bring in evidence upon the credit of a witness so as to impeach such testimony: 1975 Cr.L.J. 1297: 1974 Mah.L.J. 416.

The assault on the character of a witness permitted by S. 146(3) must be directed only for the purpose of shaking the credit of the witness and not for any other purpose. In other words, if the cross-examination was intended to shake the credit of a witness, it must naturally be to impugn the credibility of that witness in relation to the matter which is involved and relevant under one or the other provisions of the Evidence Act. It is not permissible to have recourse to S. 146(3) to ask all sorts of questions which are not necessary to shake the credibility of that witness: 1977 Cr.L.J. 1637: 1979 Mah.L.J. 11 (D.B.).

Questions lawful in cross-examination on behalf of the accused touching the character and conduct of the witness and without any material to substantiate the same—Such questions without any basis unfair to the witness—Questions touching the character and conduct of a witness should be asked and should be allowed by the Court only when there is some material to substantiate the same: (1984) 4 Guj.L.H. 473.

The credit of a witness can be shaken only if it can be shown that he is not a man of veracity, and not that he is of bad moral character, *viz.*, a black-marketeer: A.I.R. 1959 All. 149. On S. 146. *See* I.L.R. 3 Mad. 271; 9 Cr.L.J. 370; (1913-14) 18 Cal.W.N. 185. Putting scandalous questions in cross-examination: 2 Weir 819.

Magistrate should confine questions as to character asked in cross-examination to questions which are relevant to the case, and disallow questions which are unnecessary, provocative or merely harassing: 41 Cr.L.J. 790: A.I.R. 1940 Rang. 113.

Putting defamatory question to witness—Remedies at law. *See* A.I.R. 1954 Mad. 741. *See* also (1976) 17 Guj.L.R. 1007; (1986) 61 Cut.L.T. 37.

Defamatory questions put by lawyer to a witness in cross-examination on clients instructions—No reasonable basis available for putting them—Such communication is not professional—Its disclosure is not protected under S. 126—Imputation conveyed by those questions held *per se* defamatory—Hence, client is liable under S. 500, Penal Code: A.I.R. 1970 Mys. 34: (1969) 1 Mys.L.J. 606: 1970 Cr.L.J. 260.

147. When witness to be compelled to answer.—If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

Where the accused denies that he ever made certain verbal statement which amounted to confession to the Police and the written statement alleged to have been signed by him and prosecution was allowed to cross-examine the accused as to his previous conviction, *held*, that since, the allegations of the accused involved an attack on the character of the prosecution Police witness, in that it was alleged that the alleged written confession was concocted by the Police, the Court was entitled to know the character of the accused who made the imputation and his cross-examination as to his character was properly admitted: (1955) 3 All E.R. 29.

Where the prosecution alleged that the lady complainant accompanied by a male was proceeding in a car and was robbed of her ornaments and currency notes at 9-30 p.m. and in her examination-in-chief she had given out their movements right from the evening till the time of occurrence and also disclosed the purpose for moving towards the particular spot, and in her cross-examination the defence sought to ask questions about her intimate relations with the other occupant of the car, *held*, it was the Court's duty to consider whether the question was relevant from point of view of the defence; it could not be said that the questions which may raise doubt about the veracity of the witness were completely irrelevant; unless there was a clear indication that it was a reckless and scandalous attempt intended to insult or annoy, the topic raised by the question could not have been ruled out; her involvement with her companion, also a witness could not be termed as out of the purview of S. 146. The Court should have taken into account, after taking the defence Counsel into confidence, the line of defence and then decide whether such questions should or should not be allowed and whether they really fell within the exceptions carved out by the statute. [A.I.R. 1960 Mad. 73; A.I.R. 1970 Mys. 94; A.I.R. 1933 Cal. 316; I.L.R. 47 All. 799, Rel. on]: 1975 Cr.L.J. 1297: 1974 Mah.L.J. 416.

A question put to a female witness whether she was made pregnant by one *X*, in a case relating to title to property would be relevant if the point was whether by reason of unchastity she could not inherit her husband's property. But if the object was to impeach her credit, Ss. 146 and 148 to 162 must be considered: 65 I.C. 692.

Where defendants resisted a possession suit filed by the plaintiff-auction purchaser of the disputed property who purchased it in a private sale, on the ground that the plaintiff was only a nominee of the mortgagee and, thus, private sale held in his favour was invalid but the defendants were refused cross-examination of the plaintiff regarding the question whether he was only a nominee of the mortgagee, *held*, order of the lower Court in disallowing questions in cross-examination regarding the plea taken by defendant was illegal: (1975) 88 Mad.L.W. 371.

Where the opposite party failed to produce evidence in the Court in order to test the veracity of the evidence given by the witnesses, *held*, the testimony of the witnesses was acceptable. [A.I.R. 1938 Nag. 156; A.I.R. 1961 Pat. 129, Disting.]: A.I.R. 1978 J.&K. 50: 1978 Kash.L.J. 132 (D.B.).

Section 147—Notes.

See I.L.R. 17 Cal. 344; I.L.R. 39 Bom. 386.

The words "relevant to the suit or proceeding" mean relevant to a matter in issue: I.L.R. 3 Mad. 271 (F.B.).

S. 147 empowers a Court to compel a witness to reply to a relevant question. If he refuses to answer a question, immediate action should be taken against him in the interest of a fair trial: 1953 Cr.L.J. 990: A.I.R. 1953 Bhopal 21.

There is no law which governs the order in which two contesting parties are entitled to cross-examine a witness of the opposite party; S. 141 deals with leading questions, S. 143 with questions lawful in cross-examination, S. 147 with the circumstances wherein a witness shall be compelled to answer questions and S. 148 empowers the Court to decide as to when a question may be asked and the witness be compelled to answer it: (1976) 17 Guj.L.R. 1007.

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148. Court to decide when question shall be asked and when witness compelled to answer.—If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would serious affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Section 148—Notes.

See I.L.R. 26 All. 371; I.L.R. 37 Cal. 878; 11 Cr.L.J. 403: 6 I.C. 782; I.L.R. 21 Cal. 392; (1900-01) 4 Cal.W.N. 684; A.I.R. 1940 Rang. 113 [Magistrate's power to disallow scandalous questions in cross-examination.]

Ss. 146 to 151 are to be read together; so read they spell out a duty for the Court, *viz.*, the exercise of its sense of proportion: (1982) 1 Bom.C.R. 519.

Ss. 146 to148 together with S. 132 embrace the whole range of questions which can properly be addressed to a witness: I.L.R. 3 Mad. 271 (F.B.).

There is no law which governs the order in which two contesting parties are entitled to cross-examine a witness of the opposite party; S. 141 deals with leading questions, S. 143 with questions lawful in cross-examination, S. 147 with the circumstances wherein a witness shall be compelled to answer questions and S. 148 empowers the Court to decide as to when a question may be asked and the witness be compelled to answer it: (1976) 17 Guj.L.R. 1007.

The Court has the power either of prohibiting questions under S. 148 and if the questions are allowed, of drawing or not drawing an inference from a witness's refusal to answer. The exclusions provided in sub-Ss. (2) and (3) in S. 148 and Ss. 151 and 152 indicate with more distinctness, than is to be found in the English law, the principles on which the Court should proceed in protecting witnesses from reckless and unjustifiable interrogations: A.I.R. 1954 Mad. 741: 1954 Cr.L.J. 1239.

Law is no respecter of men though it is a living instrument to achieve individual and social good and morality. Status however high, therefore, cannot be used or held as a shield to cover the core of the cause or reality of a truth. In the high temples of justice all the basic bones must be felt bare and attempt to reach them should not in any manner be stifled. S. 146(3) permits a cross-examiner to put questions which will not only shake the credit of a witness, but which will also expose his ethical and moral behaviour which may ultimately weigh with the Court while evaluation or appreciating evidence. By its very nature questions on *mala fides* as opposed to *bona fides*, immorality as opposed to good morality, dishonesty as against honesty, falsehood as against truthfulness, can all conceivably be put, provided there is necessity and foundation for the same. S. 155 expressly permits by indication the mode and manner to bring in evidence upon the credit of a witness so as to impeach such testimony: 1975 Cr.L.J. 1297: 1974 Mah.L.J. 416.

Once an irrelevant question is put in cross-examination, the matter is within the Court's discretion; it has to decide whether the witness has to be compelled to answer it

149. Question not to be asked without reasonable grounds.—No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations

(*a*) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.

(*b*) A pleader is informed by a person in Court that an important witness is a dakait. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

(*c*) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(*d*) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakait.

150. Procedure of Court in case of question being asked without reasonable grounds.—If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

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or whether a warning should ensue that he is not obliged to answer the same. The decision of the Court must reach either of these two results. While exercising the discretion, the matters to be taken into account are enumerated in Cls. (1) to (4) of S. 148; one of them is that such questions are proper if the same are of such a nature that the truth of the imputation conveyed by them would seriously affect the Court's opinion as to the credibility of the witness on the matter to which he testifies. Indecent and scandalous question should not be disallowed merely on the ground of relevancy from the prosecution's point of view. When the Act speaks of relevancy of a fact, it may have bearing both on prosecution and defence versions: it is, therefore, the Court's primary duty before rejecting such a question to be satisfied whether it is relevant or not from the point of view of the defence: 1975 Cr.L.J. 1297: 1974 Mah.L.J. 416.

Accused charged for offences under Ss. 323, 504, 506, 541 and 148 on basis of Police report—Offences under Ss. 323, 504, 506 and 541 compounded—Magistrate has to discharge accused for offence under S. 148 as also under S. 251-A: 1970 Cr.L.J. 1038 (Bom.).

Section 149—Notes.

Ss. 146 to 151 are to be read together; so read they spell out a duty for the Court, *viz.*, the exercise of its sense of proportion: (1982) 1 Bom.C.R. 519.

Counsel for prisoner should not state as alleged existing facts, matters which he had been told in his instructions on the authority of the prisoner but which he does not propose to prove by evidence, or suggest in cross-examination of prosecution witnesses: (1914-15) 19 Cal.W.N. 923: 21 Cal.L.J. 396. *See* (1913-14) 18 Cal.W.N. 185; (1984) 4 Guj.L.H. 1055.

Defamatory questions put by lawyer to a witness in cross-examination on client's instructions—No reasonable basis available for putting them—Imputation conveyed by those questions is *per se* defamatory—Hence, client is liable under S. 500, Penal Code: A.I.R. 1970 Mys. 34: (1969) 1 Mys.L.J. 606: 1970 Cr.L.J. 260; A.I.R. 1925 All. 641 (F.B.).

Certain standard of decency and decorum should be maintained while putting questions in cross-examination. Thus, question to a young daughter after cruel death of her mother that her mother had illicit connection, *held*, was improper: (1980) 21 Guj.L.R. 684 (D.B.).

Section 150—Note.

See I.L.R. 19 Bom. 340.

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151. Indecent and scandalous questions.—The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

152. Questions intended to insult or annoy.—The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

153. Exclusion of evidence to contradict answers to questions testing veracity.—When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.

Section 151—Notes.

Indecent or scandalous question—Latitude to Counsel: 52 I.C. 54: 20 Cr.L.J. 566. *See* also A.I.R. 1954 Mad. 741.

Under S.151 of the Act, the Court had discretion to forbid any question which it regards as indecent and scandalous although such question may have some bearing on the question before the Court. But such a discretion cannot be exercised if such questions relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed: (1970) 83 Mad.L.W. 42; A.I.R. 1919 Pat. 515; A.I.R. 1960 Mad. 73: (1960) 1 M.L.J. 21 (D.B.).

Ss. 146 to 151 are to be read together; so read they spell out a duty for the Court, *viz.*, the exercise of its sense of proportion: (1982) 1 Bom.C.R. 519.

Section 152—Notes.

See I.L.R. 18 Bom. 468 (470); 3 Mys.H.C.R. 372; 2 Weir 819; A.I.R. 1954 Mad. 741.

A Counsel is, no doubt, privileged to test the veracity of a witness, but such a privilege is not unfettered. A Counsel should not act to the dictates, or wishes of his client in putting defamatory questions to a witness who has a misfortune to be in the witness-box, and, at least, the client should instruct his Counsel to put defamatory question to a witness, only when he has materials to substantiate such imputations, otherwise, he takes the risk of being run down for defamation: 1969 Kash.L.J. 27.

Section 153—Notes.

See 11 B.H.C.R. 169; 9 Cr.L.J. 226; A.I.R. 1954 Mad. 741.

S. 146 deals with questions lawful in cross-examination; Cl. (1) thereof provides for a witness being cross-examined by questions tending to test his veracity. S. 153 generally deals with exclusion of evidence to contradict answers to questions testing his veracity; but exception 2 provides that if the witness denies the facts suggested to impeach his impartiality, he may be contradicted. S. 155 deals with impeaching the credit of a witness by various ways set out in Cls. (1) to (4) thereof; and one of the ways set out in Cl. (3) is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. It cannot, therefore, be entirely correct that S. 146 must be read with S. 153: A.I.R. 1971 S.C. 1162: 1970 U.J. (S.C.) 604: (1971) 1 S.C.R. 399.

The purpose of including S. 153 in the Evidence Act is to impose some restriction so as to enable the Court to confine to specific and material issues: (1992) 2 Ker.L.J. 163: (1992) 2 Ker.L.T. 126 (D.B.); without such rule collateral questions would unnecessarily crop up

Illustrations

(*a*) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b*) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c*) *A* affirms that on a certain day he saw *B* at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that *A* was on that day at Calcutta.

The evidence is admissible, not as contradicting *A* on a fact which affects his credit, but as contradicting the alleged fact that *B* was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d*) *A* is asked whether his family has not had a blood feud with the family of *B* against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

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in the course of a trial and the specific questions to be determined might be lost sight of and the trial itself would be lengthened inordinately: A.I.R. 1928 P.C. 54.

S. 153 is based on the observation of Pollock C.B. in Attorney General v. Hichock [1847 (1) Ex. 91] that "a witness may be contradicted as to anything he denies having said provided it be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness's testimony, and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject to enquiry". The rule limiting the right to call evidence to contradict witnesses on collateral issues excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute: (1992) 2 Ker.L.J. 163: (1992) 2 Ker.L.T. 126 (D.B.).

The bar of S. 153 is attracted not only in giving evidence after the witness has been asked and answered the questions; it extends to examining any such evidence even before the witnesses are examined; no evidence intend to or capable of shaking the credit and injuring the character of a witness, yet to be examined, is permissible. As per S. 5, evidence could be given only of facts in issue and those declared to be relevant and of no others; and the credit and character of a witness to be examined in future is certainly not a fact in issue or a fact declared to be relevant by any provision of the Evidence Act: 1991 Cr.L.J. 23: (1990) 1 Ker.L.J. 721: I.L.R. (1991) 1 Ker. 98 (D.B.).

A party may not in general impeach the credit of his opponent's witness by calling witnesses to contradict him on irrelevant matters; his answers thereon are conclusive. Thus, if a question in cross-examination affects only the credit of the witness and is irrelevant to the matters actually in issue, the witness cannot be contradicted by other evidence except in certain exceptional cases: A.I.R. 1952 All. 289 (D.B.).

The antecedents of a prosecution witness are relevant solely for shaking his credit and injuring his character; they are otherwise not relevant and constitute only a collateral or incidental matter on which independent evidence is tabooed under S. 153, if they are denied by the witness even when his answer makes him liable to prosecution for perjury; the object of the prohibition is not to save the Court's time from endless controversies on

154. Question by party to his own witness.—The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

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irrelevant matters; a witness coming to the Court to give evidence is not expected to be prepared to answer all questions concerning his past conduct; therefore, on such matters, relevant solely to shake his credit and injure his character, what he says is taken to be conclusive so far as that case is concerned: 1991 Cr.L.J. 23: (1990) 1 Ker.L.J. 721: I.L.R. (1991) 1 Ker. 98 (D.B.).

A previous statement made and tape-recorded can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of other three last mentioned matters under S. 146(1), S. 153, *Exception* 2 and S. 155: A.I.R. 1971 S.C. 1162: 1970 U.J. (S.C.) 604: (1971) 1 S.C.R. 399.

When a witness was asked and he answered that at the relevant time he was at the scene of occurrence and saw the incident, evidence that he was not there and he was somewhere else and, hence, he had no occasion to see the incident is permissible and it cannot be denied under cover of S. 153: (1990) 1 Ker.L.T. 516: (1990) 1 Ker.L.J. 421 (D.B.).

Questions touching the character and conduct of witness—Putting of. *See* (1984) 4 Guj.L.H. 473, cited under S. 146, *supra*.

Where the witness who was questioned whether he was not an active criminal and whether he was not under Police surveillance denied the suggestions and the evidence given to contradict him had nothing to do with the previous conviction or with the impeachment of the impartiality but only tended to impeach his character, *held*, the evidence was not admissible at all under S. 153: 1959 Cr.L.J. 694: A.I.R. 1959 Cal. 342. The principle of this section should be observed in examination on commission also: I.L.R. 47 Cal. 1040. Ss. 153 and 155 must be strictly construed and narrowly interpreted: I.L.R. 6 Rang. 142: A.I.R. 1928 P.C. 54.

Where the evidence of a prosecution witness was impeached on the ground of his antecedents, which he denied in cross-examination, of having been involved in various offences but his testimony stood the test of the Court's testimony and was also sufficiently corroborated, *held*, the Court could rely on his testimony; his antecedents were relevant only for cautioning the Court to scan his evidence more carefully: 1991 Cr.L.J. 23: (1990) 1 Ker.L.J. 721: I.L.R. (1991) 1 Ker. 98 (D.B.).

Where main attack against evidence of a child witness who happened to witness murder of his sister was that he falsely said that he was studying in third standard at certain School and Headmistress of said School was examined to say that no such student as child witness was then studying in that School, *held*, the evidence sought to be adduced through said Headmistress could not be permitted to come on record as it was intended to contradict child witness on an issue which was not relevant in the main enquiry: (1992) 2 Ker.L.J. 163: (1992) 2 Ker.L.T. 126 (D.B.).

Section 154—Synopsis.

1. Scope.
2. Permission of Court.
3. Hostile witness.
4. Value of evidence of witnesses cross-examined under section 154.
5. Cross-examination upon statement made under sections 162 and 164 of Criminal Procedure Code.
6. Witness tendered but not examined.
7. Interference by appellate Court with discretion exercised by trial Court under section 154.
8. Illustrative cases.

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1. Scope.—*See* I.L.R. 28 Cal. 594; I.L.R. 13 Cal. 53; 12 M.I.A. 380; A.I.R. 1954 Punj. 182; A.I.R. 1954 Andh. Pra. 39.

Right to treat one's own witness as hostile is a procedural right conferred by the Court recording the evidence and not a substantive statutory right: (1988) 1 Karn.L.J. 162.

S. 137 gives only the three stages in the examination of a witness, namely, examination-in-chief, cross-examination and re-examination. This has no relevance to the question when a party calling a witness can

be permitted to put to him questions under S. 154; that is governed by the provisions of S. 154 which confers a discretionary power on the Court to permit a person who calls a witness to put any question to him which might be put in cross-examination by the adverse party, S. 154 does not in terms, or by necessary implication, confine the exercise of the power by the Court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. The discretion is entirely left to the Court to exercise the power when the circumstances demand. The Court, therefore, can permit a person, who calls a witness to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the accused to cross-examine him on the answers elicited which do not find place in the examination-in-chief: (1963) 7 S.C.R. 361: A.I.R. 1964 S.C. 1563. *See* also (1979) 2 M.P.W.N. 209; 1982 Jab.L.J. 823.

Ordinarily, permission to cross-examine a witness is sought by the party calling him in the course of examination-in-chief itself. S. 154 itself does not specify the stage at which alone a party can seek such permission. A witness who has in his chief-examination deposed favourably or not unfavourably to the case of the party calling him may in the course of cross-examination, disclose a hostile animus against the party who had called him. In such circumstances, the Court is not only not disabled from granting permission to the party who had originally called the witness to cross-examine him but it would be improper exercise of discretion to refuse such permission if, in the opinion of the Court, circumstances justifying its grant do exist. The only point for consideration by the Court is whether, the party calling the witness should, in fairness, be permitted to cross-examine him: (1961) 2 Cr.L.J. 653 (Mys.).

S. 154 does not in terms or by implication confine exercise of the discretionary power under it before the examination-in-chief is concluded or to any particular stage of the examination. It is wide in scope and the discretion can be exercised when the circumstances so demand. Such discretion to permit cross-examination can be exercised at the stage of re-examination and in such a case the adverse party must be given further opportunity to cross-examine the witness. [A.I.R. 1964 S.C. 1563, Rel. on]: 1991 M.P.L.J. 985 (D.B); 1989 Cr.L.J. (N.O.C.) 129 (Cal.).

S. 154 shows that firstly it is in the discretion of the Court to permit a person who calls a witness, to put any question which may be put in cross-examination by the adverse party, and secondly that the party must obtain the Court's permission before doing so. At the same time, it is clear that such a permission must be sought, at any rate, before the deposition comes to an end. An application for such a permission would not be granted if it is sought after the whole examination of the witness was over and the Judge who recorded the evidence was also transferred. [A.I.R. 1933 Mad. 137, Rel. on]: (1969) 1 An.L.T. 32.

The discretion conferred on the Court under S. 154 to permit a party, who calls a witness, to put questions to him which might be put in the cross-examination by the adverse party, has to be exercised very carefully taking all the facts and circumstances into consideration. Merely because one part of the statement of the witness was not favourable to the party which called him, the Court should not readily conclude that he was suppressing the truth or that his testimony was adverse to the party which called him. Whether the witness had exhibited hostile animus has to be judged on the basis of the answers given by the witness. Thus, where the witness did not conceal any part of the truth nor did he try to injure the interests of the plaintiff by prevaricating or exhibiting, in any other manner, hostile attitude, and the motive suggested to the witness in the cross-examination by the plaintiff's counsel was that he was giving false evidence because the plaintiff, her husband and her sisters did not heed to his advice in the litigation, *held*, this suggestion deserved to be ignored in toto. He had absolutely no motive to depose against the interests of the plaintiff; whether the parties compromise or litigate was of no concern to him. Even assuming that he had earlier advised the parties to compromise and they failed to do so could not, by any stretch of reasoning be approximated to a motive strong enough to be a propelling force for the witness to utter falsehood. Therefore, his testimony was to be accepted in toto as true and believable: (1995) 3 An.L.T. 132 (D.B.).

S. 154 speaks of permitting a party to put to his own witness "questions which might be put in cross-examination"; it does not necessarily tantamount to cross-examining the witnesses. "Cross-examination", strictly speaking, means cross-examination by the adverse party as distinct from the party calling the witness. That is why S. 154 uses the

phrase, "put any questions to him which might be put in cross-examination by the adverse party". Therefore, neither the party calling him, nor the adverse party is, in law, precluded from relying on any part of the statement of such a witness: A.I.R. 1976 S.C. 294: (1976) 1 S.C.C. 727: (1976) 2 S.C.R. 11.

Ss. 143 and 154 do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the Judge. The meaning of S. 154 is that they may, with the permission of the Court, treat a witness as hostile and cross-examine him. The wording of S. 154 shows that the Legislature did not intend to distinguish the law in this country from the law which obtains in England: I.L.R. 57 Cal. 801: A.I.R. 1930 Cal. 139.

The principles underlying S. 154, Evidence Act are that where one's own witness unexpectedly makes statements adverse to his interest, it is common fairness that the Judge should permit such statements to be tested by cross-examination if the evidence is to be relied upon and if cross-examination be disallowed the evidence is of no value. The utility of cross-examination is supposed to be that it is a means whereby the Court can more readily get the truth out of the witness.

The ordinary rule that leading questions must not on material points be put by a party to his own witness, has its basis in the circumstance that as the party chooses what witness he will call, a witness is very often anxious to assist the party on whose behalf he is called. The rule is to guard against the bias of the witness in favour of the side in support of which his evidence is sought. The rule is not relaxed because the witness has already forfeited all the rights to credit but because his evidence will be more fully given and his credit more adequately tested by questions put in more pointed and searching way. Thus, to obtain permission to cross-examine, all that is necessary is that the witness's testimony should have been adverse to the party calling him and the value of the witness's testimony in such cases is to be judged in the light of the results of such cross-examination. Invoking the aid of S. 154 for declaring a witness hostile is not permissible: I.L.R. (1962) Cut. 767; 1972 M.L.J. (Cr.) 123 (Mys.).

On this section, *see* also 1946 All.W.R. (H.C.) 322.

Result of cross-examining one's own witness: I.L.R. 53 Cal. 372: (1928-29) 33 Cal.W.N. 872.

In a case where a witness or more than one of them turns hostile, the Court will have to take judicial notice of the fact that the only beneficiary of such a situation is the accused and, consequently, an appropriate adverse inference will follow. Unless an attempt has been made to tamper with the evidence, a witness will not completely resile from his earlier statement, and such efforts can only be traced back to the beneficiary of such a corrupt practice: (1991) 2 Mah.L.J. 1318.

Prosecution dropping certain witness without declaring him as hostile—Defence applying for cross-examination of said witness—Prosecution cannot object to take into consideration evidence of said witness only because he was not examined by prosecution: 1979 Cr.L.R. 531 (Guj.) (D.B.).

Evidence of a witness who was not declared hostile by the prosecution would have to be taken as a part of the prosecution version. [A.I.R. 1982 S.C. 839; A.I.R. 1989 S.C. 772, Rel. on]: 1990 M.P.L.J. 770: 1990 Cr.L.J. 2507 (D.B.).

Merely because some witnesses have turned hostile to prosecution itself would not be sufficient to discard the evidence of other witnesses—Evidence of such other witnesses examined has to be considered independently and accepted or rejected on its merits: I.L.R. (1986) Karn. 4151 (D.B.).

2. Permission of Court.—It is not necessary to make a formal declaration that a witness is hostile before permission is granted under S. 154. The discretion of the Court in granting permission is a judicial discretion and is required to be exercised in a judicious way. In ordinary circumstances or in a majority of cases it may be taken that when a party calls a witness, he represents to the Court that the witness called by him, is worthy of credit and is likely to speak the truth in respect of facts touching matters under enquiry by Court. But occasions may, not infrequently arise, where a party may be obliged to examine a witness, with whom he may have no private relations and of whose general character and credibility he may not be full aware or informed and in such cases, it will not only be absurd to assume that he represents to the Court that the witness is worthy of credit but also, in the highest degree, unfair and unjust. Permission under S. 154 could hardly be refused when any witness makes an unexpected statement adverse to the case of the prosecution. It means that an attempt on the part of the witness to depart from what is tentatively believed to be true is open to the suspicion that he may be

departing from the truth, making it necessary to test his veracity by cross-examination by the party to whose detriment his unexpected departure may operate. It is wrong law to assume that such witnesses must be regarded as witnesses called by the Court and liable to be cross-examined as of right by the party citing them. A witness should be regarded as adverse and liable to cross-examination by the party calling him only when, in the opinion of the Court, he bears hostile animus to the party calling him and further that a hostile witness in the real sense is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth. Where no case has been made out for a general permission to cross-examine witness under S. 154 of the Evidence Act, it may become necessary on particular topics or in relation to material circumstances to relieve the party against the prohibition of putting leading questions to the witness, so that the Court may have a clear picture of the witness's reaction to those questions as an aid to discovering the truth. For this purpose it is open to the Court to act either under S. 154 to a limited extent or under S. 142 which allows leading questions to be put in examination-in-chief, even if objected to with the permission of the Court: 1969 Cr.L.J. 118: A.I.R. 1969 Mys. 12.

The circumstances in which a witness may be cross-examined by the party calling him are not laid down in S. 154, which leaves the matter entirely to the discretion of the Court. The mischief begins when the grant of permission itself is considered to be equivalent to an adjudication or to an expression of opinion by the Court adverse to the veracity of the witness instead of being treated merely as a permission to test veracity of a witness, a permission which can hardly be refused when any witness makes an unexpected statement adverse to the case of the prosecution: 14 Pat.L.T. 580: A.I.R. 1933 Pat. 488; 38 Cr.L.J. 271: A.I.R. 1937 Pat. 34. *See* also 14 Pat.L.T. 494: A.I.R. 1933 Pat. 517; A.I.R. 1964 S.C. 1563.

Ordinarily, if it is made to appear to the Court that a witness has resiled from the statement made by him during investigation, it should permit the cross-examination of such a witness under S. 154, Evidence Act. Also under S. 162, Cr.P.Code as amended in 1955, it is open to the prosecution to confront a witness with his statement made during investigation with the permission of the Court: 1960 Cr.L.J. 520: A.I.R. 1960 Raj. 101. *See* also 1974 B.B.C.J. 227.

The Court has discretion to permit examination of a witness under S. 154 when it is satisfied from the manner in which the witness gives evidence that he is not desirous of telling the truth and that it is necessary to give such permission to elicit the truth. Inconsistent or contradictory statements of the witness are not the only ground for permitting examination under S. 154. [A.I.R. 1977 S.C. 170; A.I.R. 1976 S.C. 294, Rel. on]: A.I.R. 1982 Cal. 397: (1982-83) 87 Cal.W.N. 102: (1982) 2 Cal.H.N. 166.

The mere fact that the witness has given certain answers not wholly favourable or even adverse to the case of the party who has called him is never considered sufficient ground for permitting the party to cross-examine him. Such permission is granted only when the witness is said to be hostile to the party calling him. The Court, on a consideration of all factors relevant to the question, must form its own opinion that the witness really bears a hostile animus to the party calling him, the law has, advisedly left the matter entirely at the discretion of the trial Judge who has the benefit of watching the witness in the box and hearing him giving evidence. Such discretion like any other discretion vested in a Court, has to be exercised judicially: (1961) 2 Cr.L.J. 653 (Mys.).

Before declaring a witness hostile, it is usual for a Judge to look into the statement made before the Investigating Officer to see whether the witness was actually resiling from the position taken during investigation. The party must lay a foundation for cross-examining its own witness: (1958-59) 63 Cal.W.N. 671: 1960 Cr.L.J. 1579: A.I.R. 1960 Cal. 776.

A witness can become hostile only when he makes a statement contrary to the case taken by the party who has summoned him. It is then open to the party examining him to pray to the Court to declare him hostile and seek the permission of the Court under S. 154 for cross-examining him. The party may then through cross-examination elicit from him the proof of his case: A.I.R. 1980 All. 395: (1980) 6 All.L.R. 445.

S. 154 does not require a particular form of application to seek Court's permission to cross-examine one's own witness. A written application is, therefore, not necessary. Permission can be formally asked for. However, a mere declaration of one's intention to ask for Court's permission does not tantamount to asking such permission: (1969) 1 An.L.T. 32.

Before a party calling a witness can cross-examine him it is not necessary that the witness should first of all be declared hostile. In this respect S. 154 gives an unqualified discretion to the Judge quite apart from any question of the hostility or otherwise of the witness. It is, however, necessary before the procedure of S. 154 can be adopted either for permission of the Court to be obtained or for it to be given by the Court without its being sought. Such permission should be signified, if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him: I.L.R. 56 Mad. 7; A.I.R. 1933 Nag. 389. *See* also I.L.R. 58 Cal. 1404: (1930-31) 35 Cal.W.N. 731: A.I.R. 1931 Cal. 401; 1971 Mys.L.J. (S.N.) 27; I.L.R. (1974) 1 Del. 129 (D.B.).

Grant of leave to cross-examine one's own witness at any stage is left completely in the trial Court's discretion, the exercise whereof is not fettered by, or dependent upon, the hostility or adverseness of the witness; the prosecution may seek permission to cross-examine its own witness if it finds after the cross-examination is over or if the last sentence contains a statement inconsistent with or in improvement of or destructive of the prosecution case, and the Court is competent to grant the permission; such permission cannot be used to indicate that the Court has made up his mind or is biased towards one party or the other: 1990 Cr.L.J. (N.O.C.) 29: (1989) 2 An.L.T. 694.

The discretion conferred by S. 154 on the Court is unqualified and untrammelled, and is apart from any question of "hostility". It is to be liberally exercised whenever the Court from the witness's demeanour, temper, attitude, bearing or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the Court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as "declared hostile", "declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts: A.I.R. 1976 S.C. 294: 1976 Cr.L.J. 295: (1976) 1 S.C.C. 727: (1976) 2 S.C.R. 11.

The purpose of cross-examination of a witness is not only to discredit but also to elicit admissions of facts which would help to build the case of the cross-examiner: 1977 Raj.L.W. 107.

S. 154 confers a judicial discretion on the Court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion. It is however, well settled that the discretion must be judiciously and properly exercised in the interests of justice. A party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. Broadly, the contingency of cross-examining the witness by the party calling him is an extraordinary phenomenon and permission should be given only in special cases. Further, the Court, before permitting the party calling the witness to cross-examine him, must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner. [A.I.R. 1964 S.C. 1563; A.I.R. 1976 S.C. 202, Rel. on; (1976) 1 Cut.W.R. 510, Reversed]: A.I.R. 1977 S.C. 170: 1977 Cr.L.J. 173: (1976) 4 S.C.C. 233: (1977) 1 S.C.R. 439.

Before permitting the prosecution to cross-examine the prosecution witness the Judge will have to examine the statement made by the witness before the Investigation Officer to find out whether the witness is really hostile to the party calling him. He may have to consider the manner in which the witness answers the questions, his demeanour while answering questions to examine whether he is attempting to tamper the case of the prosecution. The discretion of granting permission is a judicial discretion and is required to be exercised in a judicious way. Therefore, the witness could be regarded as hostile only if the Court is of the opinion that the witness is hostile to the party calling him and that he is not desirous of telling the truth. Thus, where the Sessions Judge after examining the demeanour of witnesses concluded that they could not be said to have turned hostile, *held*, the discretion exercised by the Sessions Judge could not be interfered with: (1993) 2 An.L.T. (Cr.) 214: (1993) 2 Karn.L.J. 227; (1976) 2 S.C.W.R. 450: (1976) 2 Karn.L.J. (Jr.) 65 (S.N.) 107.

As to the evidence of hostility and principle governing discretion of Court, *see* 30

Nag.L.R. 55: A.I.R. 1933 Nag. 384; 152 I.C. 1021: A.I.R. 1934 Pat. 533.

If a party calling a witness wants to challenge his veracity or to get certain admissions detracting from the value of his evidence given beforehand, the proper procedure is to resort to S. 154, which gives discretion to the Court to permit the party calling the witness to put questions to that witness by way of cross-examination. There is no provision in the Evidence Act, or in the Criminal Procedure Code which justifies a Magistrate recording the evidence of a witness to make at the end of his deposition a note to the effect that he is "declared hostile". Such a note had absolutely no significance in law. The opposite party is entitled to rely on the evidence of such witness: 1945 Pat.W.N. 241: A.I.R. 1946 Pat. 109. *See* also 46 Cr.L.J. 692.

When the Court allows a party to cross-examine his own witness, the reason should be stated, because by offering a witness, a party is held to recommend him as worthy of prudence, and so in general, it is not open to him to test the witness's credit or impeach his truthfulness: (1971) 1 Cut.W.R. 904: (1971) 37 Cut.L.T. 724 (D.B.).

Appreciation of evidence — Witness — Witness called by party giving answers adverse to his case—Appreciation of evidence—Duty of Court—Witness if can be treated as hostile: (1961) 1 Cr.L.J. 403: A.I.R. 1961 Mys. 74.

Where the prosecution's prayer to declare a prosecution witness hostile and to permit to cross-examine her as she made statements which were destructive of the prosecution's case and thoroughly inconsistent with her earlier statements before the Police, was refused without any reason, *held*, order refusing permission was to be quashed: 1990 Cr.L.J. (N.O.C.) 1 (Ori.).

Where a prosecution witness had stated that it was he who had filled up the bank account opening form which was not only contrary but destructive of the prosecution version that it was filled up by the accused, *held*, the trial Court could not have declined to declare him a hostile witness at the public prosecutor's request on the ground that the witness had not stated anything contrary to any earlier statement; the prosecution in the circumstances was entitled to treat the witness as hostile and cross-examine him: A.I.R. 1979 S.C. 569.

Letter produced for first time in course of cross-examination of defendant's witness—Letter taking defendant by surprise—Court is right in allowing defendant to cross-examine witness—Cross-examination should be permitted only in regard to genuineness and contents of letter: A.I.R. 1956 Bom. 189.

Plaintiff's witness during first cross-examination saying nothing regarding a certain document—In further cross-examination, witness admitting the document—Document against interest of plaintiff—Plaintiff's advocate wanting to cross-examine witness on this point by declaring him hostile—Court disallowing—Court, *held*, exercised discretion wrongly: I.L.R. (1961) Cut. 635.

3. Hostile witness.—Though no hard and fast rule can be laid down as to when a witness can be called an adverse or a hostile witness, it can, however, be broadly stated that the Court can allow a party to cross-examine his witness firstly, when his temper, attitude, demeanour, etc., in the witness-box show a deliberately hostile feeling towards the party calling him or secondly, when concealing his true sentiments he does not exhibit any hostile feelings but makes statements contrary to what he was called or expected to prove. Hostility may appear either during the examination-in-chief or the cross-examination and even in re-examination: (1969) 1 An.L.T. 32.

A witness is not necessarily hostile because in an absent-minded moment he admits the truth. Before a prosecution witness can be declared hostile, there must be good ground for believing that the statement he made in favour of the defence is due to enmity to the prosecution: 44 I.C. 33: 3 Pat.L.J. 419. *See* also I.L.R. 61 Cal. 399: (1933-34) 38 Cal.W.N. 659: A.I.R. 1934 Cal. 636; (1976) 2 S.C.W.R. 450: (1976) 2 Karn.L.J. (Jr.) 65 (S.N.) 107.

A witness cannot be treated as hostile merely because his evidence is favourable to the other side, and the fact that the witness had become hostile has to be established by eliciting information such as could give an indication of hostility.

It is not possible for the Court to say without giving reason that he will not believe a witness after permission for treating the witness as hostile has been refused by the Court unless the civil Judge himself comes to the conclusion that he has turned hostile: A.I.R. 1970 Mys. 157.

A witness is not necessarily hostile if he is speaking the truth as he knows and sees it, even if his testimony happens to go against the party calling him: 89 Cal.L.J. 127: A.I.R. 1953 Cal. 160.

Witness for party speaking truth against party calling him is not necessarily hostile witness—Court has discretion to permit party calling him to put questions to witness which might be put in cross-examination: A.I.R. 1961 Ori. 48.

A witness who is unfavourable is not necessarily hostile; a hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth: I.L.R. 49 Cal. 93: A.I.R. 1922 Cal. 267; (1929-30) 34 Cal.W.N. 526: A.I.R. 1930 Cal. 276.

The mere fact, that a witness does not adhere to or subsequently makes a statement different from his previous statement does not of itself justify the employment of the power given by S. 154: I.L.R. 11 Rang. 4: A.I.R. 1933 Rang. 57. *See* also 166 I.C. 726: A.I.R. 1933 Pat. 34; A.I.R. 1945 Cal. 150. *See* however A.I.R. 1933 Nag. 384.

That the answer of the witness is in direct conflict with other evidence is no ground to treat him as hostile and allow cross-examination: I.L.R. 59 Mad. 904: A.I.R. 1936 Mad. 516: 71 M.L.J. 231.

It is not a healthy practice for public prosecutors to tell the Court that he had information that a particular witness had turned hostile. The inference of the hostility of a witness could be drawn only from the answers given by him and to some extent from the demeanour. [1937 Mad.W.N. 557 (F.B.), Rel. on]: 1955 An.W.R. 920: A.I.R. 1956 Andhra 26.

While it is true that prosecution may not call all witnesses it is important that the witness whose evidence is essential to the "unfolding of the narrative" should be called. To say that certain witness has been won over is not conclusive of the allegation and in such a case witness can be produced for cross-examination by the accused for eliciting correct facts: A.I.R. 1971 S.C. 1586: 1971 Cr.L.J. 1173; 1987 Cr.L.J. 1533 (Gau.) (D.B.).

Witness must be put in witness-box and foundation must be laid for theory that he has turned hostile: 1979 Mah.L.J. 494.

In a large number of corruption cases, panchas turn hostile and ultimately because of that, the cause of justice suffer. It is regrettable that public prosecutors do not declare a particular panch or a witness hostile to the prosecution at the proper stage in course of the trial before the Special Judge. Eradication of corruption is a must and if that object is to be achieved, it is high time that not only the panchas who are selected should be respectable panchas but if panchas deliberately turn hostile to the prosecution, the public prosecutors in the State must be on special caution to see, that at the relevant time, and at the proper stage, the panchas are declared hostile to the prosecution in a situation where the panchas turn hostile to the prosecution. It is equally the sacred duty of the public prosecutors to move the Court for necessary action against the panch who has been declared hostile to the prosecution.

It is the absolute discretion of a public prosecutor to drop a witness from examining him either on the ground of the witness being hostile to the prosecution or on the ground that if examined he would duplicate and burden the record, but if the prosecution witness having entered the box tries to trifle with the prosecution case by deliberately adopting the attitude in cross-examination which would destroy the very core of the prosecution case, it is the duty of the public prosecutor to declare such a witness as a witness hostile to the prosecution: (1980) 21 Guj.L.R. 464 (D.B.); (1981) 1 M.P.W.N. 287.

No doubt even if any witness appears to be hostile, it is still the duty of the prosecution to produce the witness before Court whatever may be the worth of his evidence. But for non-production of such witness the whole of the prosecution case cannot be rejected: 1991 Cal.Cr.L.R. 61.

Before seeking permission to declare a witness hostile, the prosecution must demonstrate either by referring to his statement recorded under S. 161 of the Code of Criminal Procedure or otherwise that he was not telling the truth and only then the Court can permit the prosecution to declare a witness hostile: 1991 Cal.Cr.L.R. 121: (1991) 1 Cal.H.N. 331.

Hostility between witness and accused has to be so grave that false implication may be the result. But, mere hostility cannot be sufficient to show that a person would make false allegation against his own brother: 1994 Cr.L.J. (N.O.C.) 348 (Ori.) (D.B.).

Offence under S. 5-A, Prevention of Corruption Act—Illegal investigation does not render statements recorded therein by Police Officer illegal—Offence in Ahmedabad city—Investigation made by Dy.S.P.—Fresh investigation by Superintendent of Police—Statements recorded earlier by Dy.S.P. fall under Ss. 161 and 162, Cr.P.Code—Witness resiling from such statements can be cross-examined: 1968 Cr.L.J. 1505: A.I.R. 1968 S.C. 1323.

"Witness called by party"—Witness tendered—Cross-examination: A.I.R. 1958 Pat. 422: 1958 Cr.L.J. 931.

Where a witness was examined at the accused's instance but he was examined-in-chief by the public prosecutor under the Court's direction and he did not support the prosecution case that the wife set ablaze and found naked and dead in the well was thrown therein by the accused but the Court refused to declare him hostile and did not permit him to be cross-examined, *held*, feeling that its witness is not telling the whole truth or is suppressing some parts thereof, the prosecution can request the Court to declare him hostile and permit it to ask questions which might be but in cross-examination; it may as well seek permission under S. 145 of the Evidence Act to contradict the statement of the witness under S. 162 of the Cr.P.Code. Moreover, if the Court finds from the witness's demeanour, temper, attitude, bearing or tenor or tendency or from his inconsistent statements or otherwise that it is expedient to extract the truth and to do justice, the Court should grant the permission under S. 154 of the Evidence Act: 1995 Cr.L.J. 2195 (Bom.) (D.B.).

Where in the absence of direct evidence, the prosecution relied upon circumstantial evidence to establish that the wife, having recently come to her in-laws' house after having stayed in her parental house for almost a year and a half, was set ablaze at the first floor and was found dead and naked in a nearby well and the circumstances negatived the defence of suicide and though it was stated during the inquest and mentioned in the spot *panchnama* that a petticoat had been found near the well and one of the prosecution witnesses turned hostile and admitted in cross-examination that the petticoat was not near the well and he had told the Police that rich or poor lady would not jump into the well in naked condition, *held*, simply because a witness is declared hostile and permitted to be cross-examined does not mean that his evidence is banished from consideration; the Court is free to accept such portion of his testimony as inspires confidence; the Court may conclude that non-finding of the petticoat near the well showed that even if she reached the well on her own, she was totally naked, one of the circumstances against the plea of suicide: 1995 Cr.L.J. 2195 (Bom.) (D.B.).

4. Value of evidence of witnesses cross-examined under section 154.—Where a witness turns hostile and is cross-examined by the party calling him, the evidence of such a witness need not be rejected *in toto*. It is a question for the Judge to decide whether inspite of the witness having been descredited on one point his testimony may be considered on another: A.I.R. 1933 Mad. 137: I.L.R. 56 Mad. 7: 64 M.L.J. 208; 1993 Cr.L.J. 3634 (Bom.) (D.B.); 1990 Cr.L.J. 821 (Ori.); (1976) 2 S.C.W.R. 450: (1976) 2 Kam.L.J. (Jr.) 65 (S.N.) 107.

The fact that the witness is dealt with under S. 154, Evidence Act, even when under that section he is cross-examined to credit, in no way warrants a conclusion that the Court is bound in law to place no reliance on his evidence or that the party who called and cross-examined him can take no advantage from any part of his evidence. The evidence of such a witness is not to be rejected either in whole or in part. It is not also to be rejected so far as it is in favour of the party calling the witness, nor is it to be rejected so far as it is in favour of the opposite party. The whole of the evidence so far as it affects both parties favourably or unfavourably must go to the Court for what it is worth: 28 Cut.L.T. 523: I.L.R. (1963) Cut. 67; 1973 B.L.J.R. 347: 1973 B.B.C.J. 227; 1983 Cr.L.J. 1706 (Ori.) (D.B.); 1991 Cr.L.J. 1878 (All.) (D.B.).

Hostile witness is not necessarily a false witness: 1993 Cr.L.J. 120 (Madh. Pra.).

If a witness is turned hostile, it does not mean that his entire statement is to be discarded. The rule of prudence is that his statement has to be considered with due care and caution. In other words explicit reliance cannot be placed upon him but if he is duly corroborated by other evidence, his statement can certainly be availed of in favour of the prosecution or in favour of the accused as the case may be: 1976 Cr.L.J. 162 (Him. Pra.); 1981 All.L.J. 871.

The fact that the witness was declared hostile by the Court at the request of the prosecuting Counsel and he was allowed to cross-examine the witness furnishes no justification for rejecting en block the evidence of the witness. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same: 1953 Cr.L.J. 1719: A.I.R. 1953 J.&K. 41 (D.B.).

It is settled law that the testimony of witness is not completely effaced merely because he was declared hostile. Such part of testimony of a hostile witness, as inspires confidence can be accepted by the Court. Partly hostile witness can corroborate: 1993

Cr.L.J. 3421 (All.) (D.B.); 1993 Cr.L.J. 1525 (Del.) (D.B.); 1993 Cr.L.J. 2125 (Ker.); 1992 Cr.L.J. 372 (Cal.) (D.B.).

The grant of such permission does not mean that the witness is a "hostile" or "unfavourable" or "adverse witness" and therefore, a liar. It should be remembered that the only object of cross-examination of a witness or putting in examination-in-chief with the permission of the Court questions of the kind allowed only in cross-examination, is not to discredit the witness but also to bring out evidence which would advance the case of the cross-examiner or the person calling the witness, as the case may be. It is by now well settled that merely because a witness has been dealt with under S. 154 of the Evidence Act, 1872, his evidence does not become unreliable or unacceptable. The Court will have to assess his evidence as any other witness's evidence. Thereupon, the Court may accept it in whole or in part. Acceptance of his evidence or portion or portions thereof would mean that the Court considers that the witness has deposed truthfully on those matters on which his evidence is relied on, but rejection of evidence or portion or portions thereof would not indicate that he swore falsely concerning the matters on which his evidence is rejected as unreliable or undependable, and this is so even if it be that his credit has been successfully impeached and shaken and his veracity doubted. [A.I.R. 1931 Cal. 401; A.I.R. 1976 S.C. 294, Rel. on]: 1978 Ker.L.T. 546 (D.B.).

A party is allowed to cross-examine his own witness because the witness displays hostility and not necessarily because he displays untruthfulness. The fact that the witness is being cross-examined does not imply an admission that all the witnesses' statements are falsehoods. On the other hand, the main purpose of cross-examination is to obtain admission. Consequently, the prosecution is entitled to rely on a part of the witness's evidence even though he has turned hostile: I.L.R. 9 Pat. 474: A.I.R. 1930 Pat. 247; 1972 Cr.L.J. 978.

When a public prosecutor declares a prosecution witness to be hostile and cross-examines him after taking the Court's permission it merely amounts to a declaration by him that the witness is adverse or unfriendly to the prosecution and not that the witness is untruthful. The true rule is that either party may rely upon the evidence of such a witness, and the Court can come to its own conclusion after a consideration of the whole of his evidence: 1958 B.L.J.R. 454: A.I.R. 1959 Pat. 66; (1971) 2 Cut.W.R. 121; (1972) 2 Mys.L.J. 6: 1972 M.L.J. (Cr.) 123.

The evidence of a prosecution witness cannot be rejected wholesale, merely on the ground that the prosecution had dubbed him "hostile" and had cross-examined him: A.I.R. 1979 S.C. 1848.

Evidence of hostile witnesses is not wiped-off merely because they have turned hostile and it can be used for the purpose of corroboration to the extent they corroborate the prosecution version: 1995 Cr.L.J. 819 (Raj.); 1993 Mah.L.J. 1416.

In a criminal prosecution, even if a witness is cross-examined and contradicted by his previous statement with the leave of the Court by the party calling him, his evidence still remains admissible in the trial and a conviction can be based upon that evidence, if corroborated by other reliable evidence. [1975 Cr.L.J. 1009 (S.C.); 1976 Cr.L.J. 295 (S.C.); 1976 Cr.L.J. 203 (S.C.), Rel. on]: 1976 Raj.L.W. 410: 1977 Cr.L.J. 68 (D.B.); 1977 Cr.L.J. 1349 (Gau.) (D.B.); 1985 Cr.L.J. 1767: 59 Cut.L.T. 381.

What is required to be considered is whether the credit of the witness has been completely shaken. The fact that such cross-examination was permitted does not imply that the witness who was cross-examined is, for all purposes an untrustworthy witness, and no part of his statement can be regarded as representing the truth. The question before the Court in such a case would be to decide which part of his testimony is false, and which part of his evidence is true, provided there is the required degree of conviction in the mind of Court that a particular part of the testimony of a witness, whether it forms a part of the examination-in-chief or cross-examination, is true. There is nothing which can prevent the Court in acting upon such evidence in support of its conclusion. [1976 Cr.L.J. 203 (S.C.), Rel. on]: 1977 Cr.L.J. 59: 1976 Raj.L.W. 345 (D.B.); 1977 Cr.L.J. 513 (Pat.) (D.B.); 1979 Cut.L.R. (Cr.) 36 (D.B.); (1978) 1 M.P.W.N. 25; 1976 Cr.L.J. 1409 (D.B.); 1980 Raj.L.W. 510; 1981 All.Cr.R. 442: 1982 All.L.J. 66 (D.B.).

Because a person is produced as a witness on the side of the plaintiff he should not be regarded as a witness of truth if he is interested in the defendant and as such is clearly hostile to the plaintiff. The value of his evidence is to be judged on its merits and the

plaintiff cannot be pinned down to the case put by him in his cross-examination: I.L.R. (1954) 4 Raj. 822: 1954 Raj.L.W. 563: A.I.R. 1955 Raj. 65.

Permission to cross-examine witness by itself is not enough to discredit the witness: 1969 Cr.L.J. 1527: A.I.R. 1969 Pat. 415.

A hostile prosecution witness who is permitted to be cross-examined by the prosecution, does not necessarily loose his or her credibility because of that fact. The entire evidence of the hostile witness has to be considered on its merits and the Court would be perfectly entitled to accept as much of that evidence as it might find acceptable: 1968 Cr.L.J. 1352 (Cal.).

It is now settled that the evidence of a witness who is cross-examined by the party calling him is still, evidence and can be relied on by either party the credibility of the facts deposed being a matter for the jury. There is no legal objection to permission to treat a witness as hostile being granted freely, although, it is preferable to avoid the use of the words "declared hostile" which by association have come to carry by implication a misleading significance: I.L.R. 19 Pat. 369: A.I.R. 1940 Pat. 289: 22 Pat.L.T. 98.

Grant of permission under S. 154, does not amount to an adjudication by the Court as to the credibility of the witness. When a party is permitted to put questions to the witness in the nature of cross-examination, the evidence of the witness cannot, as a matter of law, be treated as washed off the record altogether. Either party may rely upon the evidence of such a witness and the whole of the evidence so far as it affects both parties favourably or unfavourably must be considered for what it is worth. It is for the Court to consider, in each case, whether the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. Neither the party calling the witness nor the adverse party is precluded from relying on any part of the statement of such a witness. Therefore, in the order granting such permission, it is preferable to avoid the use of expression as "declared hostile" which may appear to carry the implication that the witness is already discredited: (1983) 56 Cut.L.T. 251.

Even in the case of witness who has been permitted to be cross-examined under S. 154 of the Evidence Act, the Court can depend upon that part of the testimony given by the witness which appears to be truthful evidence there being no principle on the basis of which it can be said, that a witness who is permitted to be cross-examined must be dismissed as person giving false evidence on every matter about which he speaks: 1966 Cr.L.J. 1155: A.I.R. 1966 Mys. 248; 1971 Mys.L.J. (S.N.) 368.

Even if a witness is hostile, his entire evidence is not to be discarded. It is for the Court to go through the entire evidence and see what part of his evidence is acceptable: (1969) 35 Cut.L.T. 794. If a part thereof finds support from corroborative and circumstantial evidence, it would be acceptable: (1976) 42 Cut.L.T. 667.

Mere fact that a witness is dealt with under S. 154, of the Evidence Act and was cross-examined, does not necessarily warrant that such an evidence is wholly unreliable. The Court has to consider the facts in each case and see whether as a result of the witness being treated hostile, he stands thoroughly discredited or can still be believed in regard to a part of his testimony and if the Court is satisfied that the credit of the witness has not been completely shaken it can with due care and caution accept that part of the testimony of the witness which is found to be creditworthy and the Court can act upon the same: (1985) 1 An.W.R. 124 (D.B.).

If in the statement of a hostile witness proof is available of certain facts which the party calling him intends to establish, there is nothing to prevent such portion of his evidence as support the case of the side putting him in the witness-box from being considered on their merits and being used as evidence against the party whom he has resolved dishonestly to favour: A.I.R. 1953 Pepsu 97: 1953 Cr.L.J. 1212.

Where hostile evidence is the problem, the appropriate course for a Court would be to bring its judicial discretion to bear on the whole statement and to decide which part of the statement impresses it as true and which not: I.L.R. (1952) Patiala 494: A.I.R. 1953 Pepsu 97: 1953 Cr.L.J. 1212.

When a witness becomes hostile, it would in certain cases be unsafe to accept any portion of testimony which he has rendered in examination-in-chief. To pick and choose between the statement which such a witness makes in examination-in-chief would sometimes be an unsound proceeding. But it would be quite wrong to hold that a Court is entirely debarred from bringing its judicial discretion to bear on materials which cross-examination elicits and of deciding whether the truth lies there: (1939-40) 44 Cal.W.N. 999: A.I.R. 1940 Cal. 536.

The evidence of a hostile witness is not necessarily to be rejected either in whole or in part. It is also not to be rejected so far as it

is in favour of the party which called in the witness nor is to be rejected so far as it is in favour of the opposite party: 30 Cut.L.T. 517: A.I.R. 1965 Ori. 31.

It is not correct to say that when a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part but must be excluded from consideration altogether. The correct rule is that either side may rely upon his evidence and that the whole of the evidence so far as it affects both parties favourably or unfavourably must be considered for what it is worth. *Held*, on examination of the evidence given by the witness declared as hostile, that his evidence should be discarded not on the ground of alleged hostility but on the ground of its thorough unreliability: 1959 Cr.L.J. 212: A.I.R. 1959 Ori. 19; (1959) 1 M.L.J. (S.C.) 101.

Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence *in toto*: A.I.R. 1976 S.C. 294: (1976) 2 S.C.R. 11.

Where the hostile witness does not refute the prosecution story but is silent with regard to a material part of it, *held*, the Court can rely on his testimony, to the extent, it is consistent with the prosecution's case: (1984) 1 Crimes 629 (All.).

In dealing with the evidence of a hostile witness, the Court has to be cautious; it must read his evidence as a whole, weigh it carefully and decide which part of it is true and worthy of credence and which is not; the Court should take into account whether or not there are contradictions in it on material points and, if they are, whether or not they have been satisfactorily explained away by the witness and whether or not any part of his or her evidence is true and carries conviction to a prudent mind. If on such assessment the Court finds any part of such evidence is true and trust-worthy, the Court may act upon it. And the testimony of a hostile witness has to be tested, weighed and considered in the same manner as the evidence of any other witness. Thus, where the prosecutrix, cross-examined with the Court's permission, disclosed all the facts within her knowledge without least hesitation and gave convincing explanation for her contradictory statement made in her examination-in-chief, *held*, her evidence could not be brushed aside *in toto* merely because the trial Court had allowed her to be cross-examined as a hostile witness. [A.I.R. 1976 S.C. 294; A.I.R. 1976 S.C. 202, Foll.]: 1977 Raj.L.W. 146.

A hostile witness may not be rejected outright but the Court has at least to be aware that *prima facie* a witness who makes different statements at different times has no regard for truth. The Court should, therefore, be slow to act on the testimony of such a witness and, normally, it should look for corroboration to his evidence. Thus, where the High Court utilised a serious contradiction in the evidence of the hostile witness for corroborating the evidence of other witnesses, *held*, approach of High Court was wrong. [1971 Mad.L.W. (Cr.) 124, Reversed]: A.I.R. 1976 S.C. 980: (1976) 1 S.C.C. 31: 1976 Cr.L.J. 708.

The fact that the Court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. Thus, where evidence of a witness who was declared hostile by the prosecution was amply corroborated by other evidence to inspire confidence in his testimony, *held*, conviction could be based on his testimony: A.I.R. 1976 S.C. 202: 1976 Cr.L.J. 203: (1976) 1 S.C.C. 389: 1976 U.J. (S.C.) 78: (1976) 2 S.C.R. 921. But *see* A.I.R. 1975 S.C. 1400: 1975 Cr.L.J. 1009: (1975) 3 S.C.C. 562; 1975 Mah.L.J. 779; A.I.R. 1926 Cal. 139: 27 Cr.L.J. 266: I.L.R. 53 Cal. 372; A.I.R. 1923 Cal. 463.

The mere fact that the statement of a witness with regard to the occurrence is favourable to the accused is no ground to reject his evidence, especially when his evidence has also disclosed that he was not wholly in favour of the accused: 1974 Cr.L.J. 724 (D.B.).

Witness declared hostile by prosecution and cross-examined—Statement in cross-examination cannot be taken as substantive evidence—At best it may be utilised for discrediting the testimony of the witness: 1962 Raj.L.W. 55: I.L.R. (1961) 11 Raj. 1091.

It is well settled that declaring a witness hostile has not effect of washing away his entire evidence and acceptable portions can be acted upon. Thus, where both witnesses, who were declared hostile by the prosecution, stated that it was dark at the time of incident and they could not identify any of the assailants and F.I.R. lodged by them did not give out name of any of the accused, *held*, this omission in the information about the names of any of the accused would support the version of these two witnesses that due to darkness they could not identify any of the assailants: 1990 M.P.L.J. 770: 1990 Cr.L.J. 2507 (D.B.). *See* also 1978 All.Cr.R. 11: 1978 Cr.L.J. 196.

Where a witness who was declared hostile by the prosecution deposed about the place of occurrence of incident and the presence of prosecution witnesses at the time of occurrence, *held*, his evidence to that extent could be relied upon. [1978 Cr.L.J. 196; A.I.R. 1976 S.C. 202, Rel. on]: 1994 Cr.L.J. 3351 (P.&H.) (D.B.).

Where a witness had turned hostile and had thereby become totally unreliable, *held*, it was wrong on the part of the Court to pick out any stray sentence spoken by him to make the same basis of any conclusion. [A.I.R. 1976 S.C. 294, Rel. on]: 1992 M.P.L.J. 267 (D.B.).

Evidence of a hostile witness can be accepted in support of motive for the attack: 1991 Cr.L.J. 1859 (Ker.).

Evidentiary value of statement before the Police of a witness who has turned hostile, is practically "nil" and his testimony cannot be utilised for any purpose whatever by the prosecution: 1990 Cr.L.J. 1491 (Mad.) (D.B.).

Hostile witness—Previous statements can be used to contradict him by complying with formalities of S. 145: 1967 Cr.L.J. 1023: A.I.R. 1967 Manipur 11.

Hostile witness—Contradicted with his earlier statement—No formal order transferring earlier statement made—Accused questioned with reference to the statement of hostile witness before committing Magistrate and invited to say what he wanted in defence—Court was right in using the earlier statement as substantive evidence: 1967 Cr.L.J. 975: A.I.R. 1967 Him. Pra. 1027.

5. Cross-examination upon statement made under sections 162 and 164 of Criminal Procedure Code.—Statement recorded under S. 164, Cr.P.Code—Not a substantive piece of evidence—It can be used only to corroborate or contradict its maker: 1967 Cr.L.J. 62: A.I.R. 1967 Him. Pra. 10. *See* also A.I.R. 1960 Raj. 101 (D.B.); A.I.R. 1966 Mys. 248; A.I.R. 1968 S.C. 1323.

Minor omissions—Does not entitle use of S. 162 as amended—S. 162 cannot be used unless witness is declared hostile: (1964) 1 Cr.L.J. 198: A.I.R. 1964 Madh. Pra. 30. *See* also 1974 Cr.L.J. 1346 (Del.).

6. Witness tendered but not examined.—Where a witness has been tendered but not examined by the prosecution, the prosecution cannot cross-examine that witness; S. 154 does not authorise such cross-examination: I.L.R. 7 Pat. 55: A.I.R. 1928 Pat. 203.

Hostile witness—Witness only tendered before but not examined—Still Court can declare him hostile and allow party to cross-examine him—Power to Court to declare witness hostile is not limited by section to cases where there is any previous statement of the witness and from which he is alleged to have departed: 1969 Cr.L.J. 1527: A.I.R. 1969 Pat. 415.

Where the prosecution discards a witness examined by it before the committing Magistrate on the ground that he is not likely to prove himself to be a witness of truth, and tenders him in the Sessions Court for cross-examination by the defence without bringing on record his evidence before the committing Magistrate, the witness is really examined-in-chief by the defence and not cross-examined. But in order that a witness may be dealt with in that way, it is clearly necessary that the leave of the Court contemplated by S. 154, Evidence Act, should be asked for and obtained. Otherwise the evidence of that witness, at least so much of it as is elicited from him by the cross-examination by the prosecution itself, is not properly and legally obtained and to that extent the defence is certainly prejudiced: 1952 Cr.L.J. 1427: A.I.R. 1952 Cal. 621.

The practice of tendering witnesses for cross-examination at the Sessions trial without examination-in-chief on the ground that they had been declared as hostile by the prosecution in the committal proceedings is inconsistent with the provisions of S. 138. Inference of hostility is a matter for the Court to decide and can only be drawn from the answers given by the witness. Where neither the answers of the witnesses given before the committal Court have been transferred under S. 288, Cr.P.Code nor does the prosecution examine them with the permission of the Court under S. 154 there would be nothing before the Sessions Court from which it could draw an inference as to the hostility of the witnesses. As in the circumstances the testimony given by those witnesses before the Magistrate would be inadmissible for the purpose of deciding whether the witnesses were resiling from the truth or not hostility could not be presumed merely on the word of the prosecution. Another result that follows from such a course, would be that the examination by the defence, of such a tendered witness, is really examination-in-chief, and if the prosecution wanted to show that he was not telling the truth, they should cross-examine him with the permission of the Sessions Court under S. 154. If they do not do that their credibility will have to be judged within the four corners of the evidence given by them before the Sessions Court. Any other view would lead to the anomalous position, that the prosecution would be entitled to get the benefit of the presumed hostility before the committing Court in the Sessions Court also, without giving the later Court material on which to decide, whether the witnesses are really hostile or not: 1959 Cr.L.J. 237: A.I.R. 1959 Tripura 11.

A prosecution witness who was declared hostile and permitted to be cross-examined by the prosecution in the committing Court, cannot be treated at once as a hostile witness and cross-examined by the prosecution in the Sessions Court without being examined-in-chief: (1940-41) 45 Cal.W.N. 763: A.I.R. 1941 Cal. 533.

A party can cross-examine even a witness tendered by it: 1969 Cr.L.J. 1527: A.I.R. 1969 Pat. 415.

Where in a murder case the public prosecutor examined a prosecution witness in the trial Court in spite of his being treated as hostile in the committing Court, the fact that no question was addressed to the witness in the trial Court even as a preliminary to seeking to treat him as hostile and he was not confronted with any contradictions between his testimony in the committal Court and in the trial Court would indicate that the witness was not put forward by the prosecution in the trial Court as an unfavourable witness and, therefore, he cannot be treated as a hostile witness especially when the statement of the witness before the committing Court had not been transferred to the record under S. 288: 1977 Cr.L.J. 1349 (Gau.) (D.B.).

7. Interference by appellate Court with discretion exercised by trial Court under section 154.—The discretion given under S. 154 is a discretion vested in the trial Court and where this discretion was exercised after perusal of the statement given under S. 161, Cr.P.Code to the Police, the appellate Court cannot lightly interfere with such discretion exercised by the trial Court and that too without perusing the statement given by the witness under S. 161, Cr.P.Code. Even if the appellate Court holds that permission to cross-examine the witness should have been given by the trial Court, the proper thing for the appellate Court to do would be to send back the case to the trial Court to take the evidence of the said witness further after granting the prosecution permission to cross-examine the witness. Without doing so, the appellate Court cannot straightway proceed to reject the entire evidence of the said witness, as if he was a hostile witness and had been won over by the defence: (1964) 2 Cr.L.J. 213: A.I.R. 1964 Tripura 45.

Exercise of discretion by trial Courts—Discretion not judicially exercised—Appellate Court will interfere in appeal: (1961) 2 Cr.L.J. 653 (Mys.).

Right to treat one's own witness hostile not a substantive statutory right. It is a procedural right conferred on Court recording evidence which may in its discretion come to the conclusion that a witness is hostile or not having regard to circumstances and demeanour of witnesses. Discretion once exercised may not be interfered with by superior Court either exercising appellate or other extraordinary jurisdiction: (1988) 1 Karn.L.J. 162.

8. Illustrative cases.—Where in a suit for a declaration by four plaintiffs that the

155. Impeaching credit of witness.—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:—

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has [1][accepted] the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

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1. Substituted by Act 18 of 1872, S. 11, for "had".

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plaintiffs Nos. 1 to 3 were, respectively, the heads of 3 Schools and they could not be disturbed by the defendant No. 1, the Baptist Union, a witness produced on behalf of the plaintiff Nos. 1, 3 and 4 deposed in his examination-in-chief that the Schools were owned by the defendant No. 1 which was clearly against the pleading and relief, *held*, the plaintiff No. 2 was not alone entitled either to seek amendment of the plaint or to cross-examine the witness under S. 154 which was not attracted under the circumstances; he could only take steps to seek transposition of the dissenting plaintiffs as defendants: (1993-2) 41 B.L.J.R. 1103.

Where evidence of eye-witness was of doubtful nature as to participation of all the accused and hostile witness did not speak anything about the occurrence and there was no other direct evidence, *held*, the evidence of hostile witness could not be of any use: A.I.R. 1993 S.C. 1193: 1993 Cr.L.J. 187.

Two complaints one by *A* and the other by *M* in respect of same incident—Divergent versions—Complaints investigated simultaneously—Statement of *A* recorded as first information in one case and statement of *M* as first information in the other—*B* questioned during investigation—Prosecution against *B* and *M*—*Held*, no portion of *B*'s statement could be used to contradict statement of *M* in his complaint, either under S. 157 or S. 145—*B* not being examined as a witness in the case, his previous statement could not be used either to contradict his evidence or corroborate it even if it is to be held that it is a statement coming under S. 154, Cr.P.Code: 1968 Cr.L.J. 1479: A.I.R. 1968 S.C. 1281.

Amalgamation of complaints—Second complaint before same Magistrate pertaining to same facts and offences, during pendency of first complaint—Magistrate acts within jurisdiction in amalgamating both complaint cases and directing that evidence of both complainants should be recorded during trial—But Magistrate acts improperly in ordering that complainants should have right to cross-examine and contradict witnesses examined by other complainant, though he has discretion to put any question to any witness: 1964 All.L.J. 335: A.I.R. 1965 All. 131.

Section 155—Synopsis.

1. Scope.
2. Section 145 *viz-a-viz* section 155.
3. Clause (1).
4. Clause (2).
5. Clause (3).
6. Clause (4).

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1. Scope.—*See* also Notes under S. 145. *See* (1940-41) 45 Cal.W.N. 763: A.I.R. 1941 Cal. 533; I.L.R. (1945) Mad. 821: A.I.R. 1945 Mad. 358: (1945) 1 M.L.J. 197; 104 I.C. 377: A.I.R. 1927 Rang. 247; 25 All.L.J. 994: A.I.R. 1927 All. 705: I.L.R. (1939) Nag. 109: A.I.R. 1939 Nag. 13; I.L.R. 6 Rang. 542: 54 M.L.J. 545 (P.C.).

S. 155 must be construed strictly: A.I.R. 1928 P.C. 54; A.I.R. 1971 S.C. 1162.

Section if affected by S. 162, Cr.P. Code: I.L.R. 4 Rang. 72: A.I.R. 1926 Rang. 116. *See* also 14 Pat.L.T. 543: A.I.R. 1933 Pat. 589.

Law is no respecter of men though it is a living instrument to achieve individual and social good and morality. Status however high, therefore, cannot be used or held as a shield to cover the core of the cause or reality

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations

(*a*) *A* sues *B* for the price of goods sold and delivered to *B*. *C* says that he delivered the goods to *B*.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to *B*.

The evidence is admissible.

(*b*) *A* is indicted for the murder of *B*.

C says that *B*, when dying, declared that *A* had given *B* the wound of which he died.

Evidence is offered to show that, on a previous occasion, *C* said that the wound was not given by *A* or in his presence.

The evidence is admissible.

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of a truth. In the high temples of justice all the basic bones must be felt bare and attempt to reach them should not in any manner be stifled. S. 146(3) permits a cross-examiner to put questions which will not only shake the credit of a witness, but which will also expose his ethical and moral behaviour which may ultimately weigh with the Court while evaluating or appreciating evidence. By its very nature questions on *mala fides* as opposed to *bona fides*, immorality as opposed to good morality, dishonesty as against honesty, falsehood as against truthfulness, can all conceivably be put, provided there is necessity and foundation for the same. S. 155 expressly permits by indication the mode and manner to bring in evidence upon the credit of a witness so as to impeach such testimony: 1975 Cr.L.J. 1297: 1974 Mah.L.J. 416.

2. Section 145 *viz-a-viz* section 155.—S. 145 in express terms applies to previous statements in writing or reduced to writing only and does not apply to statements not in writing or not reduced to writing. English law places statements in writing and oral statements at par when such statements are used for the purpose of contradicting a witness in cross-examination. The position of the law as laid down by the Indian Evidence Act is different from the position in English law on this point and the principles of English law cannot be followed when they are inconsistent with the express text of the law as contained in the Indian Evidence Act. By virtue of S. 155 proof of former statements inconsistent with any part of the evidence given by a witness can be given and it is not required by S. 155 that the attention of the witness must be drawn to such previous statement in course of his examination. It is obvious, therefore, that S. 145 does not control the provision of S. 155 which is much wider and the evidence of a witness, *A* cannot be regarded as inadmissible for the reason that the attention of witness *B* was not drawn to the statement attributed to him by the witness *A*: A.I.R. 1956 Raj. 196: 1956 Cr.L.J. 1432.

S. 145 appears to be included in S. 155. S. 145 enables a witness to be cross-examined and contradicted with reference to previous statements made by him. This is one method of impeaching the credit of a witness. S. 155 deals generally with the impeaching of the credit of a witness and enumerates different methods of contradicting a witness. One of the methods mentioned in S. 155 of impeaching the credit of a witness is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted and in this sense the whole of the ground covered by S. 145 is included in S. 155: (1942) 44 Punj.L.R. 269: A.I.R. 1942 Lah. 215: I.L.R. (1943) Lah. 397.

3. Clause (1).—Ss. 145, 148 and 155 indicate that the credit of a witness can be said to have been shaken only if it can be shown that he is not a man of veracity, and not that he is of bad moral character. A black-marketeer is not necessarily untruthful nor a non-black-marketeer necessarily a man of veracity. There is, therefore, no reason for rejecting the

evidence of a witness on the ground alone that he is a black-marketeer: 1959 Cr.L.J. 268: A.I.R. 1959 All. 149.

If a witness goes into the box and makes a statement that he believes that another witness is unworthy of credit there would be two safeguards: (*1*) the statement would be on oath and (2) it could be tested by cross-examination. To draw an inference against the credibility of a witness without anybody going into the witness-box in the manner contemplated by S. 155(1) of the Evidence Act would not be legitimate. It would be a proposition which in some conceivable cases might be dangerous to accused persons themselves. Opinion evidence is, as a general rule, not admissible and S. 155(1) is exception to that rule: (1970) 72 Bom.L.R. 405: 1970 Mah.L.J. 634: A.I.R. 1970 Bom. 438.

Witness not believed in judgment in previous case does not necessarily impeach his credit. *See* 162 I.C. 300: A.I.R. 1936 Pesh. 106.

Where the prosecution alleged that the lady complainant accompanied by a male was proceeding in a car and was robbed of her ornaments and currency notes at 9.30 p.m. and in her examination-in-chief she had given out their movements right from the evening till the time of occurrence and also disclosed the purpose for moving towards the particular spot, and in her cross-examination the defence sought to ask questions about her intimate relations with the other occupant of the car, *held*, it was the Court's duty to consider whether the question was relevant from point of view of the defence; it could not be said that the questions which may raise doubt about the veracity of the witness were completely irrelevant; unless there was a clear indication that it was a reckless and scandalous attempt intended to insult or annoy, the topic raised by the question could not have been ruled out; her involvement with her companion also a witness could not be termed as out of the purview of S. 146. The Court should have taken into account, after taking the defence Counsel into confidence, the line of defence and then decide whether such questions should or should not be allowed and whether they really fell within the exceptions carved out by the statute. [A.I.R. 1960 Mad. 73; A.I.R. 1970 Mys. 94; A.I.R. 1933 Cal. 316; I.L.R. 47 All. 799 and Wigmore on Evidence 3rd Ed, p. 922, Rel. on]: 1974 Mah.L.J. 416: 1975 Cr.L.J. 1297.

4. Clause (2).—Testimony of trap witnesses and persons of shady character—Conviction can be based on such testimony—Testimony should not be rejected as tainted without scrutiny: 1967 Cr.L.J. 744: A.I.R. 1967 Del. 26.

5. Clause (3).—The language of S. 155(3) is *prima facie* wide enough to permit such questions as asking the Investigating Officers if certain witnesses made certain statements. But where the evidence has been reduced into writing, it is undesirable to permit the putting of such questions. In such a case the written record made by the Police Officer is the only proper and right thing to prove to discredit the witnesses. If the Police diary is used the provisions of S. 145, Evidence Act, and S. 162, Cr.P.Code will have to be borne in mind. A copy of the statement made before the Police cannot be used as against the witness till he has been confronted with it: 26 All.L.J. 139: A.I.R. 1928 All. 280.

S. 155 only lays down that the credit of a witness may be impeached *inter alia* by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted; but it does not lay down the manner in which the former statement is to be proved. The mode of proof of such a statement in writing, when it is sought to be tendered in evidence for contradicting a witness, is provided in S. 145. In other words, S. 155 is controlled by S. 145 and is not independent of it: A.I.R. 1930 Lah. 491.

S. 155(3) does not render nugatory the clear and explicit provisions of S. 145 and in fact takes for granted the existence and binding effect of those provisions: (1930) 32 Punj.L.R. 259: A.I.R. 1931 Lah. 38. *See* also 147 I.C. 591: A.I.R. 1934 All. 226; A.I.R. 1936 P.C. 289.

The previous statement of a witness, put in under S. 155(3) for the purpose of contradicting him, cannot be used as substantive evidence: (1945-46) 50 Cal.W.N. 206: A.I.R. 1947 Cal. 342. But see *infra*. S. 145 must be taken as it is uninfluenced by any consideration derived from the previous state of the law or the English law upon which it may be founded. It makes no mention of oral statement. It, therefore, cannot control S. 155. Hence, questions with reference to statement made by one witness to another are legally admissible, though the Court could refuse

to rely on them on the ground that they had not been put to the witness concerned for explanation: A.I.R. 1939 Nag. 13: I.L.R. (1939) Nag. 109.

The proposition that the expression "which is liable to be contradicted" in S. 155(3) should mean "which is relevant to the issue" is too broad. [I.L.R. 17 Cal. 344; A.I.R. 1928 P.C. 54, Expl. and Disting.]: A.I.R. 1971 S.C. 1162: 1970 U.J. (S.C.) 604: (1971) 7 S.C.R. 399.

Statements of prosecution witnesses previously recorded—Use for impeachment, right to accused: 1969 Cr.L.J. 990: A.I.R. 1969 Ori. 176.

Former statement—Use of for impeaching credit of its maker: 1968 Cr.L.J. 201: A.I.R. 1968 Ori. 20.

Witness's attention should be drawn to his previous statement before using it: A.I.R. 1970 Pat. 95.

In absence of any inherent vice, no presumption adverse to a witness should be drawn on any matter unless it is put to him and he is given an opportunity to explain it: A.I.R. 1970 Cal. 38.

What is meant by there being no estoppel against a statute is that a person is not estopped by a previous statement as to the existence of a statutory provisions from contending that the converse is the statutory provision. The only rule to which estoppels are subject is that they cannot override the law of the land. The question of clash between the law of the land and an estoppel arises only when the statement on which the estoppel is founded is about the state of the law of the land, *i.e.*, is a statement of law. A mixed statement of fact and law cannot be said to be contrary to the law because in a certain state of facts it may be correct according to the law of the land. If a judgment debtor states that his house is liable to be attached and sold, it is not necessarily against S. 60(1)(*c*) because if he is not an agriculturist and does not occupy it as such it is not exempt from attachment and sale: I.L.R. (1963) 2 All. 976: 1963 All.L.J. 832.

S. 162, Cr.P.Code, allows the credit of a witness to be impeached by a statement which he is alleged to have made to the Police in the course of an investigation under Chapter XIV of the Code though no person is bound to state the truth to the Police in the course of the above investigation: 41 I.C. 668: 18 Cr.L.J. 844. *See* also 14 Pat.L.T. 543: A.I.R. 1933 Pat. 589.

When a witness is confronted with a statement made to the Police during investigation under S. 162 of the Code of Criminal Procedure, such contradiction even by the prosecution becoming possible after the amendment of that section, there may be more than one possibility. The first possibility is that the witness may deny that he made the previous statement; the second possibility is that he admits that he made them; and the third possibility is that he may not only admit the previous statement but he may also state that what he stated before the Police was the truth. In the case of the first two possibilities, all that emerges by reason of the contradiction of the witness would be that his credit is shaken and impeached since he is demonstrated to be a person who stated something before the Police and stated something else before the Court. That being so, it would be impossible for the prosecution to make any further use of that part of the evidence given by the prosecution witness who is cross-examined. That is the clear position emerging from the provision of S. 162 of the Code of Criminal Procedure, which incorporates a very clear embargo upon the use of any statement made by any person to a Police Officer in the course of an investigation for any purpose save the purpose expressly permitted. The purpose for which its use is permitted is what is explained in the proviso to sub-S. (1) of S. 162 which states that when such statement or record has been reduced to writing and is duly proved it may be used by the accused and by the prosecution with permission to contradict the witness in the manner provided by S. 145 of the Evidence Act. There is of course provision for similar use in re-examination: 1966 Cr.L.J. 1155: A.I.R. 1966 Mys. 248.

Where the witnesses, who were treated as hostile by the prosecution were confronted with their earlier statements to the Police and their evidence was rejected as it was contradicted by their earlier statements, *held*, such use of the statements is permissible under S. 155 of the Evidence Act and the proviso to S. 162(1) of the Code of Criminal Procedure read with S. 145, Evidence Act: A.I.R. 1979 S.C. 400.

Statements of witnesses made to the Police should not be used to corroborate them except in very special circumstances. The evidence of a witness hostile to the Crown may be impeached by reference to the Police diary: 45 I.C. 272: 5 P.L.J. 568.

Ss. 145, 146 and 155(3) are complementary to each other; read together, a cross-examiner cannot be restricted from putting questions except to the extent indicated in Ss. 148 to 152. Where trial Court permitted the defence Counsel to use the statement recorded by the Police in connection with another case for cross-examining a prosecution witness, *held*, he was perfectly right in doing so as S. 162 of Cr.P.Code was never intended to curb the right of the accused to contradict a witness with his previous statement: 1994 Cr.L.J. 464 (Ker.).

The statement to the Police is not evidence like a statement made on oath before a competent authority: 41 I.C. 668: 18 Cr.L.J. 844. A confession by an accomplice to an Excise Officer is inadmissible as a piece of substantive evidence as against the other accused, even if the later had been tried along with the maker and, *a fortiori*, it is inadmissible as a piece of substantive evidence in a separate proceeding against the other accused. But where the maker is examined as a witness on behalf of the other accused, it is admissible for the purpose of impeaching his credit in respect of the later statement made by him in his evidence in Court under the provisions of S. 145: I.L.R. 61 Cal. 967: (1933-34) 38 Cal.W.N. 1005: A.I.R. 1934 Cal. 616.

Two independent reports to Police—Second report not in course of investigation—Admissibility in evidence: A.I.R. 1957 All. 755: 1957 Cr.L.J. 1200.

First information report admissible in defence to impeach informant's veracity: A.I.R. 1927 Cal. 17: 44 Cal.L.J. 253; A.I.R. 1936 Lah. 833: 165 I.C. 146.

First information report—Use of to impeach credit of informant: 1957 M.P.L.J. (Notes) 178.

Statements under S. 164, Cr.P.Code cannot be substituted as evidence of witness—They can be used only either to impeach credit or corroborate: 1957 Cr.L.J. 117 (All.).

Where, in the Sessions Court, witnesses retracted the statements made before the committing Magistrate, *held*, under S. 155, the statements made to the Police and to the committing Magistrate were relevant to contradict their evidence before the Sessions Court given in place of their retracted statements: I.L.R. 46 Bom. 97: (1921) 23 Bom.L.R. 820: A.I.R. 1922 Bom. 108.

It cannot be said that as the former statement of witness was recorded by the order of the Court which had no jurisdiction, it cannot be used even for the purpose of contradiction or corroboration or shaking his credit. The statement of a person does not cease to be his statement merely because it was written in aforementioned circumstances. Such a statement can be used for the purpose of Ss. 145, 155 and 157 of the Act: A.I.R. 1987 P.&H. 126.

The statement made by any person before the Commission of Enquiry under S. 6 of the Commissions of Enquiry Act, 1952 is wholly inadmissible in evidence in any future proceedings, civil or criminal; it cannot also be used for the purposes of cross-examination to contradict the witness or to impeach his credit: A.I.R. 1988 S.C. 1883: 1989 Cr.L.J. 1.

A defendant who is endeavouring to shake the credit of a witness by proof of former inconsistent statements, can depose that while he was engaged in conversation with the witness, a tape-recorder was in operation or can produce the said tape-recorder in support of the assertion that a certain statement was made in his presence: A.I.R. 1956 Punj. 173: (1956) 58 Punj.L.R. 441: I.L.R. (1956) Punj. 1351.

Tape-recordings—Not inadmissible merely on ground of possibility of their being tampered with: (1964) 4 S.C.R. 733: A.I.R. 1964 S.C. 72.

Where the alleged former statement is allegedly recorded on a tape-recorder, it falls within S. 155(3), Evidence Act. Even in respect of statements sought to be brought within S. 155(3), the witness's attention must, before the alleged former statement could be proved, be called to such parts of the statement as are sought to be used for the purpose of contradicting him. If at any time, the Court feels the necessity for a transcription or translation of any part of the tape-recording considered relevant and admissible, it will be open to the Court to get such transcription or translation done: (1976) 1 Karn.L.J. (Jr.) 45 (S.N.) 21.

156. Questions tending to corroborate evidence of relevant fact, admissible.—When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

A previous statement made and tape-recorded can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of other three last mentioned matters under S. 146(1), S. 153, *Exception* 2 and S. 155: A.I.R. 1971 S.C. 1162: 1970 U.J. (S.C.) 604: (1971) 1 S.C.R. 399.

Statement made before Coroner is admissible at trial: (1926) 28 Bom.L.R. 775: A.I.R. 1926 Bom. 404.

Letter written by witness is no evidence of facts stated therein, more so when it is not put to him and given opportunity to contradict or explain the same. [A.I.R. 1945 P.C. 174, Foll.]: A.I.R. 1984 N.O.C. 131: (1983) 2 D.M.C. 77 (Del.).

Identification in jail—Value of, as evidence.—Evidence of identification in the jail cannot be treated as substantive evidence in the trial as it is not on oath, and is made in extra-judicial proceedings: 19 All.L.J. 947: A.I.R. 1921 All. 215. When a person, who makes such an identification, states in Court that he can identify no one, the evidence of identification is not admissible: A.I.R. 1921 All. 215.

6. Clause (4).—In prosecution for rape, general immoral character of prosecutrix may be shown. S. 155(4) refers to such evidence as that her general reputation was that of a prostitute or that she had the general reputation of going about and committing immoral acts with a number of men: A.I.R. 1932 Cal. 523 (D.B.). *See* also A.I.R. 1926 Cal. 320 (D.B.).

Where in a rape case wherein the body of the victim was found floating in a well after 18 hours, the doctor, in his chief-examination, had stated that laceration on vagina was due to intercourse, *held*, the veracity of that statement is not in any way affected by the admission in his cross-examination that on account of laceration only on the labia mizora, it cannot be said that there was intercourse as the deceased was a grown-up married lady and there could not have been laceration on the vagina in the absence of violent intercourse: 1992 Cr.L.J. 2236 (Andh. Pra.) (D.B.).

Section 156—Notes.

One untruthful witness cannot corroborate another untruthful witness: 1953 Cr.L.J. 990: A.I.R. 1953 Bhopal 21. Corroboration by circumstances. *See* A.I.R. 1957 Ori. 78: 1957 Cr.L.J. 469.

Corroboration in order to be of any value, must be on material particulars and the facts relied on for corroboration must be established by reliable and independent evidence. These facts must be such as to lend assurance to the crucial issue which is in question: 1961 M.P.L.J. 1361: A.I.R. 1961 Madh. Pra. 127. *See* also 1978 Jab.L.J. (Note) 77.

Independent evidence might be admissible under S. 156 to corroborate the evidence of an accomplice about certain incidents unconnected with a robbery in which he took part. But this will not be "material particulars" under S. 114, *Illus.* (*b*): I.L.R. 35 Mad. 247: 13 Cr.L.J. 305 (S.B.).

First information report—What is—Use of, at the trial—First information by accused—Admissibility in evidence: I.L.R. (1961) 1 Raj. 299: A.I.R. 1962 Raj. 3.

Statement by widow that her deceased husband was in continuous possession of

157. Former statements of witness may be proved to corroborate later testimony as to same fact.—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

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disputed land and in proof, producing rent receipts. Though receipts were not properly proved they were admissible to corroborate her statement that they were regularly brought home to her by her husband who said that they were rent receipts: 1960 All.W.R. (H.C.) 607: A.I.R. 1961 All. 38.

Report by Commissioner appointed to inspect—Proof of its execution by Commissioner proves its contents under S. 61—Commissioner, not examined under O. 26, R. 10(2), C.P.Code but as ordinary witness, proving the report—Report can be relied on as corroborating evidence of inspection by Commissioner notwithstanding non-compliance with O. 26, R. 18: A.I.R. 1970 Del. 205.

Malicious prosecution—Suit for damages—Nature of proof required—Judgment in criminal case—Value or weight of. *See* A.I.R. 1957 Mad. 646.

Witness not supporting prosecution case at the trial—His earlier statement to the Police constable in favour of prosecution cannot be used for corroboration: 1970 M.P.L.J. 976.

Even where the evidence of the complainant in a corruption case is quite credible, no conviction can be based on such evidence unless it is corroborated by independent material: 1993 Cr.L.J. 2878 (Bom.).

The investigating agency in order to be fair to the public servant concerned should get a part of that solution chemically examined with a view to obtain unimpeachable evidence before the Court as regards the contents of the solution which was used for the purpose of the experiment. After all, an investigating agency is expected to be as fair to the alleged culprit as to the prosecution when the trial commences before the Court.

It is necessary for the investigating agency to preserve the solution used for the experiment as regards detection of Phenolphthalein powder on the person of the accused or on his clothes or on anything that he has touched. Court further lays down that in case of failure or omission of the investigating agency to preserve such solution, it is open to the Court to raise an inference adverse to the prosecution at the trial, depending upon the facts and circumstances of each case, and to determine upon the impact of that inference on the other evidence before it: (1979) 20 Guj.L.R. 535.

Evidence as to official acts done by an official witness need not be corroborated as corroboration is only a rule of prudence and not law: I.L.R. (1987) Karn. 3538.

Straight forward and trust worthy evidence of relations of deceased needs no corroboration for sustaining conviction. Such evidence cannot be discarded on the sole ground of interested witness in the prosecution case: I.L.R. (1992) 3 Ker. 142 (D.B.); 1982 M.P.W.N. 92 [Corroboration by highly interested witnesses living far away from place of incident is no corroboration at all]; 1971 S.C.D. 374 [Independent corroboration for any evidence may be sought for if the testimony is that of an interested witness.]

Corroboration—Whether should be on all parts. *See* (1982-2) 23 Guj.L.R. 438: (1982) 2 Guj.L.H. 977.

Section 157—Synopsis.

1. Scope and applicability.
2. "Statement".
3. Former statement.
4. "At or about the time".
5. "Investigate".
6. Statement before authority competent to investigate.
7. Evidence regarding identification.
8. Statement recorded by Court having no jurisdiction.
9. Police investigation.
10. First information report.
11. Statement of victim of sexual offence.
12. Previous statement of accomplice.
13. Statement affecting conduct.
14. Recital in documents/deeds.
15. Previous statements on question of date of birth/age.
16. Illustrative cases.

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1. Scope and applicability.—*See* (1910) 12 Bom.L.R. 663; I.L.R. 25 Mad. 183 (210); 7 All.L.J. 468: I.L.R. 53 Bom. 699 (P.C.); I.L.R. 34 Cal. 129; 2 Cal.W.N. 704; (1902) 4 Bom.L.R. 434; I.L.R. (1953) Cut. 531: A.I.R. 1954 Ori. 23.

The principle of the section is that consistency is a ground for belief in a witness's veracity: 13 Cr.L.J. 305 (S.B.). The section is an exception to the rule that a person cannot corroborate himself: (1968) 1 S.C.W.R. 23.

There are only two things which are essential for S. 157 to apply. The first is that a witness should have given testimony with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact. If the witness to be corroborated also says in his testimony that he had made the former statement to someone that would add to the weight of the evidence of the person who gives evidence in corroboration, just as, if the witness to be corroborated says in this evidence that he had made no former statement to anybody, that may make the statement of any witness appearing as a corroborating witness as to the former statement of little value. But in order to make the former statement admissible under S. 157 it is not necessary that the witness to be corroborated must also besides making the former statement at or about the time the fact took place, say in Court in his testimony that he had made the former statement: (1962) 3 S.C.R. 590: A.I.R. 1962 S.C. 424; 1973 Cr.L.J. 481; 1991 Cr.L.J. 3350 (Del.) (D.B.). However, the aforesaid proposition would not apply when the witness had not at all given a statement in Court which is sought to be corroborated. [(1962) 1 Cr.L.J. 473 (S.C.), Expl.]: 1985 Cr.L.J. 569.

S. 162(1), Cr.P.Code by enacting that no statement made to the Police Officer or any record thereof shall be used "for any purpose at any enquiry or trial" repeals by implication S. 157 so far as it concerns statements made to a Police Officer in the course of an investigation: 14 Pat.L.T. 543: A.I.R. 1933 Pat. 589.

The general provisions of the Evidence Act contained in S. 157 are controlled by the special provisions of S. 162, Cr.P.Code which is a special enactment as against the wider and more general enactment in the Evidence Act. It is, therefore, of first importance to determine whether an information is really first information and therefore, can be used under S. 157, Evidence Act, or it is hit by the provisions of S. 162, Cr.P.Code. If it is hit by S. 162, Cr.P.Code, it cannot be used except for the limited purpose mentioned therein: 1958 Cr.L.J. 986: A.I.R. 1958 Mad. 368; 50 I.C. 834: 10 Mad.L.W. 239.

A statement admissible under S. 157 can be proved by a person to whom it was made. Evidence of a person who hears a statement being made is as direct proof of the same as the evidence of a person who sees a deed is proof of the deed being done: 58 I.C. 344: 21 Cr.L.J. 760.

S. 157 provides an exception to the general rule excluding hearsay evidence and in order to bring a statement within the exception, the duty is cast on the prosecution to establish by clear and unequivocal evidence the proximity of the time between the taking place of the fact and the making of the statement: 110 I.C. 676: A.I.R. 1928 Lah. 647; 1984 Cr.L.R. 650: 1984 W.L.N. (U.C.) 401 (Raj.); 1984 Cr.L.R. 651: 1984 W.L.N. (U.C.) 400 (Raj.).

Hearsay evidence—Admissibility under the section: 1968 Cr.L.J. 54: A.I.R. 1968 Guj. 11.

S. 157 cannot be invoked to let in statements made by somebody else as evidence for the purpose of corroboration of a witness examined in the case: 110 I.C. 521: A.I.R. 1928 Cal. 893. But *see* I.L.R. 53 Bom. 699: (1928-29) 33 Cal.W.N. 1006 (P.C.).

Where a person has been examined as witness, a statement said to have been made by him to another is not admissible when no question is put to the witness as to whether the particular statement had been made to such other person: A.I.R. 1934 Sind 100.

Two circumstances, which are alternative, are conditions precedent to the proof of earlier statements under S. 157. The first is that the statement must have been made at or about the time when a fact took place. Where the fact is the authority to adopt said to have been given by the husband in 1901 and the statements were made on 18th December, 1928, 27 years after the event, they cannot be said to have been made at or about the time when the fact took place. Further, where the statements were made in an enquiry by the

Court of Wards for purposes of according consent to the adoption, the statement is not made before the authority legally competent to enquire into the fact of giving of authority. S. 157, therefore, cannot make the statements provable: A.I.R. 1965 S.C. 1549.

The facts stated in the affidavits of persons who are alive cannot be proved without examining their deponents in the Court and giving an opportunity to the other side to cross-examine them: (1990) 1 Hindu L.R. 639 (P.&H.).

Where statement of first informant to prosecution witness and in the F.I.R. was sought to be used as corroborative evidence under S. 157 against the accused, *held*, as first informant was dead, she could not be examined as a witness in the trial and, therefore, S. 157 was inapplicable to the facts of the case: 1991 Cr.L.J. 3350 (Pat.) (D.B.).

In case complainant dies before trial starts, no question of corroboration of his testimony under S. 157 arises: 1989 Cr.L.J. (N.O.C.) 129 (Cal.).

Witness not supporting prosecution case at the trial—His earlier statement to the Police constable in favour of prosecution cannot be used for corroboration: 1970 M.P.L.J. 976.

Where a lady teacher had narrated the incident of the Head Master's attempt to outrage her modesty to her three colleagues on the very next day, *held*, even though it was not *res gestae* and, hence, inadmissible under S. 6, but when corroborated by the three witnesses was clearly admissible under S. 157: A.I.R. 1985 S.C. 1268.

2. "Statement".—The word "statement" has been used in a number of sections of the Act, *viz.*, Ss. 17 to 21, 32, 39, 145 in its primary meaning of "something" that is stated and that meaning should be given to it under S. 157 also unless there is something that cuts down that meaning for the purpose of that section. Words are generally used in the same sense throughout in a statute unless there is something repugnant in the context. On a consideration, or primary meaning of the word "statement" and the various sections of the Act, the conclusion is clear that a "statement" under S. 157 means only "something that is stated" and the element of communication to another person is not necessary before "something that is stated" becomes a statement under that section. Hence, the notes of attendance prepared by a prosecution witness recording the conversation that took place between him and other prosecution witnesses in connection with the defalcation made by the accused would be statement within the meaning of S. 157 and would be admissible to corroborate his evidence under S. 157: A.I.R. 1959 S.C. 356.

Prior whole statement of a witness cannot be admitted—Even admissible parts cannot be admitted before witness is examined: 22 Sind L.R. 309: A.I.R. 1927 Sind 209. *See* also 1933 Mad.W.N. 1148.

It cannot be said that because a statement happens to be "subsequent" one, following a similar statement made by one accused, it becomes *ipso facto* inadmissible. If the time lag between the first and the subsequent statement is much, and if after taking into account the facts and the circumstances of the case, the Court is of the opinion that subsequent statement is likely to have been wrongly ascribed to the concerned accused, the Court may reject the subsequent statement either as inadmissible or as unacceptable. But simply because a statement happens to be a "subsequent" statement it does not become inadmissible. In this sense a joint statement made by the accused is not *per se* inadmissible: (1975) 16 Guj.L.R. 782.

3. Former statement.—The words "former statement" in S. 157 mean a previous statement of the witness, who is to be corroborated, made on another occasion, (*i.e.*), an occasion other than that at which the subsequent statement requiring corroboration is made: 39 Cr.L.J. 395: A.I.R. 1938 Cal. 125. *See* also A.I.R. 1944 Sind 38.

The previous statement of a witness is admissible under S. 157. In order to corroborate the testimony of a witness, and former statement made by such witness, relating to the same fact, at or about the time when the fact took place, may be proved under S. 157: (1975) 41 Cut.L.T. 751.

A witness's earlier statement about the time and place of the incident is quite relevant as also a very important piece of evidence; it is admissible as *res gestae* under S. 6 as also under S. 157: (1986) 2 Kam.L.J. 417 (D.B.).

In order to be admissible, it is not necessary that the witness sought to be

corroborated must also say in the Court in his testimony that he had made the statement. Thus, where the victim's brother to whom the victim had narrated the incident after the occurrence gave evidence in the Court, *held*, it could be treated as sufficient corroboration: 1972 W.L.N. 309 (Raj.).

Former statement—Corroboration—Fact that witness made a statement to corroborating witness need not be mentioned in his evidence: I.L.R. (1967) Cut. 980: A.I.R. 1968 Ori. 20.

Former statements of a witness—Can be used only to corroborate or contradict statements made by him in Court—Statement of witness in Court not believed—His former statements cannot be used as independent evidence in support of other evidence: (1964) 1 S.C.R. 688: A.I.R. 1964 S.C. 900.

4. "At or about the time".—The evidence of witnesses who heard the occurrence several hours after the occurrence, is not relevant. To be evidence of corroborative value it must be at or about the time of the occurrence—Which means that the evidence should be by persons who had heard the occurrence before there was sufficient time for concoction. That is the criterion: (1949-50) 54 Cal.W.N. 221: A.I.R. 1950 Cal. 327. *See* also (1971) 1 Cut.W.R. 711 (D.B.); A.I.R. 1939 P.C. 146.

Philosophy of S. 157 is that when mind of the witness is so connected with events as to make it probable, any statement made by him then would be true and accurate. The words "at or about the time" must mean that the statement must be made at once or at least shortly after the event. The statement loses its value if the interval between the event and the statement is such as to afford opportunity for reflection. But it must be borne in mind that a statement referred to in S. 157 cannot become substantive evidence unless the statement falls within the purview of one of the provisions in the second Chapter of the Evidence Act. Otherwise, the statement has only the limited utility of corroborating the witness concerned. Where four witnesses deposed that they rushed to the scene on hearing the sound of explosion and heard the sole eye-witness saying that the appellant and others threw bomb at her brother, *held*, said statement though not admissible under S. 6 could be admitted under S. 157 and further such statement, if reliable, would corroborate the testimony of its maker: 1992 Cr.L.J. 575: (1991) 1 Ker.L.J. 746 (D.B.).

Where the question is whether delay in making a statement fulfils the "at or about" condition of S. 157 there can be no hard and fast rule. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction. *Held*, applying the test to the facts of the case, the statement alleged to have been made was made as early as could reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction: (1970) 72 Bom. L.R. 405: A.I.R. 1970 Bom. 438.

The expression "at or about the time" means that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself. What is a "reasonable time" is a question of fact in each case: A.I.R. 1945 Mad. 358; A.I.R. 1952 S.C. 54.

In order to prove a statement what is required to be proved under S. 157 of the Evidence Act, is that it was made "at or about the time" when the fact took place and it must have been made before an authority legally competent to investigate into the fact. There cannot be a hard and fast rule in regard to delay caused in making a statement so as to stand the test in the expression at or about condition laid down in S. 157. The main test is whether the statement was made as early as could reasonably be expected in the circumstances of the case and before there was any opportunity for tutoring or concoction.

Where the Honorary Magistrate took the statement of the injured person immediately after he regained consciousness in the hospital which fact showed that the statement was recorded soon after the incidence happened and at the available opportunity when the witness could make a statement, *held*, as there was no opportunity to tutor him nor was there any opportunity for anyone to concoct anything, the said statement therefore, was provable under S. 157: (1976) 17 Guj.L.R. 574 (D.B.).

If a Judge of fact is convinced that the interval, howsoever slight, between a declaration and the fact, is one that probablised fabrication, the declaration ceases to be part of

res gestae. On the contrary, the interval, not short, but is such as permits deduction of an inference that declarant was still under excitement of the fact, the declaration would be part of *res gestae*. Thus, where in a case of sexual offence against a young child, the prosecutrix-victim had narrated the gist of the incident soon after the occurrence to her mother and another villager, on being asked by them about it and at a time when she was still under the impulse of sexual assault on her, *held*, it could not be inferred that prosecutrix had been tutored or that she was devising something to her own advantage between the time of outrageous assault on her and the time when she made her statement to her mother and to the said villager. She was weeping and wearing blood-stained clothes, she came to home straight from the place of incident and had not met anyone else on way and therefore, it could not be said that she would not have made the statement to her mother if she were not questioned: 1989 M.P.L.J. 243.

Receiver's report to the District Judge that he was wrongfully confined and obstructed in the discharge of his duties about 24 hours after the occurrence did not come under the provisions of S. 157, as it was not made at or about the time of occurrence but 24 hours after, and as it was not made to a person who had power to investigate the fact, and that therefore, the prosecution could not have used it to corroborate the witnesses, but that it was open to the defence to have used S. 155 to impeach the credit of the receiver: I.L.R. 53 Cal. 879: A.I.R. 1928 Cal. 732. *See* also (1910) 6 Mad.L.T. 17 (F.B.) [Statement made three days after the occurrence is not admissible]; A.I.R. 1965 S.C. 1549 [Statement made 27 years after the event]; A.I.R. 1949 Cal. 629 [After ten days of occurrence.]

5. "Investigate".—The word "investigate" used in S. 157 is not to be understood in the narrow sense in which the word is used in the Cr.P.Code. It must carry its ordinary dictionary meaning in the sense of ascertainment of facts, sifting of materials, search for relevant data: 33 Cut.L.T. 1193: I.L.R. (1967) Cut. 980: A.I.R. 1968 Ori. 20; I.L.R. 35 Mad. 397 (F.B.).

The word "investigate" used in S. 157 must be taken as a word of wide import and the restricted meaning given to the word "investigation" in S. 4 (1) of Cr.P.Code, cannot be attached to it. The word "investigation" merely means in this section of a fact-finding process and is not confined to one conducted by the Police for the collection of evidence: (1961) 2 Cr.L.J. 71 (Cal.).

6. Statement before authority competent to investigate.—The words "legally competent" mean having power under some law, statutory or otherwise: 50 I.C. 834: 10 Mad. L.W. 239. *See* also I.L.R. 35 Mad. 397 (F.B.); I.L.R. 35 Mad. 247 (S.B.).

The expression in S. 157, Evidence Act is competent to investigate "the fact" and not "the case". The former statement made to any person investigating fact is not enough. The investigation must be by a person legally competent. He must have power to investigate under some law, statutory or otherwise. There being no provision of law or rules under which the sarpanch was legally competent to hold the test identification parade, his report of the identification parade cannot be relied upon under S. 157 as a former statement to corroborate the testimony of the informant: 33 Cut.L.T. 1193: I.L.R. (1967) Cut. 980: A.I.R. 1968 Ori. 20.

A statement made by the informant to a person not legally competent to investigate the fact within S. 157 being a former statement can be used for contradiction under S. 145 and for impeaching his credit under S. 155 as the restrictions imposed in S. 157 do not find place in S. 145 or 155: 33 Cut.L.T. 1193: I.L.R. (1967) Cut. 980: A.I.R. 1968 Ori. 20.

S. 157 draws a sharp distinction between statements made to persons competent to investigate facts and statements made to other persons. A report of an offence, not made at or about the time of the occurrence, to a person who is not legally competent to investigate the offence, cannot be used to corroborate the witness under the section: (1949-50) 54 Cal.W.N. 8: A.I.R. 1949 Cal. 629.

Statement of the witnesses recorded under S. 164 of the Cr.P.Code can be relied on for corroborating their subsequent evidence before the committal Court. [(1971) 1 S.C.R. 56, Rel. on; 1976 Cr.L.J. 1969 (Mad.), Affirmed]: A.I.R. 1980 S.C. 628: (1980) 2 S.C.C. 84: 1980 Cr.L.J. 439: (1980) 2 S.C.R. 491.

As long as an authority legally competent to deal with the matter investigates, the requirement of S. 157 appears to be satisfied.

The proceedings conducted by the Magistrate for purpose of identification would certainly be proceedings by an authority legally competent to investigate and any statement made by a witness to such authority can be used to corroborate his testimony in Court.

Statements made by a witness to a Magistrate at a test identification parade may be treated as plain previous statements made to such Magistrate functioning in discharge of duties imposed upon him under S. 159 of the Code of Criminal Procedure rather than as having been made under S. 164 of the Code. When a witness, makes a statement before a Magistrate holding a test identification parade, the statement thus made whether treated as having been made under S. 159 or under S. 164 of the Code of Criminal Procedure, will be available for corroboration under S. 157 as well as for contradiction under S. 145 of the Evidence Act: (1961) 2 Cr.L.J. 71 (Cal.).

Any Magistrate is competent to hold a test identification and can prove the statements made before him under S. 157 even though he is not empowered to deal with the matter under enquiry: (1927-28) 32 Cal.W.N. 616: A.I.R. 1928 Cal. 500.

Statements by witnesses recorded by a Police Superintendent during investigation are not admissible in evidence nor oral evidence based on such statements: I.L.R. 45 Mad. 766: A.I.R. 1923 Mad. 20: 43 M.L.J. 222.

A statement made to the Deputy Superintendent of Police in which the informant gave an account of what occurred is admissible in evidence as the Deputy Superintendent of Police is an officer legally competent to investigate the facts of murder and dacoity, within the meaning of S. 157: 45 M.L.J. 279: A.I.R. 1923 Mad. 694.

An officer of the C.I.D. who investigates a matter under the order of his superior is not an officer "legally competent" within the meaning of S. 157 as he does not derive his power from the Police Act or the Cr.P.Code: I.L.R. 35 Mad. 397: 13 Cr.L.J. 352 (F.B.).

The "local area" of an officer of C.I.D. is the Presidency of Madras and he is, therefore, competent to investigate an offence under the Cr.P.Code. An Inspector of the C.I.D. is not one of the officers legally entitled to investigate an offence under Ss. 157 to 167 of the Cr.P. Code, and so his evidence is not admissible under S. 157: I.L.R. 35 Mad. 247 22 M.L.J. 490 (S.B.). But *see* I.L.R. 54 Cal. 237 A.I.R. 1927 Cal. 17.

A statement about a fact made on previous occasion before a Collector, who had no authority to investigate the fact cannot be used as a corroboration of the statement by the witness in a subsequent proceeding when that fact is in issue: A.I.R. 1960 All. 339.

A kanungo deputed to make inquiry under S. 148 of the Cr.P.Code may give his deposition and his report is admissible to corroborate his sworn testimony: 12 I.C. 88: 12 Cr.L.J. 480 (Cal.).

A headman cannot examine witness on oath in the course of an inquiry in a criminal case. The statement made to headman can only be used in the manner provided for in Ss. 145 and 157, Evidence Act: 34 Cr.L.J. 781: A.I.R. 1933 Rang. 119.

7. Evidence regarding identification.— (*See* also Notes under S. 9). The Court has to appreciate the evidence on the basis of the facts, circumstances, peculiarities and probabilities of a particular case. The absence of test identification parade is not invariably fatal; there may be other sources and circumstances to provide assurance to the Court in acting on the identification made in Court: 1990 Ker.L.N. 23 (D.B.).

Witnesses might have accidentally seen the photograph of the accused in newspapers. In the absence of evidence of captions or descriptions in newspapers, this will not cause rejection of identification of accused by witnesses: 1990 Ker.L.N. 23 (D.B.). *See* also 1979 Cr.L.R. 614: 1979 W.L.N. 501 (Raj.).

The identification of the accused in Court, without anything else, should not be taken into consideration in order to convict him. [A.I.R. 1980 S.C. 1382, Foll.]: (1982) 53 Cut.L.T. 342.

8. Statement recorded by Court having no jurisdiction.—It cannot be said that as the former statement of witness was recorded by the order of the Court which had no jurisdiction, it cannot be used even for the purpose of contradiction or corroboration or shaking his credit. The statement of a person does not cease to be his statement merely because it was written in aforementioned circumstances. Such a statement can be used for the purpose of Ss. 145, 155 and 157 of the Act: A.I.R. 1987 P.&H. 126.

9. Police investigation.—Any part of a statement of a witness before the Investigating Officer can be brought in record only by way of contradiction as per S. 162 of the Code. What came to the knowledge of the Investigating Officer while recording the statement of a witness cannot be allowed to be brought on record. A question is first required to be put to the witness about the contradiction, if any, between the evidence of the witness and his statement recorded by the Investigating Officer and if the witness denies then that contradiction has to be proved by the evidence of Police Officer who has to look into the statement of the witness and give reply in that regard. Where what came to the knowledge of the Investigating Officer during the investigation of another case was brought on record in the evidence of the said Officer by Court, *held*, such general statement could not and should not have been permitted: 1988 Cr.L.J. 981: 1988 Cr.L.R. 252 (Guj.) (D.B.).

If the statements of the witnesses are recorded after an unusually long time when they could have been recorded or when there was sufficient opportunity of those statements to be recorded earlier, then the explanation as to why those statements could not be recorded earlier has to come from the prosecution. In all criminal matters, the early recording of a statement, especially when it relates to the commission of a cognizable offence, is regarded as a rule. If this rule is not followed, the exception has to be explained by the prosecution. No burden is cast upon the defence to ask prosecution witnesses as to why they have not disclosed their information to the concerned persons at the earliest opportunity. When witnesses insist that they had disclosed the information to certain person, it is the bounden duty of the prosecution to examine those persons to whom such information is alleged to have been disclosed because in that case corroboration as contemplated by S. 157 of the Indian Evidence Act would be available. But the value of the early disclosure of knowledge about the commission of a cognizable offence by witnesses who have seen the commission of such offence cannot be overemphasised. [A.I.R. 1971 S.C. 1467; A.I.R. 1979 S.C. 135, Rel. on]: (1988) 1 Bom.C.R. 92 (D.B.). *See* also (1976) 42 Cut.L.T. 1028.

Previous statements contained in a pre-trap or post-trap mahazar in a corruption case do not come within the ambit of "statement made to the Police Officer" as contemplated in S. 162, Cr.P.Code attracting the prohibition against signature. They are only previous statements which could be legitimately used for corroboration under S. 157 of the Evidence Act. The purpose of such statement is to record things which occur in the presence of the witnesses and which are seen and heard by them and is never intended to convey or impart knowledge to the Police Officer. The secondary purpose of the recording is to serve as aid memoir to the witnesses when they enter the box as a contemporary record of what they saw and heard. The purpose is not to aid the Investigating Officer in detecting the offence and offender in order to place him for trial. Such mahazars cannot take the place of substantive evidence, but they merely corroborate the substantive evidence given before Court as a previous statement under S. 157 of the Evidence Act: 1988 Cr.L.J. 1144 (Ker.).

Dying declaration recorded by Police Officer during investigation in presence of Doctor—*Held*, it cannot be excluded from consideration: 1984 W.L.N. (U.C.) 574: 1985 Raj.L.W. 97.

Two independent reports to Police—Second report not in course of investigation—Admissibility in evidence: A.I.R. 1957 All. 755: 1957 Cr.L.J. 1200.

Panchanama.—Under S. 63(1) of the Bombay City Police Act although the documents containing statements of witnesses made before the Police in the course of investigation cannot be tendered in evidence on behalf of the prosecution, yet the oral statements of witnesses recorded in the panchanama in the presence of the Police at an identification parade in the course of investigation are admissible in evidence to corroborate the statements of those witnesses at the trial, under S. 157: (1945) 47 Bom.L.R. 992: A.I.R. 1946 Bom. 189.

Oral evidence of what the witness had said on the occasion of an identification parade held by the Bombay Police in the course of investigation and recorded in a panchanama written on the occasions in the presence of a competent Police Officer is admissible for purpose of corroboration under S. 157: I.L.R. 54 Bom. 528: (1930) 32 Bom.L.R. 327: A.I.R. 1930 Bom. 158. On this, *see* also 180 I.C. 239: A.I.R. 1939 Pesh. 4.

Panchanamas—They are not substantive evidence of facts stated therein—They can be used only for corroborating or contradicting the panch witness or for refreshing his memory. *See* A.I.R. 1955 Sau. 32.

A panchanama is not evidence of the statements contained therein and it should be proved and exhibited as relevant evidence of those statements: 12 Cr.L.J. 489: 5 Sind L.R. 31. *See* also 1939 Mad.W.N. 465: A.I.R. 1939 Mad. 766.

Panchanama in a corruption case — Admissibility of — When it is hit by S. 162: (1963) 4 Guj.L.R. 5: A.I.R. 1963 Guj. 145.

Statement made in panchanama is not evidence to be read in Court unless it is put to witness who had made it: 1968 Jab.L.J. 737: 1968 M.P.L.J. 745.

Panchanama made during course of investigation—It is hit by S. 162 and not admissible under S. 157, Evidence Act—Even if regarded as note made by panch to refresh memory it cannot be produced in evidence by party calling witness: (1962) 1 Cr.L.J. 142 (Guj.).

Panchanama—If and when amount to statement falling under S. 162: (1963) 4 Guj.L.R. 253: A.I.R. 1963 Guj. 188.

Though a panchanama is a piece of corroborative evidence, the facts which are stated in it cannot be relied upon when they are not stated in the deposition of panchas before the Court, because they do not corroborate any fact deposed to in Court: 1979 Cr.L.J. (N.O.C.) 208 (Goa).

Admissibility of pre-trap and post-trap panchanama in anti-corruption cases—Statements of panchas in panchanama do not fall under S. 162, Criminal Procedure Code—They fall under S. 157 of the Evidence Act unless intended as communication to Police Officer—Mere fact that panchanama is scribbled by Police Officer or signed by the panchas will not make any difference: 1974 Mah.L.J. 789: (1974) 76 Bom.L.R. 627 (F.B.).

Statement made in expectation of death.—Statements made by the persons in expectation of death, who are not only alive but they deposed in the Court, are not admissible under S. 32; but their statements are admissible under S. 157 as former statements made by them in order to corroborate their testimony in Court: A.I.R. 1983 S.C. 126: 1982 All.L.J. 1524; 1993 Cr.L.J. 1881 (Madh. Pra.) (D.B.); 1985 Cr.L.R. 628 (Guj.); 1975 Mah.L.J. 36.

Where statement of a grievously injured person was recorded as dying declaration after a surgical operation without obtaining the doctor's endorsement regarding conscious mental state of the patient and names of the assailants were also neither asked, nor mentioned in the statement recorded by the Magistrate but after his recovery, he in his oral testimony disclosed names of assailants, *held*, his testimony could not be discarded on ground of contradiction with his earlier statement: A.I.R. 1993 S.C. 1544: (1993) 3 S.C.C. 95: 1993 S.C.C. (Cr.) 612: 1993 Cr.L.J. 1857.

Medical/Post-mortem report.—It is not correct to say that in the face of the medical evidence, the mention of injuries in the inquest report cannot prevail. It is true that if the Investigating Officer has given any opinion of his as to how those injuries could be caused or any other technical opinion as could be given only by a medical report, it would not be safe to accept it. But if he has stated a fact which he saw with his own eyes it cannot be said that it should not be read in corroboration of the evidence of the eye-witnesses: A.I.R. 1957 Raj. 331: 1957 Cr.L.J. 1187.

Post-mortem report—Before it can be used to corroborate there must be evidence in the deposition of a witness which can be corroborated: (1967) 2 Cr.L.J. 1633: A.I.R. 1967 Guj. 288.

10. First information report.—The first information report, does not constitute substantive evidence though its importance as conveying the earliest information regarding the occurrence cannot be doubted. It can, however, only be used as a previous statement for the purpose of either corroborating its maker under S. 157 of the Indian Evidence Act or for contradicting him under S. 145 of that Act. It cannot be used for the purpose of corroborating or contradicting other witnesses: A.I.R. 1972 S.C. 283: 1972 Cr.L.J. 233; A.I.R. 1975 S.C. 757: 1975 Cr.L.J. 634: (1975) 3 S.C.C. 851; 1977 Cr.L.J. 1293 (Gau.) (D.B.); 1982 Cr.L.J. 534 (Ori.). *See* also 31 Mad.L.W. 51: A.I.R. 1930 Mad. 632 (2).

First information report by accused—Its use at trial: A.I.R. 1957 Raj. 159.

First information report—Use of, to corroborate the testimony of informant: 1957 M.P.L.J. (Notes) 178.

First information report is admissible: I.L.R. 54 Cal. 237: A.I.R. 1927 Cal. 17. *See* also (1936) 38 Punj.L.R. 203: A.I.R. 1936 Lah. 833.

Where the first information report given by the accused himself to a Police Officer amounts to a confession, its proof is prohibited by S. 25 except to the extent it is permitted by S. 27; the first information report recorded under S. 154 of the Code of Criminal Procedure is not a substantive piece of evidence; it may, however, be used to corroborate the informant under S. 157 or to contradict him under S. 145 if the informant is examined as a witness at the trial. But the first information report having been lodged by the accused himself, it is admissible against him as evidence of his conduct under S. 8 and its non-confessional portion would also be relevant under S. 21 but its confessional portion cannot be used at all against the accused because of the ban under S. 25: (1994) 1 An.L.T. (Cr.) 695 (S.C.).

Rape case—F.I.R. by girl—Evidentiary value—Although F.I.R. is not a substantive piece of evidence yet it is a very valuable piece of evidence for corroboration—It is not necessary that Police report to be used as corroborative evidence should have been made at or about time when the incident took place: 1953 Raj.L.W. 255.

F.I.R.—Use of—Oral complaint reduced to writing by officer in charge of Police Station—Report signed by complainant and counter-signed by Police Officer—Handwriting of Police Officer not proved—Document not admissible in evidence for corroboration—Complaint entered in prescribed book under S. 154—Entry not complaint—Report made to Magistrate as prescribed under S. 157—Not relevant under S. 35, Evidence Act: (1962) 3 Guj.L.R. 107: A.I.R. 1962 Guj. 214.

Where a statement made to a Police Officer is not the first information under S. 154, Cr.P.Code, the Magistrate must take from the Police Officer a statement that the particular statement was made to him: 61 I.C. 650: 22 Cr.L.J. 410 (Cal.). *See* also I.L.R. 5 Lah. 324: A.I.R. 1924 Lah. 609.

In the absence of substantive evidence, first information report cannot be used as corroborative evidence: I.L.R. 6 Rang. 481: A.I.R. 1928 Rang. 295. A letter written by a Police Officer to his superior expressing that a certain person would make a certain statement for a certain sum of money is not under S. 157 receivable in evidence for any purpose: I.L.R. 6 Rang. 142: A.I.R. 1928 P.C. 54: 54 M.L.J. 545 (P.C.).

Where the first information report was lodged within 35 minutes of the occurrence at the Police Station at a distance of two miles from the place of occurrence and in the said report the names of the accused as the culprits as well as the names of the eye-witnesses were mentioned, *held*, it lent considerable corroboration to the testimony of prosecution witness regarding the participation of the accused in the occurrence in question: A.I.R. 1973 S.C. 2695.

Where at the time when maker of first information report was examined in Court the report was not tendered by the prosecution in accordance with the provisions of the Evidence Act and the accused were denied opportunity of cross-examination on the F.I.R., *held*, the first information report was inadmissible under S. 157: A.I.R. 1972 S.C. 622: 1972 Cr.L.J. 451.

11. Statement of victim of sexual offence.—In a case of rape, evidence of witness based on earlier statements made by the victim to them regarding the offence furnishes corroborative evidence. The weight to be attached to that evidence is another matter, depending upon the facts and circumstances of each case one of them being whether the corroborative evidence is given by an independent person: 1956 An.W.R. 572. *See* also 1971 Mys.L.J. (S.N.) 369; A.I.R. 1951 Mad. 760; A.I.R. 1967 Raj. 159; A.I.R. 1949 Cal. 613 (D.B.).

A statement of a raped girl in answer to a person who saw her weeping is admissible: I.L.R. 5 Lah. 324: A.I.R. 1924 Lah. 609. The statement made by a ravished woman after the commission of the offence of rape can be used to corroborate her under S. 157, even if it is not admissible under any other provision of the Act. But a statement admitted under the section is not substantive evidence and cannot be made the basis of a finding as to the existence of the facts mentioned in the statement: A.I.R. 1950 Lah. 151.

In a case of rape independent confirmation of every material circumstance is not required and the corroboration of the evidence of the prosecutrix need not be direct evidence that the accused committed the crime but it is sufficient if it is merely

circumstantial evidence of his connection with the crime. Where the vaginal swab taken from the vagina of the prosecutrix immediately she was rescued from the custody of the accused was found to contain supermatozoa, it is corroborative of the evidence of the prosecutrix that the accused had committed rape on her, even though it was not established that the supermatozoa was that of the accused: (1962) 2 Cr.L.J. 751: A.I.R. 1962 Cal. 641.

Statements of victim of rape can be given as evidence of consistency of the conduct of the victim, but not as corroboration: (1972) 2 Mys.L.J. 59.

In a rape case the statement made by prosecutrix to her husband immediately after the incident is admissible under S. 157 and has a corroborative value: A.I.R. 1983 S.C. 911: 1983 Cr.L.J. 1285: (1983) 4 S.C.C. 10: (1983) 2 Rec.Cr.R. 302.

Girl victim of unnatural offence—Statement by girl to mother 16 hours after occurrence upon persistent questioning—Admissibility: I.L.R. (1960) 10 Raj. 250.

Where prosecutrix disclosed to her maternal aunt soon after the occurrence that she had been raped by the accused and the evidence of the maternal aunt to that effect did not suffer from any infirmity, *held*, such a former statement made by the prosecutrix soon after the event before her aunt was admissible under S. 157 for the purpose of corroboration of her subsequent evidence in the Court regarding same fact: 1977 Raj.L.W. 146: 1977 Cr.L.R. 392.

Where the prosecutrix deposed that on going home she narrated the incident of accused having committed rape on her to her mother and the evidence of her mother and father fully corroborated victims version, *held*, said evidence being relevant under S. 157 could serve as corroborative evidence in support of the evidence of the victim girl: 1991 Cr.L.J. 835 (Ori.).

Where the victim girl in her evidence had neither said anything about the incident nor about the accused but said that she had seen the accused and had not implicated the accused in her evidence, her previous statement to the effect that she was raped shortly after the crime can, of course, be relied on as corroborative evidence under S. 157 of the said testimony, but in the absence of any such substantive piece of evidence, the allegation cannot be proved by the evidence and no conviction can be based thereon: A.I.R 1991 Cal. 42: (1989-90) 94 Cal.W.N. 836.

12. Previous statement of accomplice.—In a charge under S. 161, I.P. Code, of having received a bribe the bribe-giver is in the position of an accomplice and as a matter of expediency his evidence must be corroborated in material particulars implicating the accused. It is highly doubtful if an accomplice can corroborate himself, assuming that he can, statements made by the bribe-giver to third parties are inadmissible in evidence if made long after the event. The statements to be admissible must have been made at or "about the same time" which means within a reasonably short time after the event, when a reasonable opportunity for making it presented itself; whether the statements were so made is a question of fact in each case: I.L.R. (1945) Mad. 821: (1945) 1 M.L.J. 197: A.I.R. 1945 Mad. 358.

Where there were circumstances completing the links in the chain of circumstantial evidence against the accused, *held*, it constituted substantial and sufficient corroboration of the approver's statement in material particulars: A.I.R. 1975 S.C. 1320: (1975) 4 S.C.C. 234.

13. Statement affecting conduct.—Husband charged with murder of his wife—Wife missing for some days—Photograph published in newspaper of dead body recovered by Police—Body identified later as that of missing wife—Statement soon after publication by husband showing reaction of disturbed mind—Admissible under S. 8, Expl. 2 and S. 21—S. 157 not attracted: (1962) 2 Cr.L.J. 354: A.I.R. 1962 Cal. 504.

Statement of complainant immediately after occurrence—Is admissible as evidence of conduct and as corroboration: 29 Cut.L.T. 540: (1963) 1 Cr.L.J. 310: A.I.R. 1963 Ori. 58.

14. Recital in documents/deeds.—Ordinarily, before the corroborative evidence is admissible, the evidence sought to be corroborated must be given. Where, in support of the plaintiff's case, a witness for the plaintiff produces a letter written to him by another witness but before the production of such letter the witness does not make any statement whatsoever, which is sought to be corroborated by the letter, the letter cannot

be admissible in evidence under S. 157: A.I.R. 1937 Mad. 861.

Where the writer of a letter appears as a witness in Court, the contents of that letter would amount to a previous statement of a witness and can also be used for the purpose of corroborating his testimony in Court under S. 157. But it cannot be used as substantive evidence and for that purpose one must scrutinise the nature of the evidence given in Court by the writer himself: I.L.R. (1953) Cut. 531: 19 Cut.L.T. 402: A.I.R. 1954 Ori. 23.

Contents of letters written by wife to her parents from time to time giving graphic details of incidents about strained marital relations with the husband would be admissible as corroborative piece of evidence: A.I.R. 1984 N.O.C. 131: 1984 Hindu L.R. 74: (1983) 2 D.M.C. 77 (Del.).

Reference by witness to deed to which he was not party not permissible: (1938) 40 Punj.L.R. 968: A.I.R. 1938 Lah. 635.

Document showing ownership of land adjacent to disputed land is admissible to corroborate the testimony of ownership: 44 Cal.L.J. 582: 99 I.C. 907: A.I.R. 1927 Cal. 230 (D.B.). *See* also 1940 Mad.W.N. 80.

In a suit regarding ownership of a property, a document to which none of the parties to the suit were parties was held to be admissible as one of the executants of the documents had been examined as a witness and the recital in the document had been relied upon as corroborative of the evidence given by the party to the document, who was examined as a witness. On a contention that the recital in the document is not admissible under S. 157 by way of corroborative evidence, *held*, that if a statement that a particular property was in possession of a particular person in a particular period is relevant evidence of a fact that had taken place, the recital that the person owned it also is a statement of fact that had taken place, at the time when it was made. Possession is a legal conception as also ownership. If a particular statement about a particular individual that he was in possession of a property is relevant evidence of a fact that had taken place, then the fact that he owned it is also a similar recital of a fact that had taken place. The statement in the document in question was therefore relevant as corroborative evidence being a statement made by the witness on a previous occasion: A.I.R. 1947 Mad. 345: (1947) 1 M.L.J. 60.

The word "right" in S. 13 includes a private land; thus, where the dispute pertains to adverse possession and the adjoining land owners orally testify and produce sale deeds, *held*, the deeds have a corroborative value; being admissible under S. 157, the question of their relevancy is not material at that stage: A.I.R. 1972 Gau. 52.

Admissibility of document and proof of document—Distinction between. *See* (1985) 1 W.L.N. 381.

Recital as to boundaries.—A recital regarding boundaries in a document executed between strangers to the suit relating to lands adjoining the suit lands in which the suit land is referred as a boundary is not admissible under S. 13 but may be admissible if the executant is called and deposes to the boundary, to corroborate him under S. 157, or if he is dead under S. 32: 145 I.C. 944(2): A.I.R. 1933 Pat. 639; A.I.R. 1940 Mad. 450: (1940) 51 Mad.L.W. 509; A.I.R. 1972 Mad. 154 (D.B.), overruling A.I.R. 1956 Mad. 226; A.I.R. 1950 Pepsu 7; A.I.R. 1927 Cal. 230 (D.B.).

15. Previous statements on question of date of birth/age.—A recital of the date of birth of a minor in a guardianship application can be used as a corroborative evidence under S. 157, in support of the oral testimony of the applicant in a subsequent suit, if the application was made before a competent authority and long before the subsequent dispute arose: 199 I.C. 19: A.I.R. 1942 Cal. 438.

Proof of age—Verified application made by guardian—Such application containing ward's date of birth—Application can be used for refreshing memory—It cannot be of use in proving age of ward: A.I.R. 1964 All. 53.

Recital as to date of birth of the mortgagor contained in an application by his brother is admissible: 1929 All.L.J. 615: A.I.R. 1929 All. 550.

But a statement by a father in vaccination register made 3 years after birth of child cannot be relied upon to prove paternity of the child: 1929 Mad.W.N. 696: A.I.R. 1930 Mad. 194.

16. Illustrative cases.—Where a party files a petition on the date of hearing asking for adjournment on the ground that his pleader cannot attend Court that day on account of hartal, the fact of filing the petition

158. What matters may be proved in connection with proved statement relevant under section 32 or 33.—Whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

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as well as its contents can be proved and are admissible, though not perhaps sufficient to charge the pleader with professional misconduct: I.L.R. 49 Cal. 732: (1921-22) 26 Cal.W.N. 589 (F.B.).

Anybody who has seen a place may be examined as to what he saw under the general provisions of law: 12 I.C. 88: 12 Cr.L.J. 480 (Cal.).

Admission of guilt by Government servant—Such admission can be used to corroborate independent evidence led to prove charges against him: A.I.R. 1967 Cal. 381.

Report of the local Commissioner, who appeared in witness-box and proved his report, *held*, is admissible in evidence under S. 157. [A.I.R. 1970 Del. 205, Rel. on]: A.I.R. 1985 N.O.C. 133 (P.&H.).

In proceedings under S. 107, Cr.P. Code panchas or reports made by the prosecution witnesses on various dates against the accused, in the absence of the latter, are not substantive evidence of the matters mentioned in them. But under S. 157, such reports can be used in order to corroborate what the witnesses testify to in Court when they are examined in Court: 21 Pat.L.T. 652: A.I.R. 1940 Pat. 252.

In a dacoity case, P.W. 1 had stated in his testimony that he had identified the dacoits, and P.Ws. 19 and 23 had said in their evidence that P.W.1 had mentioned before them the names of the dacoits whom P.W. 1 claimed to have identified among the raiders. *Held*, that even if P.W. 1 had not stated in his evidence that he had named the dacoits, to P.Ws. 19 and 23 after the occurrence, the testimony of P.W. 1 could be said to have been corroborated by the testimony of P.Ws. 19 and 23: I.L.R. 42 Pat. 454.

Evidence of witness cannot be corroborated by the statement made by him in his complaint when he admits he has no personal knowledge of the facts: (1961) 2 Cr.L.J. 76: A.I.R. 1961 Guj. 117.

Two complaints one by *A* and the other by *M* in respect of same incident—Divergent versions—Complaints investigated simultaneously—Statement of *A* recorded as first information in one case and statement of *M* as first information in the other—*B* questioned during investigation—Prosecution against *B* and *M*—*Held*, no portion of *B*'s statement could be used to contradict statement of *M* in his complaint, either under S. 157 or S. 145—*B* not being examined as a witness in the case, his previous statement could not be used either to contradict his evidence or corroborate it even if it is to be held that it is a statement coming under S. 154, Cr.P.Code: 1968 Cr.L.J. 1479: A.I.R. 1968 S.C. 1281.

Bombay Prevention of Gambling Act (IV of 1887), S. 6—Question whether evidence of person who executes warrant under S. 6 requires corroboration—Question depends on facts and circumstances of each case and no legal distinction can be made merely because person who executes the warrant happens to be the person who makes complaint under proviso to S. 6: A.I.R. 1966 S.C. 1633.

Statement of witness under S. 164, Cr.P.Code—Can be used for purpose of corroborations or contradiction of the witness: A.I.R. 1969 Ori. 289.

Before corroborative evidence is admitted, evidence sought to be corroborated must be given: 1968 Cr.L.J. 690 (Manipur).

Entries in diary in solicitor's office—How far admissible: A.I.R. 1968 Bom. 112.

Section 158—Notes.

Statements made before the Sub-Registrar by the deceased attestors to a will are admissible under S. 32(7) taken with S. 158 but not under S. 33. Under S. 158, even prior statement of deceased persons can be admitted both for contradiction and corroboration: 1933 Mad.W.N. 1148. *See* I.L.R. 5 Pat. 777: A.I.R. 1927 Pat. 61. As to scope of section, *see* A.I.R. 1926 Lah. 122.

The Legislature under S. 32(1) in its wisdom had made dying declarations admissible out of necessity; authors of dying

159. Refreshing memory.—A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.—Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

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declarations may not survive to give evidence in the Court; being of persons usually close to death, great solemnity is attached to their dying declarations. The authors of dying declarations are thus a class apart; and the classification is reasonable. S. 158, besides, provides an assurance that dying declarations are tested by other relevant evidence so that they may not lead to injustice. S. 32(1) is, therefore, not violative of Art. 14 of the Constitution: 1985 All.W.C. 399.

Murder—Deceased stating name of assailants—Deceased's statement 5 years back stating that his vision was poor and blurred—*Held*, his previous statement was admissible in evidence: 1964 All.L.J. 1134.

Contradiction of earlier statement—Statement made by widow in her gift deed—Argument that statement is relevant to contradict her earlier statement—*Held*, on facts, that statement made in gift deed did not directly contradict her earlier statement and that it carried little value as compared to her earlier statement: (1967) 1 S.C.R. 153: A.I.R. 1967 S.C. 1134.

Section 159—Notes.

Before a witness is allowed to refresh his memory from any writing made by him, the requirements of S. 159 should be complied with. It must be shown that the writing was made by the deponent at the time of the transaction or so soon after that the Court considers it likely that the transaction was at that time fresh in his memory: A.I.R. 1949 Cal. 103: (1947-48) 52 Cal.W.N. 922.

For purposes of S. 159, it is not requisite that the writing used to refresh memory of a witness should have been admitted in evidence: (1945) 47 Bom.L.R. 992: A.I.R. 1946 Bom. 189.

Accordingly, a document not produced in Court within the proper time and in consequence rejected as evidence under the provisions of O. 13, R. 2, C.P.Code may nevertheless be referred to by the party producing it or his witnesses to refresh his memory of the document if otherwise within the purview of S. 159. The weight of the evidence, the objection to the document upon the ground that it not having been produced at the proper time, renders its authenticity the subject of suspicion and all other grounds upon which a document can be successfully impeached still remain open but refusal to permit a man to refresh his memory by proper relevant contemporaneous document might lead to a grave injustice: 55 I.A. 107: I.L.R. 7 Pat. 305; A.I.R. 1928 P.C. 80: 54 M.L.J. 325 (P.C.).

Witness may refresh his memory by referring to any writing made by himself at the time of transaction concerning which he is questioned: 1979 M.L.J. (Cr.) 546.

Under S. 159, the copy of the original can be used for refreshing a memory before the witness gives evidence when the non-production of the original is accounted to the satisfaction of the Court. Such secondary evidence must be authenticated by foundational evidence that the alleged copy is infact a true copy of the original. The notes jotted down at the time of inspection of documents is not the true copy of the originals which cannot be tendered as secondary evidence in any form either by marking or reproducing its contents by way of refreshing memory under S. 159. No doubt he could give the oral

account of the contents of the document as secondary evidence provided what he had seen in the original document, is established by authenticated foundational evidence: (1992) 3 Kam.L.J. 399.

Where the writing brings to the mind of the witness neither any recollection of the facts mentioned in it nor any recollection of the writing itself but nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing a writing, which he knows to be genuine, the witness may refresh his memory by referring to the writing: I.L.R. 49 Cal. 573: (1921-22) 26 Cal.W.N. 680.

When a witness wants to refresh his memory under S. 159, he is to do so by referring in Court to the document which he had read at or near the time of the transaction and it is the fact that he had known it to be correct when he read it that is the justification of his doing so. It is quite immaterial that a document to which the witness refers in Court was not printed by the witness himself or in his presence. It is essential only that he should have read it at or soon after the transaction, to which it relates: 120 I.C. 798: A.I.R. 1930 Lah. 371.

The word "writing" used in S. 159 includes also printed matter: A.I.R. 1930 Lah. 371.

Hearsay evidence given after refreshing memory—Admissibility. *See* 1982 Cr.L.J. (N.O.C.) 127 (Gau.).

A witness can be allowed to refresh his memory by reference to any memorandum or other writing prepared by the witness, if there is a lapse of memory on a point asked of the witnesses. On this section, *see* also I.L.R. 8 Cal. 732; (1914-15) 19 Cal.W.N. 890; 11 Bom.H.C. 123: I.L.R. 11 Bom. 657; I.L.R. 32 Mad. 384 .

Memoranda kept by a witness can be used in evidence not by itself but as corroborating a witness or refreshing his memory: 120 I.C. 224: A.I.R. 1930 Nag. 24(1).

Where a witness has to depose to a large number of transactions and those transactions are referred to or mentioned either in the account books or in other documents, there is nothing wrong in allowing the witness to refer to the account books and the documents while answering the questions put to him in his examination. He cannot be expected to remember every transaction in all its details and S. 160 specifically permits a witness to testify the facts mentioned in the documents referred to in S. 159 although he has no recollection of the facts themselves if he is sure that the facts were correctly recorded in the document. Therefore, where an approver, was allowed to refresh his memory while giving evidence, by referring extensively to the account books and documents produced in the case, the procedure adopted was held to be neither in violation of law nor an abuse of the powers of Court under S. 159: (1964) 3 S.C.R. 297: A.I.R. 1963 S.C. 1850.

Ss. 159 and 160—Prosecution under S. 409, Penal Code—Accounts audited by auditor—Prosecution desiring to file loose sheets of accounts to be used by auditor at time of his examination in Court—*Held*, documents would be admissible under S. 63(3) or S. 159 or S. 160, Evidence Act: I.L.R. (1965) Cut. 426: 1966 Cr.L.J. 1042: A.I.R. 1966 Ori. 189.

Under S. 159 a witness may refresh his memory by looking into a document and give evidence. The document can acquire some evidentiary value under S. 160 subject to the conditions mentioned therein. Where a witness merely refreshed his memory by looking into a certified copy and also spoke to the various details of dates, etc., by looking into it, such a procedure is not hit by S. 159: A.I R. 1960 Tripura 26.

Statement under S. 162, Cr.P.Code—Permission to prosecution Counsel to read out, to refresh witnesses' memory, illegal: (1963) 2 Cr.L.J. 198 (All.).

Defence witness using a private note book for refreshing memory—Prosecution complaining that witness practically reading out his deposition verbatim from the book—Whether the witness used it for refreshing his memory or for deposing. Verbatim could be tested by verification of the same by prosecution — Can insist on the production of that document for use in cross-examination: I.L.R. (1967) Cut. 148: 1967 Cr.L.J. 1039: A.I.R. 1967 Ori. 115.

There is a common practice in the Punjab of referring to statements in the first information reports, medico-legal reports and so forth as if they were evidence. This is not justified by law. The proper course is for the

witnesses to refer to the document which he has prepared at the time under S. 159 and state in Court everything which the prosecution or Counsel for defence or the trying Magistrate or Judge considers material: (1937) 39 Punj.L.R. 290: A.I.R. 1937 Lah. 475.

First information report.—S. 159, Evidence Act, lays down that a witness can refresh his memory by reference to any document or its copy with the permission of the Court. This provision is subject to one condition and it is this that the document should have been made by the witness. Thus, where the S.O. was the maker of the first information report, *held*, with the permission of the Court he could refresh his memory by seeing it: 1980 All.Cr.R. 48.

Post-mortem report.—Ss. 159 to 161 permit a limited use being made of the post-mortem notes of Medical Officer, namely, that they may be used by the witness who made them for refreshing his memory or by a party for the purpose of contradicting the witness. It is extremely undesirable that such notice of post-mortem examination be put in evidence through the Medical Officer en block as it is prejudicial to both parties: A.I.R. 1930 Sind 225.

Post-mortem examination report is not by itself legal evidence. It is only a record summarising the salient features observed by a medical man in the course of autopsy, giving his opinion as to the cause of death. By itself it proves nothing, as it is not a substantive piece of evidence. It can only be used by the medical man who conducted the post-mortem examination as an aid to his memory while giving evidence. Ss. 159 to 161 of the Evidence Act only permit limited use of the post-mortem report. The substantive evidence, is the oral testimony given by the medical man before the Court on oath. In giving evidence the medical man may refresh his memory by referring to the report which he has made of the post-mortem examination. [A.I.R. 1938 Mad. 336, Rel. on]: 1971 Cr.L.J. 1656 (Raj.) (D.B.). *See* also 1994 All.Cr.C. 94 (D.B.).

The post-mortem report is, normally, used by the Doctor who had conducted the post-mortem examination to refresh his memory; but in the absence of any evidence to show that the report was being tendered in evidence under any relevant provision of Chap. II of the Act, *held*, the report cannot be treated as substantive evidence: (1982-83) 87 Cal.W.N. 565 (D.B.).

Panchanamas.—No doubt an entry in any public record stating a relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of the duty specially enjoyed by the law is itself a relevant fact. But where panchanamas contain a confession which cannot be given in evidence because of S. 26, the proper way of dealing with a panchanama containing such an entry is to place it into the hands of a witness and to allow him to use it to refresh his memory. If he finds in it any thing of which evidence can lawfully be given, he may give such evidence in the ordinary way; but the document itself should be excluded: 144 I.C. 772: A.I.R. 1933 Sind 220. There is no provision in the Evidence Act by which panchanamas prepared by the Police for the recovery of articles on information given by the accused can be used as substantive evidence. If they are prepared at the time, they can be used by the witnesses for the purpose of refreshing their memories in the witness-box under S. 159 but in themselves they are not evidence: 1939 Mad.W.N. 465: A.I.R. 1939 Mad. 766. Panchanamas—They cannot be used as substantive evidence of facts stated therein—They can be used only to corroborate or contradict or to refresh the memory of panch witness. *See* A.I.R. 1955 Sau. 32: 6 Sau.L.R. 517: 56 Cr.L.J. 274.

List of stolen things given by informant—Admissibility.—A list of the stolen things given to supplement the first information report is admissible and can be referred to under S. 159 and proved under S. 159. The fact that a copy of such a list had been given to the Police would not affect the admissibility of the informant's list: 1933 Cr.C. 1503: A.I.R. 1933 Lah. 987.

Police investigation—Admissions made by accused in presence of Magistrate—Use of memorandum.—Where during the investigation of a criminal case, a Magistrate is associated with the Investigating Officer, and in the presence of such Magistrate, the accused points out places alleged to be connected with the crime and makes admissions which do not lead to the discovery of any fact and the Magistrate does not record the admissions in accordance with the provisions of

S. 164 of the Cr.P.Code but makes a memorandum of the conduct and admissions of the accused, the written memorandum of the Magistrate is not admissible though the Magistrate under the provisions of S. 159 can refresh his memory when under examination by referring to the memorandum: I.L.R. 14 Lah. 290: A.I.R. 1933 Lah. 716 (F.B.).

Notes of speech.—S. 159 does not render the notes of a speech inadmissible in evidence: A.I.R. 1930 Lah. 867. *See* also I.L.R. (1944) Mad. 113: A.I.R. 1943 Mad. 542: (1943) 1 M.L.J. 343 [Proof of shorthand notes of speech at a meeting taken by a Police Officer.]

Where a witness refreshing his memory refers to notes taken by another of a speech made at a meeting, *held*, it is necessary under S. 159 that such notes should have been read by him immediately after the meeting and not merely read out to him. If the witness had read the notes himself, there would be naturally greater guarantee of their correctness: (1942) 44 Punj.L.R. 167.

Under S. 159, the witness refreshes his memory by looking at the document and gives his evidence in the ordinary way; the document is not itself an evidence nor is it tendered. Under S. 160 the memory of the witness is not refreshed. Here the document itself is tendered in evidence and the witness testifies to the facts mentioned therein if he has no specific recollection of the facts themselves and if he is sure that the facts were correctly recorded in the document. It is only subject to the conditions mentioned in S. 160 that a document itself acquires some evidentiary value.

When the witness does not give a resume of a speech said to have been delivered at a meeting nor does he state that he is unable to state by memory what was said at the meeting or that the notes of speech taken down by him contains a correct record of what was said at the meeting but admits that the notes contain his impression of the speech delivered, the notes of the speech does not become primary evidence of the speech said to have been delivered at the meeting and cannot be used as such: 1963 M.P.L.J. 498: A.I.R. 1964 Madh. Pra. 137.

Speeches made by certain Maharaj during election campaign—Notes taken down by members of Police force and reported to their officers—Election petition on grounds of corrupt practice—Speeches as evidence of corrupt practice, sought to be proved by producing these members as witnesses—Reports held complied with conditions of S. 160: A.I.R. 1969 S.C. 851.

In this case it is clear that the reports were written by the witnesses themselves at the time of the speeches or soon afterwards when the speeches were fresh in their memory. It seems that it is not necessary that a witness should specifically state that he has no specific recollection of the facts and that he is sure that the facts were correctly recorded in the document, before the document can be used under S. 160 of the Evidence Act. It is enough if it appears from his evidence that these conditions are established. In this particular case the witnesses were giving their testimony in Court after a lapse of nearly nine months and one would have to have super-human memory to specifically recollect the details of the speeches, especially when the witness may have attended and reported many similar meetings as a part of his duty during the election campaign. It may be implied in this case that the witnesses had no specific recollection of the facts. The second requirement would be satisfied if the Court comes to the conclusion that the witness was in a position to correctly record the facts in the document. Are then the requirements of S. 160 satisfied in this case? On the evidence it is quite clear that both the conditions required by S. 160 have been complied with. While the speech was delivered on 18th February, 1967 he was giving his evidence on 7th November, 1967. It is implicit that he had no specific recollection of the speeches, and the second condition is also satisfied because he made notes and then made out the report from his notes. It is clear that in this particular passage (Exhibit K) an appeal was being made to the electors to cast their votes for the first respondent because the first respondent is a Brahmin and also because of the promise, which had been put forward in this passage, that there should be at least one Brahmin Minister in the Ministry. So far as the petitioner is concerned, the petitioner is a Patidar and it is in the context of this background that an appeal is made in the name of caste of the first respondent and the people are asked to vote for the first respondent because he was a

160. Testimony to facts stated in document mentioned in section 159.—A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Brahmin. It is also clear that the first and third passage (Exhibit P) read together constitute an attempt to induce the electors to believe that they would become objects of divine displeasure if they voted for the Congress and thereby allowed cow slaughter to be continued. Under the circumstances, judging by the manner in which the first respondent was touring with Shambu Maharaj, the manner in which tour programme was arranged and judging from the fact that this tour was specially arranged to bring success to the first respondent, that the first respondent did consent to the commission of the breaches of the proviso of S. 123(2) and S. 123(3) of Representation of the People Act by Shambu Maharaj: A.I.R. 1969 S.C. 851.

In an election petition, full shorthand transcripts made by those who heard the speeches could be treated as corroborative evidence which could be used by a witness to refresh his memory as laid down in S. 159 and further their contents could be brought on record by direct oral evidence in the manner prescribed by S. 160 of the Act: A.I.R. 1975 S.C. 1788. *See* also A.I.R. 1974 S.C. 66, cited under S. 160, *infra.*

Horoscope—Admissibility.—A horoscope is admissible in evidence in proof of age and though it may not be relied on as a probative document in itself, it can be used for the purpose of refreshing the memory of the witness under S. 159: 12 Mys.L.J. 133: 39 Mys.H.C.R. 406.

A horoscope can be used to help in proving the date of birth stated in it only under S. 159 or S. 160 and that of course only if the person who wrote it or a person who read it soon after it was written, is examined as a witness; no part of S. 32 can make any statement of a date in such a document, a relevant fact: A.I.R. 1986 Madh. Pra. 218: 1986 M.P.L.J. 25: (1986) 2 Hindu L.R. 213: (1987) 1 Hindu L.R. 241. *See* also A.I.R. 1918 P.C. 118; (1989) 2 Ori.L.R. 562.

Section 160—Notes.

See also notes under S. 159. *See* I.L.R. 19 All. 390 (Special Diary); I.L.R. 11 Bom. 657; I.L.R. 31 Cal. 1050; I.L.R. 32 Mad. 384; 11 B.C. 120 (Statement to Police Officers); 97 I.C. 200: A.I.R. 1929 Cal. 988: 43 Cal.L.J. 479 (Engineer's report); A.I.R. 1936 Rang. 42 (Statement of deceased person).

Where no attempt is made by a witness to state orally before the Court, what the accused in the case was alleged to have said, nor does he state before the Court, that although he has no specific recollection of the facts themselves, he was sure that the facts were correctly reported by him in his report, the evidence of such witness is inadmissible in evidence: (1938) 40 Punj.L.R. 872: A.I.R. 1938 Lah. 629.

Use of writing for refreshing memory: A.I.R. 1969 Tripura 26.

It is not necessary that a witness should specifically state that he has no specific recollection of the facts and that he is sure that the facts were correctly recorded in the document, before the document can be used under S. 160. It is enough if it appears from his evidence that these conditions are established.

In an election petition, the petitioner, alleged that the speeches made by certain Maharaj during election campaign in support of successful candidate amounted to corrupt practice within Ss. 123(2) and 123(3) of Representation of the People Act. He sought to prove the said speeches by producing members of Police force as witness, who had under instructions of Government taken down notes of the speeches and reported them to their officers. The reports of these members of the Police force were found by High Court as correctly recorded and as fairly representing the speeches of the said Maharaj. While the speeches were delivered in February, the witnesses gave evidence in

161. Right of adverse party as to writing used to refresh memory.—Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

November. Relying on evidence of these witnesses, High Court set aside the election of the successful candidate. On appeal by him under S. 16-A of Representation of the People Act, *held*, that though these reports had not been used for the purpose of refreshing the memory of any witness under S. 159 of the Evidence Act, these had been used under S. 160, thereof, it might be implied that the witnesses had no specific recollection of the facts. The witnesses being in position to correctly record the facts in the document, both the conditions required by S. 100, Evidence Act had been complied with, though the report was strictly speaking not substantive evidence as such; and the document could only be used as a part of the oral evidence sanctified by the oath. (Position in some States of U.S.A. indicated): A.I.R. 1969 S.C. 851.

Use of private note book by defence witness, for refreshing memory—Whether the witness used it for refreshing his memory or for deposing verbatim could be tested by verification of the same by prosecution: I.L.R. (1967) Cut. 148: A.I.R. 1967 Ori. 157.

Witness testifying to large number of transactions contained in account books—If can be permitted to testify by referring to them: (1964) 3 S.C.R. 297: A.I.R. 1963 S.C. 1850.

In an election petition, full shorthand transcripts made by those who heard the speeches could be treated as corroborative evidence which could be used by a witness to refresh his memory as laid down in S. 159 and further their contents could be brought on record by direct oral evidence in the manner prescribed by S. 160 of the Act: A.I.R. 1975 S.C. 1788.

Where witnesses deposed having taken down the notes in shorthand of the speeches as and when delivered and the transcription whereof were supplied to the party which had cross-examined the witnesses on the basis thereof, *held*, the party could not contend that the notes must have been recorded in the language understood by it; this extreme contention cannot be appreciated; notes of a speech recorded in Bengali or Oriya do not become inadmissible merely because the other party is ignorant of that script or language. That would be an absurd as well as impracticable interpretation of S. 161: A.I.R. 1974 S.C. 66: (1974) 3 S.C.C. 425.

A horoscope can be used to help in proving the date of birth stated in it only under S. 159 or S. 160 and that of course only if the person who wrote it or a person who read it soon after it was written, is examined as a witness; no part of S. 32 can make any statement of a date in such a document, a relevant fact: A.I.R. 1986 Madh. Pra. 218: 1986 M.P.L.J. 25: (1986) 2 Hindu L.R. 213: (1987) 1 Hindu L.R. 241.

Section 161—Notes.

See I.L.R. 8 Cal. 739 at p. 745; 5 L.B.R. 40: 2 I.C. 535.

Defence witness using private note book for refreshing memory—Use was made for refreshing memory or deposing verbatim can be verified by prosecution—Prosecution can insist on production if that document for use in cross-examination: I.L.R. (1967) Cut. 148: A.I.R. 1967 Ori.115.

Where witnesses deposed having taken down the notes in short hand of the speeches as and when delivered and the transcription whereof were supplied to the party which had cross-examined the witnesses on the basis thereof, *held*, the party could not contend that the notes must have been recorded in the language understood by it; this extreme contention cannot be appreciated; notes of a speech recorded in Bengali or Oriya do not become inadmissible merely because the other party is ignorant of that script or language. That would be an absurd as well as impracticable interpretation of S. 161: A.I.R. 1974 S.C. 66: (1974) 3 S.C.C. 425.

Case diary maintained by Police Officers, *held*, cannot be used as evidence in the case; the Court can use it as an aid in the enquiry or trial: 1985 Cr.L.J. (N.O.C.) 56: I.L.R. (1984) 2 Del. 627.

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162. Production of documents.—A witness summoned to produce a document shall, if it is in his possession or power, bring it to the Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents.—If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code (45 of 1860).

Section 162—Notes.

(*See* also Notes under S. 123, *supra*). *See* (1939) 41 Bom.L.R. 391: A.I.R. 1939 Bom. 237, cited under Ss. 123 and 124.

S. 123 relates of the competency of the witness to depose to the matters referred therein, on the other hand, S. 162 regulates the examination of such witnesses who are required to produce such documents. But even here S. 162 carries out an exception in favour of the documents which refer to matters of State, which are no other than relating to affairs of State as mentioned in S. 123: 1986 Rev.L.R. 193 (P.&H.). *See* also A.I.R. 1975 S.C. 865, cited under S. 123, Note 1, *supra*.

S. 162 enables Court to inspect document or take other evidence to determine its admissibility: 1968 Cr.L.J. 1584: A.I.R. 1968 Bom. 400.

It is clear from S. 162 that notwithstanding any objection, a witness who is summoned to produce a document is bound to produce it in the Court. He cannot raise any objection when directed to produce a document in the Court. However, the section gives him a right to raise objections which there may be to its production or to its admissibility, and such objection, if any, must be decided by a Court at the time when he is directed to produce such a document in a Court. The objection can be raised by a witness as to its production or to its admissibility. The word "admissibility" used in S. 162 necessarily means the relevancy of the document. Unless a document is relevant for the purpose of inquiry, it cannot be said to be admissible in a criminal trial. The word "admissibility" used in S. 162 involves all sorts of objections as to production, as to relevancy and as to admissibility, or even claiming any privilege in respect of the said document. The word "admissibility" will have to be construed to mean all objections that the person who is asked to produce the document has raised in the matter. Having regard to the language used in S. 162, it is not possible to hold that the word "admissibility" is restricted to a privileged document by the State. It is significant that the objections to the production or admissibility of evidence specified in S. 162 relate to all claims of privilege provided by the relevant sections of Chap. IX of Part III of the Evidence Act. S. 123 is only one of such privileges so that the jurisdiction given to the Court to decide the validity of the objection covers not only the objections raised under S. 123 but all other objections as well: (1983) 2 Bom.C.R. 45.

S. 162 refers to official as well as private documents, and provides in the second paragraph that when a document, in respect of which an objection to production or admissibility is raised to inspect the document; with regard to other documents in respect of which privilege is claimed, the Court if it thinks fit, may inspect the document in Court and it is not for him to decide whether the document should or should not be produced. It is for the Court to decide it. Once the Court holds that the document is one with regard to which privilege can be claimed, in other words, that it is a communication made to a public officer in official confidence or that it is an unpublished official record relating to affairs of State which it would not be in the public interest to disclose, the question whether privilege should be claimed for it or not is entirely within the discretion of the officer in charge of the document. The Court, for the purpose of deciding whether the claim to privilege is well

founded or not, is not entitled to look at the document. It must decide the question of the validity of the objection without looking at the document: (1944) 46 Bom.L.R. 802: A.I.R. 1945 Bom. 122.

S. 162 has divided privileged documents into two categories. The Court can inspect documents for the purpose of deciding the question of privilege only if those documents do not refer to matters of State. In other words an exception is made in respect of document that refer to matters of State. The provision of O. 19, R. 2, C.P.Code, being general and the provisions of S. 162, Evidence Act, being restricted so far as they relate to documents relating to affairs of State, the special provisions of S. 162 relating to documents of State must be enforced in preference to the general provisions embodied in the Code of Civil Procedure. It is, therefore, not open to the Court to peruse the documents for which privilege is claimed in order to determine whether the documents constitute official records relating to affairs of State: A.I.R. 1944 Lah. 209. *See* also I.L.R. (1945) Lah. 219: A.I.R. 1944 Lah. 434; (1950) 52 Punj.L.R. 153 (F.B.). On this point, *see* also Notes under S. 123.

It cannot be said that it is a personal right of a person to produce or not to produce a document when called upon to produce it by a witness summons by the Court. Documents which are called for in a Court notwithstanding the provision of an Act, are meant for administration of justice by a Court and a party to whom a witness summons had been issued to produce a document cannot claim a personal right under Art. 21 not to produce it because it is a valuable document: (1983) 2 Bom.C.R. 45.

A person summoned to produce a document must bring it to the Court; it is only then that he may object to its production or admissibility under S. 162; such an objection comprehends all claims of privilege under Chap. IX of Part III of the Act and not merely under S. 123: A.I.R. 1979 Cal. 114.

Production of State documents—Claim for privilege—Difference between provision under the Evidence Act: 1957 Cr.L.J. 134 (Madh.Bh.).

Privilege in respect of official files: (1970) 2 An.W.R. 323.

Claim for privilege of document relating to affairs of State—Nature and extent of enquiry which Court can hold—Ground for claiming privilege: A.I.R. 1964 S.C. 1958.

Affairs of State—Privilege: A.I.R. 1968 Punj. 255.

Production of State document—Privilege when can be claimed—Duty of Government Officer—C.P.Code—Power of Court: 1957 Cr.L.J. 134 (Madh. Bh.).

The privilege claimable in respect of official and confidential documents is a narrow one and is based on the principle that the information contained in official documents cannot be disclosed where the disclosure would not be in public interest. The circumstance that the documents are confidential or official is by itself no reason for their non-production and the Court is always entitled to summon them and to examine how far the privilege claimed is reasonable and is justified: 11 Mys.L.J. 171. *See* I.L.R. 3 Cal. 742; (1911-12) 16 Cal.W.N. 431: 15 I.C. 77; 45 I.C. 898, *see* also I.L.R. (1940) Nag. 280: A.I.R. 1938 Nag. 358; I.L.R. (1944) 1 Cal. 410: (1942-43) 47 Cal.W.N. 928: A.I.R. 1943 Cal. 539.

Court directing production of document subject to objections that might be taken—No interference in revision: (1963) 1 Cr.L.J. 356: A.I.R. 1963 J.&K. 20.

Per Majority (*Gajendragadkar, J., Sinha, C.J.* and *Wanchoo, J., Subba Rao, J.* not expressing any opinion).—Where a privilege is claimed at the stage of inspection and the Court is required to adjudicate upon its validity, the relevant provisions of the Evidence Act under which the privilege is claimed as well as the provisions of S. 162 which deal with the manner in which the said privilege has to be considered are equally applicable; and if the Court is precluded from inspecting the privileged document under the second clause of S. 162, the said prohibition would apply as much to a privilege claimed by the State through its witness at the trial as a privilege similarly claimed by it at the stage of inspection. The provisions of O. 11, R. 19(2), C.P. Code, must therefore, be read subject to S. 162 of the Evidence Act: (1961) 2 S.C.R. 371: A.I.R. 1961 S.C. 493.

When a document is directed to be produced and the head of the department claims privilege under S. 123, the Court will have to

decide the validity of the objection raised by the Head of the Department. In deciding whether the document can or cannot be directed to be produced or whether the privilege claimed by the Head of the Department is justified, the Court may have to investigate into the matter. But the jurisdiction of the Court at that stage is limited to the determination of the question whether the documents refer to matters of State. The proper procedure, therefore, will be for the Court to determine from other circumstances without looking into the document and before directing the production of the document if it relates to matters of State or not. No evidence will be permissible with regard to the contents of such document and the certificate of the Head of the Department to the effect that he is withholding the permission after consideration of the document will be conclusive: I.L.R. (1961) 13 Assam 472: A.I.R. 1960 Assam 210.

It is now well settled that the Court is not bound by the Minister's or the Head of the Department's affidavit; it retains the power to balance the injury to the State or the public service against the risk of injustice before reaching its decision. The final decision as to the objection raised under S. 123 would always be with the Court by reason of S. 162: A.I.R. 1982 S.C. 149.

The well settled practice is that the objection to the production of summoned documents is raised by an affidavit affirmed by the Head of the Department though the Court may also require a Minister to affirm an affidavit in the course of enquiry to determine whether the document should be withheld from disclosure. If the Court is satisfied that the document should be protected in public interest from production, the matter ends there. But if it would yet satisfy itself, the Court may inspect the document. But in case no affidavit is filed or a defective affidavit is filed, the Court may call for an affidavit or a better affidavit if the Court thinks that the affidavit is not clear in regard to the objection: A.I.R. 1975 S.C. 865: (1975) 4 S.C.C. 428.

Where documents summoned relate to the security of the State, national defence, foreign relations, cabinet decisions and high national policies and privilege is sought, the Court would treat the executive's opinion as conclusive; the decision be best left to be made by the executive, for the Court is not the proper place to adjudicate upon such matters. However, on other confidential documents such as confidential reports, etc., about the Government servants, the Court may decide whether privilege should be allowed or not: A.I.R. 1977 N.O.C. 243: I.L.R. (1976) 2 Del. 667.

Having regard to the extra-ordinary jurisdiction conferred on the High Court under Art. 226 of the Constitution, no general blanket protection can be given to the State and that it is for the High Court to ultimately decide, notwithstanding the objection raised by an officer or a Minister claiming privilege, the nature and the class of the documents and the decision of the Court shall prevail. Thus, where the High Court in exercise of its jurisdiction under Art. 226, called for certain official records for scrutiny and perusal by it and the Government claimed privilege, though there was nothing to suggest that the impugned files, if disclosed, would injure or affect the public interest, *held*, having regard to the extra-ordinary jurisdiction given to the High Court under Art. 226, the State could not claim privilege from disclosing impugned documents: A.I.R. 1971 Andh. Pra. 196: (1970) 2 An.W.R. 323 (D.B.).

O. 11, R. 19(2) of the Code of Civil Procedure must be read as subject to S. 162; thus, where a witness summoned to produce certain documents claims privilege by submitting an affidavit, the Court must determine upon the material before it whether the documents were in fact of the class which related to the affairs of the State in the light of A.I.R. 1961 S.C. 493; A.I.R. 1975 Madh. Pra. 196: 1975 M.P.L.J. 801 (D.B.).

Production of documents—Documents constituting affairs of State—Privileged document—Conciliator's report—Report of a conciliator regarding his findings on an industrial dispute, is not a privileged document or confidential document—Parties to the proceedings being vitally interested in the report, a copy of the report cannot be denied to the parties: (1966) 68 Bom.L.R. 731: A.I.R. 1967 Bom. 174.

When privilege is claimed in respect of a document on the ground of public interest, *held*, the Court is entitled, indeed bound, to insist upon its production and inspection

with a view to determine whether it relates to the affairs of the State and whether the disclosure of its contents would be prejudicial to public interest; while so doing, the Court would give due weight to the opinion of the executive on the point, which is, however, not conclusive—But it would strike a balance between the requirements of public interest which demands on the one hand that evidence should be held back and that, on the other, it should have all relevant material before it to do justice to the case; it is only when the former outweighs the latter that the Court would grant privilege: A.I.R. 1977 N.O.C. 243: I.L.R. (1976) 2 Del. 667.

Copy of document in respect of which privilege is claimed by defendant filed by plaintiff—Court cannot, while deciding claim of privilege, by calling upon defendant to admit or deny the same, have its contents proved indirectly: A.I.R. 1967 Punj. 387.

Production of documents—Objection—Transcript of public speeches—Fact that record was made by Police Officer, does not render it privileged: A.I.R. 1969 Mad. 378.

Privileged documents—Production of—Clerk summoned to produce certain documents—Claim of privileged made by Sales Tax Officer—*Held*, looking to the provisions of S. 25(1) of the Act, Sales Tax Officer was justified in claiming privilege to production of concerned documents: (1967) 69 Punj.L.R. (Del.) 222.

Document produced at the time of deposition by plaintiff's witness never called for from him—Cannot be allowed to be put into evidence: (1969-70) 74 Cal.W.N. 694.

Previous statement of witness for complainant recorded under S. 162—If can be used. *See* (1977) 2 Karn.L.J. 261: I.L.R. (1977) 2 Karn. 1403: 1978 M.L.J. (Cr.) 171: 1978 Cr.L.J. 295.

Where privilege was claimed against production of a file concerning the grant of a mining lease on the ground that it contained letters written by the Departmental Head to his subordinate officers and *vice versa* and between that Department and other Departments, *held*, they were unpublished official records and secrets of the State entitled to privilege: A.I.R. 1975 Madh. Pra. 196: 1975 M.P.L.J. 801.

The Blue Book contains the rules and instructions for the Prime Minister's protection when on tour or travel; even if a paragraph or two thereof have been disclosed, it cannot be said that it is a published document; publication of some innocent part of the book would not render the entire book to be a published document; case remanded. [A.I.R. 1974 All. 324, Reversed]: A.I.R. 1975 S.C. 865: (1975) 4 S.C.C. 428.

Where a witness is asked to produce a document which is objected to, the Court may inspect, and, if unable to read, get it translated; thus, in case of short hand notes, they may be got transcribed but cannot be rendered inadmissible as "not commonly intelligible characters"; it is a matter of common knowledge that commercial documents recorded in *mahajani* are admitted in civil Courts as basis of the claims: A.I.R. 1974 S.C. 66: (1974) 3 S.C.C. 425.

Police during the investigation seized account books of a certain person and made copies of it in their diary. In a later civil suit that person denied that he kept accounts and, hence, the other party called for the copies of the account books made by the Police to be produced in evidence. Police refused to produce the copies claiming the privilege of State document. *Held*, where account books were not State documents, copies of them could not assume this important shape simply because they were written in the course of a Police investigation. Neither the Police nor any other person can evade the normal rules of disclosure by the simple expedient of entering matter for which no privilege can be claimed into an otherwise privileged document: A.I.R. 1938 Nag. 358. Power of Court—Permission to witness to refresh memory from document—Claim to privilege under S. 123—Decision before allowing witness to refresh memory—Duty of Court—Procedure: 30 Pat.L.T. 327.

First information complaining of theft of certain cloth—Additional list submitted while investigation was in progress—First information report not disclosing it was incomplete—*Held*, statements in additional lists were hit by S. 162, Cr.P.Code and were admissible only for the limited purpose provided for there: 1957 M.P.L.J. (Notes) 178.

163. Giving, as evidence, of document called for and produced on notice.—When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Section 163—Notes.

Under S. 163 the party is bound to give the opponents documents as evidence in the case if three conditions are fulfilled. The first condition is that the documents should be required by that party to be produced in evidence. The second condition is that it should be inspected by the party. The third condition is that the party producing the documents should require the party calling for it to put it in evidence. Where only the first of these conditions has been satisfied but the other two have not been satisfied, the document cannot be treated as evidence of the party: (1958) 60 Bom.L.R. 203: I.L.R. (1959) Bom. 29: A.I.R. 1959 Bom. 528.

S. 163 does not render proof of the document necessary nor normal incidence of burden of proof: A.I.R. 1953 Mad. 607.

Under S. 163, an inspection of document by the adversary entitles the party producing them to tender them as evidence of both parties. Such documents must be admitted *in toto*: (1941) 43 Punj.L.R. 128: A.I.R. 1941 Lah. 228.

It is clear from the provisions of S. 163 that the party inspecting the documents is bound to give it as evidence only if the party producing the same require it to do so: 1957 Raj.L.W. 214: A.I.R. 1957 Raj. 159.

Under S. 163 it is duty of the plaintiff to require the defendant who has taken inspection to tender the account books as evidence of both parties. Such account books need no further proof and are admissible *in toto*: 106 I.C. 305 (2): A.I.R. 1928 Nag. 119.

S. 163 does not speak of admissibility or relevancy of a document nor does it speak of proof; applicability of S. 163 does not dispense with the necessity of proof of the document in question by the party on whom lies the burden of proof and as such the party calling for production and having inspection of the document is not debarred from exercising his right of cross-examination on the document. [A.I.R. 1928 Nag. 119, held *per in curiam*]: A.I.R. 1990 Madh. Pra. 135.

Notice contemplated by S. 163 may be given by a party privately to the other party concerned and, if the other party does not produce the documents, an order of the Court for the production of the documents for inspection may also be made. The mere fact that the agency which has ordered the production of the documents is the Court is immaterial: 1953 All.L.J. 306: A.I.R. 1953 All. 689.

O. 12, R. 8, C.P.Code, refers to a notice to produce documents at the time of the hearing so that if they are not produced, the party calling for them may give secondary evidence of the same. Another kind of notice to produce documents is the one mentioned in O. 11. It is a notice to produce documents before the hearing of the case so that they may be inspected by the party calling for them. S. 163, Evidence Act, mentions inspection of the documents of which notice has been given by a party to produce. Clearly, notice to produce documents mentioned in S. 163, Evidence Act, refers to a notice to produce documents as mentioned in O. 11, C.P. Code: 1953 All.L.J. 306: A.I.R. 1953 All. 689.

Per *Sen, J.*—Under S. 165, Evidence Act, the Judge may call for the record of the statement of witnesses made to the Police Officer during investigation; but he is not bound to do so and if the accused wants to be certain of using the statement of the witnesses as recorded by the Police Officer in the Presidency Town of Calcutta the accused must call for them under S. 163, Evidence Act. To such a course there is one possible objection, namely, that if the accused calls for the document under S. 163, he must take the consequence stated in S. 163, Evidence Act, *i.e.*, if the party producing the document require the accused to do so, he would be bound to give the document in evidence. This clause of S. 163 should, however, be understood as subject to the remaining provisions of the Evidence Act, and can be used as evidence. In respect of the record of the previous statement of a witness such portion of it only would be relevant as is actually used for the purpose of contradicting under S. 145,

164. Using, as evidence, of document production of which was refused on notice.—When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration

A sues *B* on an agreement and gives *B* notice to produce it. At the trial, *A* calls for the document and *B* refuses to produce it. *A* gives secondary evidence of its contents. *B* seeks to produce the document itself to contradict the secondary evidence given by *A*, or in order to show that the agreement is not stamped. He cannot do so.

Evidence Act or corroboration under S. 157 of that Act: A.I.R. 1955 Cal. 138: (1954-55) 59 Cal.W.N. 729.

S. 163 is applicable to criminal trials as well as to civil action. If during cross-examination of a witness, the Counsel for the accused calls for the statement of that witness recorded by the Police in Calcutta during investigation and inspects it for the purpose of contradicting the witness, the Government Counsel is entitled to require the Counsel for the accused to give the whole of the statements as evidence excluding only such portions as are not relevant to the case, although that would bring on the record those parts of the statement which are corroborative of the witness's evidence at the trial in addition to those brought on the record by Counsel for the accused as being contradictory of that evidence. But where there is no formal notice or requisition from the accused calling for the Police diary and the Government Counsel produces it stating that he will not rely on the strict technicality thereby giving the impression although the impression is unintended, that he will not require Counsel for the accused to put in the document as a whole, the accused cannot be compelled to give as evidence the entire statement in question: I.L.R. (1939) 2 Cal. 429: A.I.R. 1940 Cal. 167. *See* also A.I.R. 1930 Cal. 370.

Criminal proceedings—Production of document at instance of any party—Document cannot bind party bringing it on record unless proved in accordance with provision of law: 1964 Raj.L.W. 606: I.L.R. (1965) 15 Raj. 6: A.I.R. 1965 Raj.90.

Production of documents by defendant—Inspection by plaintiff—Court cannot admit without proof: 18 Mad.L.W. 165: A.I.R. 1923 Mad. 607.

By virtue of S. 4 of the Delhi Special Police Establishment Act, 1946, the superintendence of the Delhi Special Police Establishment vests in the Central Government. Hence, it is a department of the Union of India, and under its control. Where, therefore, in a suit by the plaintiff against the Union of India, on an application made by the plaintiff, the Court issues notice in consequence of which documents are produced by the Superintendent of the Special Police Establishment then the documents being in possession of the Superintendent must be said to be under the control of the defendant. Thus, the documents having been produced in compliance with the call of the plaintiff as ordered by the Court and the documents when inspected by the plaintiff are bound to be given as evidence when required to do so by the defendant. Even if the documents are assumed to have been produced by a witness, namely, the Superintendent and not by the defendant they are the plaintiff's documents as they are filed in Court at his instance and the defendant can admit such of them as he likes and thereupon ask the Court to treat them as evidence in the case: 1953 All.L.J. 306: A.I.R. 1953 All. 689.

Section 164—Note.

The rule enacted in S. 164 says "you must produce a document or never". But the Court has got power to grant permission to produce it subsequently. Further, when a discrepancy in the original and the carbon copies is brought to the notice of a Tribunal, it would be perfectly justified in giving permission to produce the document which the party had refused to produce on notice. The reason is that the introduction of and alteration by inserting new or foreign matter itself calls for an immediate enquiry. Curiosity is at once aroused and the intellect demands an answer: (1980) 18 Del.L.T. 67.

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165. Judge's power to put questions or order production.—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

Section 165—Synopsis.

1. Scope, object and applicability.
2. Limits on power under section 165.
3. Cross-examination of Court's witness.
4. Illustrative cases.

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1. Scope, object and applicability.—*See* (1954-55) 59 Cal.W.N. 729, noted under S. 163, *supra*. A Judge's right to put questions to witnesses is expressly recognised by S. 165, Evidence Act. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and, to that end, question witnesses on points which the lawyers for the parties having either overlooked or left obscure or wilfully avoided. If, therefore, the Judge finds that the examination of a witness is not being conducted in such a way as to unfold the truth, it is not only his right but his duty to intervene with his own questions, particularly at a jury trial. But while theoretically the powers of the Judge are limitless and unfettered, certain principles have come to be recognised which he must follow as to the manner in which he exercises the power. He must not take side; but he must not also "descend into the arena" and forsake the judicial claim for the zeal of a combatant. If he does so and questions witnesses in the spirit of beating them down or encouraging them to give an answer, his action may have an intimidating or inflatory effect upon them and their evidence may not be the evidence they would have given, if not so intimidated or encouraged. Although the law allows the Judge to put any question at any time, the time generally considered proper for an extended examination is when lawyers for the parties have finished their questions or at least when the lawyers, examining the witnesses at the time, are passing on to a new subject. The Judge may always intervene, in the course of examination by Counsel to put a question in a clearer form or to have an obscure answer clarified or to prevent a witness being unfairly misled but if he does more and stops Counsel again and again to put a long series of his own questions, he makes an effective examination or cross-examination impossible and diverts the trial from its natural course. There is no limit to the questions which the Judge may put and if he considers that he has not yet got to the bottom of the matter or that the witness has not yet made his full meaning clear, there is no reason why he should not go on with the examination, whatever the number of the questions required to achieve the purpose of eliciting the truth. If the prosecution omits to bring out a material fact or the cross-examining Counsel brings a witness to a state in which he cannot make his meaning clear then defence does not acquire a vested right in such omission or confusion. It is precisely for use on such occasion that the Judge's powers under S. 165 of the Evidence Act are intended. No re-trial can be ordered merely on the ground of over-interrogation by the Judge, unless actual or substantial prejudice is proved: (1952-53) 57 Cal.W.N. 962: A.I.R. 1954 Cal. 305.

A Judge is not a mere umpire as a combat between the parties whose duty is to enforce

the rules of the game and declare at the end of the conduct who has won and who has lost. He is expected and it is, indeed his duty to explore all avenues open to him in order to discover the truth and, to that end, question witness on points which appear to be overlooked by the parties or left obscured. If he finds the evidence confusing, it is his duty to intervene with his own questions particularly in a case where a party who initiates the proceedings likely to be socially and or economically handicapped due to indigence or otherwise. This is the principle which has been enacted in S. 165 of the Evidence Act: (1987-88) 92 Cal.W.N. 307.

As per S. 165 of the Evidence Act, a Judge is entitled to ask any question in any form, at any time, to any witness about any fact relevant or irrelevant. If the Judge thinks that, the case has not been thoroughly explored, he is entitled to put as many questions as he likes. But he must not in doing so descend in the arena. Thus, caution is necessary to see that the Judge does not give an impression of assuming the role of a prosecutor: (1993) 1 Ker.L.J. 556: (1993) 1 An.L.T. (Cr.) 478.

For a criminal Court in order to become an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. It must, of course, not assume the role of a prosecutor in putting questions. The functions of the Counsel, particularly those of the public prosecutor, are not to be usurped by the Judge, by descending into the arena. Any questions put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses. [(1957) 2 All E.R. 155, Rel. on]: A.I.R. 1981 S.C. 1036: 1981 Cr.L.J. 609.

The position of law is well settled that a party is to choose his own witness. It is always open to the Court to examine a particular witness as a Court witness if it so chooses: (1973) 39 Cut.L.T. 888.

Power of Judge to question a witness is not an absolute power. The power is designed to further ends of justice. The Judge, therefore, in exercise of the power under S. 165 of the Evidence Act, in view of the wide power to examine a witness at any stage must be circumspect in his exercise of the power: 1991 M.P.L.J. 345.

Whenever all the facts necessary for a proper determination of the points in issue have not been elicited, inadvertently or otherwise, by the public prosecutor or the defence Counsel, it behoves the Judge to exercise his power under S. 165 of the Evidence Act and get elucidated what is left obscure or unintelligible: 1976 Cr.L.J. 1242: (1975) 2 An.W.R. 255 (D.B.).

Power of Judge to send for additional witness, to summon material witness and to examine persons present. *See* I.L.R. 6 Lah. 279.

Powers of Court to compel production of documents by prosecution to enable accused to conduct his defence. *See* (1975) 77 Bom. L.R. 214.

S. 165 of the Evidence Act as well as O. 16, R. 14, C.P.Code have to be borne in mind to see that if anything is required as evidence for coming to a proper and correct way of appreciation of evidence and the failure on the part of both sides to produce that evidence, will not in any way obstruct the Court from exercising its jurisdiction under S. 165 of the Evidence Act and also calling the parties to depose regarding the aspects that are behind the curtain by virtue of exercising the power vested with the Court under O. 16, R. 14, C.P.Code. Thus, where attestor of a promissory note or its scribe was not examined by the plaintiff, *held*, it did not stand in the way of the Court to shut its eyes and to examine only what was available and produced by either side by way of evidence: (1984) 97 Mad.L.W. 512.

If the provisions of O. 18, R. 17, C.P.Code were read only with the provisions of S. 165 of the Evidence Act, the power to recall and re-examine a witness is exclusively that of the Court trying the suit. The parties to the suit cannot take any objection to the question asked nor can they be permitted to cross-examine any witness without the leave of the Court: A.I.R. 1978 All. 515.

S. 311, Cr.P.Code confers a wide discretion on the Court to act as the exigencies of justice require. The power of the Court under S. 165 of the Evidence Act is complementary to its power under this section (S. 311, Cr.P. Code). These two sections between them confer jurisdiction on the Court to act in aid of justice: (1990-2) 31 Guj.L.R. 1325 (D.B.).

The power of the Court to examine a witness for the just decision of the case as

conferred by S. 311, Cr.P.Code and S. 165, Evidence Act is paramount and can be exercised at any stage of the proceeding including after the accused had closed his defence, but only so long as the Court retains seizin of the matter. [1968 Cr.L.J. 231 (S.C.), Foll.; (1951) 52 Cr.L.J. 673 (Mad.) and (1964) 2 Cr.L.J. 15 (Bom.), impliedly overruled by 1968 Cr.L.J. 231 (S.C.); 1975 Chand. L.R. (Cr.) 119; 1977 Chand. L.R. (Cr.) 60 (P.&H.), not followed in view of 1968 Cr.L.J. 231 (S.C.)]: (1982) 84 Punj.L.R. 210: 1982 Cr.L.J. 2211.

It is true that the ban imposed by S. 162, Cr.P.Code against the use of a statement of a witness recorded by the Police during investigation, appears sweeping and wide. But the language of S. 162, Cr.P.Code, though wide, is not explicit or specific enough to extend the prohibition to the use of the wide and special powers of the Court to question a witness, expressly and explicitly given by S. 165 of the Indian Evidence Act in order to secure the ends of justice. A narrow and restrictive construction put upon the prohibition in S. 162, Cr.P.Code, so as to confine the ambit of it to the use of statements by witnesses by parties only to a proceeding before the Court, would reconcile or harmonize the two provisions and also serve the ends of justice. Thus, where trial Court considered evidence of a witness important enough to examine him under S. 540, Cr.P.Code (S. 311 of new Code) yet it disabled itself from testing its worth by putting an alleged contradiction to the witness on a matter of some importance in the case, *held*, the trial Court could and should have made use of previous statement of the witness to contradict him even if it was made to the Police during the investigation: A.I.R. 1974 S.C. 463: 1974 Cr.L.J. 453: (1974) 4 S.C.C. 186.

In a sense it seems to be true that the provisions of S. 165 of the Evidence Act are wider than the provisions of S. 94 of the Cr.P.Code, 1898 because though the provisions of S. 94 are plenary they are confined to enquiry, trial or other proceedings under the Code. There is no such limitation in S. 165 of the Evidence Act, which can apply to all proceedings, civil or criminal. S. 165 deals with two situations. In Chap. X of the Evidence Act which deals with the examination of witnesses, S. 165 vests in the Judge unlimited powers in order "to discover" or "to obtain proper proof of relevant facts". Though the power is unlimited, it is meant only for two purposes and no other, namely, either to discover relevant facts or to obtain proper proof of relevant facts. These being the purposes of the powers, they are unlimited. Two different things are permitted to be done. One is to ask any witness or a party in any form, at any time any question covering relevant matters. The unlimited right of the Court to put any question at any time in any form can be exercised so far as the witness is concerned only when the witness is put in the witness-box. If the party is before the Court, he can be questioned by the Court. There is another provision in the section by which the Court may order production of any document or a thing. Such a direction to produce can be given either to a witness or to a party. If material evidence or witness is being suppressed, the Court has undoubtedly power in civil as well as criminal matters to call witnesses and direct production of documents. A provision like S. 165 of the Evidence Act is rarely used before trial. Where a Court comes across a case where the evidence in possession of a party is relevant for the purpose of the case, but there is danger of that evidence being tampered with or destroyed, it is possible to say that the Court might be induced to exercise its power under S. 165. In similar circumstances, the Court might exercise its powers under S. 165 so far as production is concerned. But direction for production is one thing and permitting the other side to look into the record and make copies thereof and exercise the right of making copies of such documents is quite another, which is clearly not envisaged by the provisions of S. 165.

Therefore, where a party is making an offer by giving an undertaking to the Court, reference to S. 165 cannot be and need not be made. If an order is to be made for production with a view to permit the other side to inspect and make copies, it is not permissible under S. 165. It would be a misuse of the provisions of S. 165. At the pre-trial stage the provisions of S. 165 of the Evidence Act can be used at best in the circumstances in which the provisions of S. 94 of the Cr.P.Code 1898, can be used.

A distinction has always been made between production of documents from possession of one party and granting inspection thereof to another party. Production must be ordered wherever there is a fear of destruction or tampering. Inspection can be allowed

only where there is a right to inspect and receive such copies. If the right arises at a particular point of time, either inspection or taking of copies could not be ordered earlier than that point of time: (1976) 78 Bom.L.R. 500 (D.B.). *See* also (1971) 3 S.C.C. 303.

S. 165 would have no application in a situation where the evidence was concluded, prosecution had closed its case and the judgment had commenced and where it appears to the Court at that point of time that the prosecution had failed on a material aspect; at that point the prosecution cannot be permitted to cover up an obvious *lacuna*: 1993 Cr.L.J. 3175 (Bom.).

Power to examine a witness—No limitation on power of Court: 1968 Cr.L.J. 231: A.I.R. 1968 S.C. 178.

Irregular evidence not relevant and not duly proved cannot form basis of judgment: (1962) 3 Guj.L.R. 107: A.I.R. 1962 Guj. 214.

Evidence—Court cannot compel party to examine any particular witness: A.I.R. 1965 S.C. 1008.

In criminal cases, the moment witness commences giving evidence which is inadmissible he should be stopped by the Court: 7 W.R. (Cr.) 25.

Mere sending for document does not make evidence in the case: 11 B.H.C.R. 166. Even though a document is not produced at the first hearing of a case, the Court can call for the document under S. 165: 25 O.C. 286: A.I.R. 1963 Oudh 59.

Decision based on weight of authority and not on individual judgment of Judge—Conduct contrary to oath of office taken by Judge: (1963) 4 Guj.L.R. 1022: A.I.R. 1963 Guj. 291.

Judicial precedents — Binding nature of decisions of co-ordinate and superior authority — Reference to section is irrelevant: A.I.R. 1968 S.C. 372.

Precedents—Judgment of High Court—Not binding on Judges of same High Court or of other High Courts: (1964) 2 Cr.L.J. 541: A.I.R. 1964 Guj. 223.

2. Limits on power under section 165.—Under S. 165, the Court cannot order the production by a party of any document or thing, no matter how irrelevant, into Court unless the object is to obtain indicative evidence which may lead to discovery of relevant evidence of any fact in any matter then before the Court: I.L.R. 57 Mad. 635: A.I.R. 1934 Mad. 199(2): 66 M.L.J. 498.

There is no doubt that under the provisions of S. 165 of the Evidence Act, the Court is invested with a wide discretion to put any question to any witnesses, in any form with a view to discover or obtain proof of any fact relevant or irrelevant. Because of the wide scope of this power, a Court should be circumspect in its exercise—always bearing in mind that it is designed to further the ends of justice it should not be sued in an inquisitorial manner. It is also not part of the duty of the Court to act as Counsel for one or the other of the parties as the primary duty of a Court is to weigh evidence for both parties and come to a decision in the case on such evidence. It ought not to lay itself open to a suspicion, by exercising this power in such a manner as will create an apprehension in the mind of one or the other party, that it is biased: 1969 M.L.J. (Cr.) 499: 18 Law Rep. 218 (Mys.).

Witnesses are not to be examined on behalf of the Court to assist the prosecution in filling in the blanks. They are to be examined in the interests of justice. It is the duty of the Judge under the continental system of law to discover the truth by his own efforts in conjunction with those of the public prosecutor. In France there is the "interregatoire" of the accused by the Judge who also takes an active part in examining witnesses. In England and also in our country the examination of all witnesses is primarily by the Counsel for the parties. The Judge may put supplementary questions to discover truth.

If the Judge under Anglo-Saxon system of law followed in this country is of the opinion that the case has not been properly dealt with, he can put to witnesses as many questions as he likes, relying on the provisions of S. 165 of the Evidence Act, in order to discover truth, but, by and large he should leave it to the parties to examine their witnesses. As far as possible, witnesses called by the Court to testify should be called before the case for the defence has been closed but not after the case of the defence is closed. There is no hard and fast rule but it is necessary that the accused on trial should not have the feeling that through the agency of the Court, the prosecution plugs in the loop holes. The Presiding Judge has to be careful so as not to identify himself with any party: 1969 Cr.L.J. 739: A.I.R. 1969 Goa 68; A.I.R. 1968 S.C. 178; A.I.R. 1954 Cal. 305 (D.B.); I.L.R. (1970) 2 Del. 854 (D.B.); (1971) 3 S.C.C. 303; (1976) 78 Bom.L.R. 500.

The Court while exercising powers under S. 165 of the Act should not cause prejudice to the defence or to the prosecution. But the right of a party to correct any error or to adduce relevant evidence which through any inadvertence was missed at an earlier stage cannot be pre-empted on basis of said reason: 1994 Cr.L.J. (N.O.C.) 292 (Ker.).

Limits to the power of Court to put questions to witnesses. *See* (1951) 1 M.L.J. 207: A.I.R. 1951 Mad. 772.

The provisions of the section cannot be used in contravention of S. 162, Cr.P.Code: I.L.R. 4 Rang. 371: A.I.R. 1927 Rang. 74; 27 Cr.L.J. 277: A.I.R. 1926 Cal. 147.

Judge not to cross-examine the points which pleaders will examine upon: I.L.R. 6 Cal. 279. Whether Judge can put irrelevant questions. *See* I.L.R. 10 Bom. 185.

3. Cross-examination of Court's witness.—Under S. 165 the parties have no right to cross-examine any witness except with the permission of the Court. No doubt, the discretion will have to be exercised judicially and ordinarily the Judge would give the requisite permission if the answers given are adverse to the party who seeks the said permission: I.L.R. (1957) Andh. Pra. 742: (1958) 1 An.W.R. 9: 1958 M.L.J. (Cr.) 31.

Right to cross-examine witnesses summoned by Court: 3 B.L.R. (A.C.) 145 at p. 158: I.L.R. 5 Cal. 614; I.L.R. 24 Cal. 288; I.L.R. 29 Cal. 387; I.L.R. 10 Bom. 185; 11 B.H.C.R. 166.

Of course a party as of right is not entitled to cross-examine the witness when the Court examines him under S. 165 of the Indian Evidence Act, 1872. But if the answers given by the witness in such examination are adverse to a party then it is desirable that such party should be given a chance to cross-examine that witness: (1983) 1 Rec.Cr.R. 289: (1983) 10 Cr.L.T. 31: (1983) 1 Chand. L.R. 192.

4. Illustrative cases.—Where in an election petition the defeated candidate sought inspection of electoral rolls and counter-foils on certain vague allegations just to fish out the material for challenging the election which was allowed by the High Court, *held*, the Representation of People Act was a special Act and provisions of the Evidence Act would only apply where they are not excluded. The High Court was totally wrong in allowing such inspection as there was strict prohibition for opening these documents unless a cast iron case was made out for the same. [A.I.R. 1964 S.C. 1249; A.I.R. 1975 S.C. 2117, Rel. on]: A.I.R. 1984 S.C. 396: (1984) 2 S.C.C. 36: 1984 U.J. (S.C.) 225.

As the charge of corrupt practice in an election petition is *quasi* criminal in character, it has to be proved beyond reasonable doubt; thus, where important aspects of the case were not satisfactorily brought out by the evidence on record despite voluminous evidence, the Election Tribunal ought to have exercised its powers under S. 165 as well as O. 16, R. 14 of the Code of Civil Procedure by putting questions to the witnesses to elicit the truth therefrom. Case remanded: A.I.R. 1975 S.C. 1045: (1975) 1 S.C.C. 535.

Where in a Motor Accident claim case, required material for coming to the conclusion regarding the liability for the accident were not placed before the Tribunal by either side, *held*, this does not mean that the Tribunal was bereft of powers for getting at the truth of the claim as well as regarding the person at fault who drove the vehicle. The Tribunal was obliged to find out from the evidence available or to get at the evidence as provided under S. 165 or give further opportunity for either side to produce necessary evidence, before it could come to conclusion regarding liability: A.I.R. 1989 Mad. 34.

Where petitioner-wife challenged an *ex parte* decree on the ground that summons were not served and that the signature found in postal acknowledgment were not put by her and opinion of hand-writing expert was available in the records though not exhibited as evidence, *held*, it was the duty of the trial Court to have exercised its jurisdiction under S. 165 and got itself enlightened so as to decide the question relating to the aspect of setting aside the *ex parte* decree that had been pronounced by it: (1982) 95 Mad.L.W. 638: 1982 Hindu L.R. 638: (1983) 1 M.L.J. 73.

Infringement of copyright — Power of Court to summon infringing copies: 1963 All.L.J. 930: A.I.R. 1965 All. 206.

Investigation in misfeasance proceedings—Power of Court to summon party against its will to give evidence: A.I.R. 1964 Mys. 75.

Modes of giving evidence—Two alternative modes allowed by Act—Before second mode is adopted first has to be fulfilled—Depositions in prior judicial proceedings—Admission in present suit—Before admission condition mentioned in S. 33 have to be fulfilled—Consent of parties is not enough: (1962) 3 Guj.L.R. 418: A.I.R. 1962 Guj. 48.

166. Power of jury or assessors to put questions.—In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

CHAPTER XI

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE

167. No new trial for improper admission or rejection of evidence.—The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

THE SCHEDULE.—[Enactments repealed.] Repealed by the Repealing Act, 1938 (1 *of* 1938), *Section* 2 *and Schedule.*

Section 167—Synopsis.

1. Scope and applicability.
2. Duty of appellate Court.
3. Improper admission or rejection of evidence in trial by jury.
4. Misdirection to jury.
5. Illustrative cases.

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1. Scope and applicability.—*See* A.I.R. 1953 Pat. 354; A.I.R. 1953 Bilaspur 17; A.I.R. 1954 Cal. 305. S. 167 applies to all judicial proceedings in or before any Court including jury trials: 73 I.A. 77: I.L.R. (1946) Lah. 119: A.I.R. 1946 P.C. 82.

According to S. 167 reversal of the decision and the new trial can be ordered only if it appears to the Revisional Court, where the objection to the admissibility is raised, that independently of such evidence objected to and admitted, there was sufficient evidence to justify the decision or the conviction: 1976 All.W.C. 128.

When a Court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was effected by the irrelevant material used by it in arriving at its findings, and such a finding is vitiated because of the use of inadmissible material. That being so, the case should be remanded for a rehearing without the inadmissible material: I.L.R. (1960) Mys. 382: A.I.R. 1961 Mys. 160. Thus, where lower appellate Court based its finding regarding adverse possession, though partly, on inadmissible evidence, *held*, said finding was vitiated. [A.I.R. 1961 Mys. 160, Foll.; A.I.R. 1956 S.C. 305; A.I.R. 1956 Mad. 226; A.I.R. 1955 S.C. 271, Rel. on]: A.I.R. 1975 Karn. 179: (1975) 1 Karn.L.J. 105: I.L.R. (1975) Karn. 25.

The reception of even inadmissible evidence is less injurious than the rejection of admissible evidence because in the former case in arriving at a decision, the evidence wrongly admitted as well be excluded from consideration whereas in the latter case the evidence wrongly excluded can only be brought on record, by having recourse to further proceeding necessitating thereby the prolongation of the trial and possible harassment to the persons concerned: I.L.R. (1953) Mys. 171: A.I.R. 1953 Mys. 80.

Effect of relevant evidence improperly proved, *see* I.L.R. 11 Bom. 320; I.L.R. 6 Cal. 66; 7 C.L.R. 497. Effect of evidence admitted at improper stage of the case. *See* 13 M.I.A. 77.

S. 167 applies to second appeals on the civil side or cases tried by a jury on the criminal side; and not to first appeals where the facts are a matter for decision of the appellate Court: A.I.R. 1934 Pat. 605. Under S. 167, improper admission is no ground for a new trial if there is other evidence sufficient to support the conviction: 59 I.C. 560: 22 Cr.L.J. 128. *See* also A.I.R. 1940 Nag. 118; 25 Cr.L.J. 1275: A.I.R. 1925 Mad. 245; A.I.R. 1927 Cal. 1: (1926-27) 31 Cal.W.N. 32; A.I.R. 1926 Pat. 211: 7 Pat.L.T. 673. *See* also (1933) 35 Bom.L.R. 174: A.I.R. 1933 Bom. 153; 152 I.C. 829: A.I.R. 1934 Pat. 617(2).

The acceptance of inadmissible evidence is not a ground to set aside a judgment or grant a new trial, if there is other evidence upon which the finding could be arrived at. And the High Court can in second appeal see

whether there is such other evidence justifying the decisions, and if there is such evidence, it cannot order a new trial: 150 I.C. 841: A.I.R. 1934 Pat. 55(2). *See* also A.I.R. 1944 Mad. 169: (1943) 2 M.L.J. 672.

Failure to consider certain evidence on record—If ground for interference with finding of fact in second appeal. *See* (1971) 37 Cut.L.T. 890.

The mere fact that some evidence which may not be strictly admissible has been admitted, is no ground for setting aside the decision of an inferior Court. S. 167 of the Indian Evidence Act provides for such contingencies. It is true that in appraising evidence different Judges may, at times, entertain different opinions, but even on an appeal the superior Court is bound to respect the findings of the trial Court on questions of fact, and, hence, the mere admission of inadmissible evidence on an insignificant fact, is not sufficient to warrant the conclusion that the trial Court was in error in taking the view that it did: I.L.R. (1953) Cut. 682: A.I.R. 1954 Ori. 67. *See* also (1978-79) 83 Cal.W.N. 248: 1979 Cr.L.J. (N.O.C.) 129 (D.B.) [Admission of certain alleged statements of deceased does not amount to failure of procedural justice but to improper admission of evidence, if at all.]

Where evidence admitted has been found to be irrelevant, that would not by itself justify a reversal of the lower Court's order according to S. 167: 1949 R.D. 409(1).

The proper time to object to the admissibility of the evidence is when the evidence is tendered. A party cannot be allowed to lie by until the case comes up in appeal. An objection as to the production of secondary evidence instead of the original, cannot, therefore, be allowed to be taken for the first time at the appellate stage: I.L.R. (1958) Punj. 335: (1957) 59 Punj.L.R. 650: A.I.R. 1958 Punj. 116.

In order that an erroneous rejection of any evidence may furnish a ground for ordering a new trial or reversing the conviction, the accused has to show that the rejection of the evidence was likely to affect the decision of the case: 49 Cr.L.J. 558: A.I.R. 1948 Sind 122.

Court's decision given without considering certain recitals in a document—Decision is not vitiated where it would not have been different even if those recitals had been considered by the Court: (1963) 5 Ori.J.D. 314: 30 Cut.L.T. 245: (1964) 2 L.L.J. 535.

The fact that a document was admitted without any objection from a party, does not entitle the Court to admit in evidence what is in law inadmissible: A.I.R. 1957 Cal. 59.

Where there has been an improper admission of evidence, a Judge would be acting correctly under S. 167 if he comes to the conclusion that the rest of the evidence is sufficient to justify the conviction: 39 Cr.L.J. 427: A.I.R. 1938 Mad. 325.

If there was evidence that there were twelve charges against the person and in eleven the evidence was properly conducted and in one charge it had been improperly conducted and admitted, then the appellate Court would not have been justified in reversing the finding, if it had come to the conclusion that apart from that charge there had been other charges which were enough to justify the finding. It is not every case in which merely because something extraneous has been taken into consideration that the High Court could immediately upset that finding. It is only when the High Court feels doubt that if one fact was not there, whether the opinion or decision of a certain authority would have been the same that the High Court interferes. But where it is patently clear that there could have been no other decisions, then in that event, the extraneous circumstances alone would not vitiate the order: A.I.R. 1962 All. 166.

Assuming that the statement of the accused was improperly held back by the Judge from the jury that would not by itself be an omission of sufficient importance to entitle the High Court, in a reference made to it to hold that the unanimous verdict of the jury had been improperly bad. For S. 167, constitutes a bar to a fresh trial, unless it could be established that there would have been material difference in the result if the evidence allegedly improperly rejected had been allowed to be produced: (1956-57) 61 Cal.W.N. 483: A.I.R. 1957 Cal. 372.

2. Duty of appellate Court.—Duty of appellate Court where evidence has been improperly admitted in the lower Court. *See* 15 W.R. (P.C.) 8; 6 B.L.R. 495: 14 M.I.A. 86; 6 M.I.A. 232; 8 M.I.A. 199; I.L.R. 7 Cal. 293; I.L.R. 8 Cal. 739.

Additional evidence in appellate Court, where relevant evidence was improperly shut out in lower Court: I.L.R. 4 All. 306.

Verdict of jury—Interference—Misdirection owing to admission of inadmissible evidence—Powers and duty of appellate Court. *See* A.I.R. 1955 S.C. 104.

3. Improper admission or rejection of evidence in trial by jury.—S. 167, Evidence Act, provides that if there is sufficient evidence left to maintain a conviction after eliminating the inadmissible evidence, the Court might still convict. However, in jury trials, where inadmissible evidence which may have had considerable effect on the mind of the jury has been introduced, it may be necessary and often is necessary to set aside the verdict and order a re-trial; because no one can say how the jury would have decided a case if the inadmissible evidence had been excluded: A.I.R. 1952 Cal. 481: I.L.R. (1953) 1 Cal. 302.

Jury trial—Admission of inadmissible evidence—Verdict of jury—Interference in appeal. *See* I.L.R. (1946) Kar. 69.

Under S. 167, misreception of evidence is not a ground for interference with the verdict of a jury, if it cannot reasonably be said to have influenced the jury in coming to their verdict: A.I.R. 1950 Assam 75: 51 Cr.L.J. 641.

As regards the rejected evidence, the question under S. 167 is not so much whether the evidence rejected would not have been accepted against the other testimony on the record as whether that evidence "ought not to have varied the decision": A.I.R. 1959 S.C. 484: 1959 M.L.J. (Cr.) 285.

4. Misdirection to jury.—A misdirection to the jury is strictly not a case of improper admission or rejection of evidence within the meaning of S. 167: 42 I.C. 161: 18 Cr.L.J. 929 (F.B.).

5. Illustrative cases.—A document was proved in the trial Court by a person who had obtained it from the writer and admitted in evidence, without the writer being examined and no objection was raised to such admission. *Held*, the non-examination of the writer would not make it inadmissible and the objection in revision had no weight: 59 Cal.L.J. 467: A.I.R. 1934 Cal. 834.

Where the High Court after excluding the evidence improperly admitted, found that the remaining evidence was not of such a character that a conviction might reasonably be based upon it, the conviction and sentence were set aside: I.L.R. 1 Cal. 207; I.L.R. 2 Bom. 61; 9 P.H.C.R. 358.

A Magistrate cannot import his personal opinion about the personal character, in the decision of the case before him nor can he refuse to believe evidence in the accused's favour on that account: 20 Cr.L.J. 283: 50 I.C. 171.

Where the evidence excluded by the appellate Court is not a piece of evidence but the main evidence in support of party's case, and there is no evidence apart from the rejected evidence, the Court is justified in ordering a fresh hearing of the appeal: 1956 B.L.J.R. 197: A.I.R. 1957 Pat. 293.

Order of acquittal by appellate Court—Revision—Interference by High Court when no substantial grounds to vary decision: 1968 Cr.L.J. 1190: A.I.R. 1968 Ori. 167.

Where in maintaining the conviction of the accused, the High Court relied upon confession of accused which was inadmissible in evidence, *held*, said finding could not be interfered with by the Supreme Court as even after excluding the confessional statement from consideration, the other material on record proved the guilt of the accused. [1972 Cr.L.J. 204, Affirmed]: A.I.R. 1972 S.C. 2077: 1972 Cr.L.J. 1317.

Where a finding by the Commissioner as well as the Board of Revenue about the relationship of father and son was based on a lease deed as well as other documentary and oral evidence, *held*, the High Court will not interfere in its writ jurisdiction in case it finds that the lease deed is inadmissible if there is other evidence to sustain the finding; the High Court cannot re-appraise the evidence even if it had a different view: A.I.R. 1972 All. 406.

Where reasons have been given for ignoring some variation and contradiction in evidence, *held*, no interference is called for in second appeal: 1983 M.P.W.N. 212.

Where evidence though admissible for collateral purposes was held to be inadmissible by lower Court, *held*, in view of S. 167 of the Act said finding could not be interfered with as it was based on the other evidence on record: A.I.R. 1972 Pat. 43: 1971 B.L.J.R. 474.

Admissibility of evidence—Oral evidence of parties on either side evenly balanced—Lot of documentary evidence taken into consideration before recording finding—One of those documents not duly proved—Yet finding not vitiated: 1969 All.W.R. (H.C.) 12: 1969 All.L.J. 129.

Land acquisition proceedings—Compensation awarded by Land Acquisition Officer substantially enhanced by High Court relying on inadmissible evidence—Evidence of claimant rejected by High Court—No appeal by Government against enhancement of compensation—If inadmissible evidence were not relied, the compensation allowed by Land Acquisition Officer would have remained—Claimant cannot, therefore, complain against High Court that it has taken into consideration inadmissible evidence: A.I.R. 1969 S.C. 255.

Where statements of two of the witnesses for the prosecution had been wrongly admitted under S. 288 of the Code of Criminal Procedure but in view of the content of the statements themselves, it seemed that the improper admission of the statements of these two witnesses before the committing Court could not possibly have affected the verdict of the jury and the other evidence of the eyewitnesses, if believed, would have sustained the charge, *held*, that the objection as to improper admission of the evidence was of no avail: 1958 Cr.L.J. 1170: A.I.R. 1958 Cal. 482.

Member of Force overstaying leave—Departmental enquiry under R. 27, Central Reserve Police Rules, 1955—Allegation of overstay not denied—Burden of showing that overstay was for reasons beyond control, lies on delinquent member—Member not producing evidence to discharge burden but complaining that he was not given opportunity to cross-examine officer who had made report against him behind his back—Prejudice not shown to have been caused by non-cross-examination—Enquiry cannot be said to be vitiated for non-cross-examination: A.I.R. 1965 Raj. 140.

Commissioner's report under O. 26, Rr. 9 and 10, C.P.Code—Disregard of—Lower appellate Court disregarding report holding other evidence on record sufficient for disposal of case—Disregard of report constitutes no "error or defect in procedure nor affects the merits of the case" within meaning of S. 100(1)(*c*), C.P.Code to justify interference in second appeal when there is proper exercise of discretion: (1963-64) 68 Cal.W.N. 1043: A.I.R. 1965 Cal. 199.

Finding as to absence of reasonable and probable cause—Finding is one of fact—Finding based on trivial error of record committed by lower appellate Court with regard to evidence of one witness—Rest of material on record sufficient to justify finding even if evidence of that witness is discarded—Finding is not vitiated and is finding in second appeal: (1963) 29 Cut.L.T. 357.

Where the lower Court in upholding the jurisdiction of the municipality to levy cart tax in the case invoked and applied the presumption under S. 99(4) of the Madras District Municipalities Act, *held*, that there was force in the contention that the judgment of the lower Court was vitiated because the presumption which on the language of S. 99(4) of the Municipalities Act was confined to carriages and had no application to a cart, had been invoked in the case. But in the second appeal the Court would not interfere with the judgment on the question of cart tax as the presumption was not the only basis on which the municipality sought to levy the cart tax but there was also evidence of fact and circumstances to justify that jurisdiction: (1961) 1 M.L.J. 385: 1961 M.L.J. (Cr.) 306.

Principle and agent—Member taking loan from Co-operative Credit Society—Society holding out cashier as person competent to receive payment—Entries by cashier in pass book issued to member by Society showing full payment—Entries in pass book held proper evidence in support of plea of discharge—Society held bound by acts of cashier: (1962) 2 M.L.J. 407: A.I.R. 1963 Mad. 105.

Statement of confession—Use of, to contradict or corroborate evidence given as approver—Refusal to allow—Prejudice—Other evidence corroborating testimony—Effect. *See* A.I.R. 1957 Assam 168.

Where it was clear from the record that the prosecution, though it had cited certain person as a witness, was not very keen to examine him and when that person objected to give evidence, the prosecution dropped him, *held*, it is not a case in which evidence can be said to have been rejected within S. 167 of the Evidence Act. In such a case the prosecution does not in fact tender the person as a witness: A.I.R. 1959 S.C. 484.

Where the defendant's witnesses were not specifically cross-examined on their deposition in respect of the public character of the temple claimed by the plaintiff to be a private temple but the only suggestion made to them was in regard to their prior enmity towards the plaintiff, *held*, their entire evidence could not be taken to be interested: (1994) 1 M.L.J. 550.

APPENDIX 1

THE BANKERS' BOOKS EVIDENCE ACT, 1891*
(18 OF 1891)

[1*st October*, 1891]

An Act to amend the Law of Evidence with respect to Bankers' Books.

WHEREAS it is expedient to amend the Law of Evidence with respect to Bankers' Books; It is hereby enacted as follows:—

1. Title and extent.—(1) This Act may be called THE BANKERS' BOOKS EVIDENCE ACT, 1891.

[1](2) It extends to the [2][whole of India except [3][the State of Jammu and Kashmir].] [3][* * * *]

[4][* * * *].

2. Definitions.—In this Act, unless there is something repugnant in the subject or context,—

[5][(1) "company" means any company as defined in section 3 of the Companies Act, 1956 and includes a foreign company within the meaning of section 591 of that Act;

(1-A) "corporation" means any body corporate established by any law for the time being in force in India and includes the Reserve Bank of India, the State Bank of India and any subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959];

(2) "bank" and "banker" mean—

[6][(*a*) any company or corporation carrying on the business of banking],

(*b*) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided,

[7][(*c*) any post office savings bank or money order office];

(3) "bankers' books" include ledgers, day-books, cash-books, account-books, and all other books used in the ordinary business of a bank;

[8][(4) "legal proceeding" means,—

(*i*) any proceeding or inquiry in which evidence is or may be given;

(*ii*) an arbitration; and

(*iii*) any investigation or inquiry under the Code of Criminal Procedure, 1973, or under any other law for the time being in force for the collection of evidence, conducted by a police officer or by any other person (not being a magistrate) authorised in this behalf by a magistrate or by any law for the time being in force;]

(5) "the Court" means the person or persons before whom a legal proceeding is held or taken;

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* For Statement of Objects and Reasons, *see* Gazette of India, 1891, Pt. IV, p. 24.

1. Act enforced in Sikkim *vide* Notification No. S.O. 659(E), dated 30-8-1984 (w.e.f. 1-9-1984).

2. Substituted by A.O. 1950.

3. Substituted for 'except Part B States' by Act III of 1951.

4. The word 'and' and sub-S. (3) repealed by Act X of 1914, Sch. II.

5. Substituted for clause (1) by Act 56 of 1962 (w.e.f. 14-12-1962).

6. Substituted, *ibid*, for sub-clause (*a*).

7. Added by Act 1 of 1893.

8. Substituted by Act 1 of 1984, S. 2 (w.e.f. 15-2-1984).

(6) "Judge" means a Judge of a High Court;

(7) "trial" means any hearing before the Court at which evidence is taken; and

(8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank [1][and where the copy was obtained by a mechanical or other process which in itself ensured the accuracy of the copy, a further certificate to that effect, but where the book from which such copy was prepared has been destroyed in the usual course of the bank's business after the date on which the copy had been so prepared, a further certificate to that effect, each such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.]

3. Power to extend provisions of Act.—The [2][State] Government may, from time to time, by notification[3] in the Official Gazette, extend the provisions of this Act to the books of any partnership or individual carrying on business of bankers within the territories under its administration, and keeping a set of not less than three ordinary account-books, namely, a cash-book, a day-book or journal, and a ledger, and may in like manner rescind any such notification.

4. Mode of proof of entries in bankers' books.—Subject to the provisions of this Act, a certificate copy of any entry in a bankers' book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

5. Case in which officer of bank not compellable to produce books.—No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause.

6. Inspection of books by order of Court or Judge.—(1) On the application of any party to a legal proceeding, the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

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1. Substituted for "such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title", by Act 1 of 1984, S. 2 (w.e.f. 15-2-1984).

2. Substituted by A.O. 1950.

3. For notifications, *see* Bombay Government Gazette, 1902, Pt. 1., p. 1289 and as to Madras, *see* Mad. R. and O., Vol. I (List).

(3) The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order.

7. **Costs.**—(1) The costs of any application to the Court or a Judge under or for the purposes of this Act and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2) Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself:

Provided that nothing in this sub-section shall be construed to derogate from any power which the Court or Judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs.

[1][**8. Order of Court to be construed to be order made by specified officer.**—In the application of sections 5, 6 and 7 to any investigation or inquiry referred to in sub-clause (*iii*) of clause (4) of section 2, the order of a Court or a Judge referred to in the said sections shall be construed as referring to an order made by an officer of a rank not lower than the rank of a Superintendent of Police as may be specified in this behalf by the appropriate Government.

Explanation.—In this section, "appropriate Government" means the Government by which the police officer or any other person conducting the investigation or inquiry is employed.]

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1. Inserted by Act 1 of 1984, S. 2 (w.e.f. 15-2-1984).

APPENDIX 2

THE COMMERCIAL DOCUMENTS EVIDENCE ACT, 1939*

(30 OF 1939)

[26*th September*, 1939]

An Act to amend the Law of Evidence with respect to certain commercial documents.

WHEREAS it is expedient to amend the Law of Evidence with respect to certain commercial documents; It is hereby enacted as follows:—

1. Short title and extent.—(1) This Act may be called THE COMMERCIAL DOCUMENTS EVIDENCE ACT, 1939.

(2) It extends to [1][the whole of India except [2][the territories, which immediately before the 1st November, 1956, were comprised in Part B States.]]

State Amendments—[Gujarat].—In section 1, in sub-section (2), the following proviso shall be added, namely:—"Provided that on and from the commencement of the Commercial Documents Evidence (Gujarat Extension and Amendment) Act, 1962, this Act shall extend to and be in force in, the Saurashtra area of the State of Gujarat".—Gujarat Act (32 of 1962) (1st November, 1962).

[Maharashtra].—In section 1, in sub-section (2), after the word "States" at the end, the words "other than the Hyderabad area of the State of Maharashtra", shall be added—The Commercial Documents Evidence (Maharashtra Extension) Act (20 of 1960) (9th October, 1960).

2. Statements of relevant facts in scheduled documents to be themselves relevant facts.—Notwithstanding anything contained in the Indian Evidence Act, 1872, statements of facts in issue or of relevant facts made in any document included in the Schedule as to matters usually stated in such document shall be themselves relevant facts within the meaning of that Act.

3. Presumption as to genuineness of documents.—For the purposes of the Indian Evidence Act, 1872, and notwithstanding anything contained therein, a Court—

(*a*) shall presume, within the meaning of that Act, in relation to documents included in Part I of the Schedule, and

(*b*) may presume, within the meaning of that Act, in relation to documents included in Part II of the Schedule,—

that any document purporting to be a document included in Part I or Part II of the Schedule, as the case may be, and to have been duly made by or under the appropriate authority, was so made and that the statements contained therein are accurate.

4. Definition.—In the Schedule the expression "recognised Chamber of Commerce" means a Chamber of Commerce recognised by the Government of its country as being competent to issue certificates of origin, and includes any other association similarly recognised.

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* For Objects and Reasons, *see* Gazette of India, 1937, Pt. V, p. 119.

1. Substituted by A.O. 1950.

2. Substituted by the Adaptation of Laws (No. 3) Order, 1956.

THE SCHEDULE

[*See* sections 2 and 3]

PART I

Documents in relation to which the Court "SHALL presume".

1. Lloyd's Register of Shipping.

2. Lloyd's Daily Shipping Index.

3. Llyod's Loading List.

4. Lloyd's Weekly Casualty Reports.

5. Certificate of delivery of goods to the Manchester Ship Canal Company

6. Official log book, supplementary official log book and official wireless log kept by a British ship.

7. Certificate of Registry, Safety Certificate, Safety Radio-Telegraphy Certificate, Exemption Certificate, Certificate of Survey, Declaration of Survey, International Load Line Certificate, [1][Indian Load Line Certificate], Report of Survey of a ship provisionally detained as unsafe, Report of Survey to be served upon the master of a ship declared as unsafe upon survey, Docking Certificate, Memorandum issued under Article 56 of the International Convention for the Safety of Life at Sea, 1929.

8. Certificates *A* and *B* issued under the Indian Merchant Shipping Act, 1923.

9. The following documents relating to marine insurance, namely, insurance policy, receipt for premium, certificate of insurance and insurance cover note.

10. Certificate concerning the loss of country craft issued by the appropriate authority under Department of Commerce, Mercantile Marine Department Circular No. 2 of 1938.

11. Protest made before a Notary Public or other duly authorised official by a master of a ship relating to circumstances calculated to affect the liability of the ship owner.

12. Licence or permit for radio-telegraph apparatus carried in ships or aircraft.

13. Certificate of registration of an aircraft granted by the Government of the country to which the aircraft belongs.

14. Certificate of airworthiness of an aircraft granted or validated by, or under the authority of, the Government of the country to which the aircraft belongs.

15. Licences and certificates of competency of aircraft personnel granted or validated by, or under the authority of, the Government of the country to which the personnel belongs.

16. Ground Engineer's licence issued by a competent authority authorised in this behalf by Government.

17. Consular Certificate in respect of goods shipped or shut out, consular certificates of origin, and consular invoice.

18. Certificate of origin of goods issued (but not merely attested) by a recognised Chamber of Commerce, or by [2][an Indian or British Consular Officer, or by an Indian or British] Trade Commissioner or Agent.

19. Receipt for payment of customs duty issued by a Customs authority.

20. Schedule issued by a port, dock, harbour, wharfage or warehouse authority, or by a Railway company, showing fees, dues, freights or other charges for the storage, transport or other services in connection with goods.

21. Tonnage schedule and schedule of fees, commission or other charges for services rendered, issued by a recognised Chamber of Commerce.

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1. Substituted for "British India Load Line Certificate" by Act 35 of 1950.

2. Substituted by A.O. 1948.

22. The publication known as the Indian Railway Conference Association Coaching and Goods Tariffs.

23. Copy, certified by the Registrar of Companies, of the memorandum or the articles of association of a company, filed under the Indian Companies Act, 1913[1].

24. Protest, noting and certifying the dishonour of a bill of exchange, made before a Notary Public or other duly authorised official.

PART II

Documents in relation to which the Court "MAY presume".

1. Survey report issued by a competent authority—

(*i*) in respect of cargo loaded; or

(*ii*) certifying the quantity of coal loaded; or

(*iii*) in respect of the security of hatches.

2. Official log book, supplementary official log book and official wireless log kept by a foreign ship.

3. Dock certificate, dock chalan, dock receipt or warrant, port warehouse certificate or warrant, issued by, or under the authority of, a port, dock, harbour or wharfage authority.

4. Certificate issued by a port, dock, harbour, wharfage or other authority having control of acceptance of goods for shipping, transport or delivery, relating to the date or time of shipment of goods, arrival of goods for acceptance, arrival of vessels or acceptance or delivery of goods, or to the allocation of berthing accommodation to vessels.

5. Export application issued by a port authority showing dues paid, weight and measurement and the shutting out of a consignment.

6. Certificate or receipt showing the weight or measurement of a consignment issued by the official measurer of the Conference Lines, or by a sworn or licensed measurer, or by a recognised Chamber of Commerce.

7. Reports and publications issued by a Port authority showing the movement of vessels, and certificates issued by such authority relating to such movements.

8. Certificate of safety for flight signed by a licensed Ground Engineer.

9. Aircraft log book, journey log book and log book maintained by the owner or operator in respect of aircraft.

10. Passenger list or manifest of goods carried in public transport aircraft.

11. Passenger ticket issued by a steamship company or air transport company.

12. Air consignment note and baggage check, issued by an air transport company in respect of goods carried by air, and the counterfoil or duplicate thereof retained by the carrier.

13. Aircraft load sheet.

14. Storage warrant of a warehouse recognised by a customs, excise, port, dock, harbour or wharfage authority.

15. Acknowledgment receipt for goods granted by a port, dock, harbour, wharfage or warehouse authority or by a Railway or Steamship company.

16. Customs or excise pass and customs or excise permit or certificate, issued by a customs or excise authority.

17. Force *majeure* certificate issued by a recognised Chamber of Commerce.

18. Receipt of a Railway or Steamship company granted to a consignor in acknowledgment of goods entrusted to the company for transport.

19. Receipt granted by the Posts and Telegraph Department.

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1. Now *see* the Companies Act, 1956 (I of 1956).

20. Certificate or survey award issued by a recognised Chamber of Commerce relating to the quality, size, weight or valuation, of any goods, count of yarn or percentage of moisture in yarn and other goods.

21. Copy, certified by the Registrar of Companies, of the balance-sheet, profit and loss account and audit report of a company, filed with the said Registrar under the Indian Companies Act, 1913[1], and the rules made thereunder.

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1. Now *See* the Companies Act, 1956 (I of 1956).

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